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**CHILE – PRICE BAND SYSTEM AND SAFEGUARD
MEASURES RELATING TO CERTAIN
AGRICULTURAL PRODUCTS**
Report of the Appellate Body
WT/DS207/AB/R

*Adopted by the Dispute Settlement Body
on 23 October 2002*

<p><i>Chile, Appellant</i></p> <p><i>Argentina, Appellee</i></p> <p><i>Australia, Third Participant</i></p> <p><i>Brazil, Third Participant</i></p> <p><i>Colombia, Third Participant</i></p> <p><i>Ecuador, Third Participant</i></p> <p><i>European Communities, Third Participant</i></p> <p><i>Paraguay, Third Participant</i></p> <p><i>United States, Third Participant</i></p> <p><i>Venezuela, Third Participant</i></p>		<p>Present:</p> <p>Abi-Saab, Presiding Member</p> <p>Bacchus, Member</p> <p>Lockhart, Member</p>
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I. INTRODUCTION

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

¹ WT/DS207/R, 3 May 2002.

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

3. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 3 May 2002, the Panel found that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994.³ The Panel also found that Chile's safeguard measures on wheat, wheat flour and edible vegetable oils violated certain provisions of the *Agreement on Safeguards* and the GATT 1994.⁴

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

5. On 24 June 2002, Chile notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").⁷ On 4 July 2002, Chile filed its appellant's submission.⁸ On 19 July 2002, Argentina filed an appellee's submission.

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

³ Panel Report, para 8.1(a).

⁴ *Ibid.*, para 8.1(b).

⁵ *Ibid.*, para. 8.2.

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

⁷ WT/DS207/5, 26 June 2002.

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

sion.⁹ On the same day, Australia, Brazil, Colombia, Ecuador, the European Communities, Paraguay, the United States, and Venezuela each filed a third participant's submission.¹⁰

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

7. The oral hearing was held on 6 and 7 August 2002.¹² The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Appellate Body Division hearing the appeal.

8. A description of Chile's price band system is contained in paragraphs 2.1 to 2.7 of the Panel Report. Nevertheless, we consider it useful, at this stage, to provide an overview of the operation of the price band system, in particular in the light of the amendment that Chile made to the price band system during the Panel proceedings.¹³

II. BACKGROUND

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

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

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

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

¹¹ Japan and Nicaragua were third parties in the Panel proceedings.

¹² Pursuant to Rule 27 of the *Working Procedures*.

¹³ We are, of course, mindful of the scope of appellate review pursuant to Article 17.6 of the DSU.

¹⁴ Consolidated version of Law 18.525, Official Journal of the Republic of Chile, 30 June 1986 as amended by Law No. 18.591, Official Journal, 3 January 1987 and by Law No. 18.573, Official Journal, 2 December 1987. Panel Report, footnote 5 to para. 2.2. See Annex CHL-2 to Chile's First Written Submission to the Panel. Chile submits, and the Panel Report states, that a price band system has been in effect since 1983. See Panel Report, paras. 7.97 and 7.139.

¹⁵ Article 12 of Law 18.525 states as follows:

For the sole purpose of ensuring a reasonable margin of fluctuation of domestic wheat, oil-seeds, edible vegetable oils and sugar prices in relation to the international prices for such products, specific duties are hereby established in United States dollars per tariff unit, or *ad valorem* duties, or both, and rebates on the

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

amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of such goods.

The amount of these duties and rebates, established in accordance with the procedure laid down in this Article, shall be determined annually by the President of the Republic, in terms which, applied to the price levels attained by the products in question on the international markets, make it possible to maintain a minimum cost and a maximum import cost for the said products during the internal marketing season for the domestic production.

For the determination of the costs mentioned in the preceding paragraph, the monthly average international prices recorded in the most relevant markets during an immediately preceding period of five calendar years for wheat, oil-seed and edible vegetable oils and ten calendar years for sugar shall be taken into consideration. These averages shall be adjusted by the percentage variation of the relevant average price index for Chile's foreign trade between the month to which they correspond and the last month of the year prior to that of the determination of the amount of duties or rebates, as certified by the Central Bank of Chile. They shall then be arranged in descending order and up to 25 per cent of the highest values and up to 25 per cent of the lowest values for wheat, oil-seed and edible vegetable oils and up to 35 per cent of the highest values and up to 35 per cent of the lowest values for sugar shall be removed. To the resulting extreme values there shall be added the normal tariffs and costs arising from the process of importation of the said products. The duties and rebates determined for wheat shall also apply to meslin and wheat flour. In this last case, duties and rebates established for wheat shall be multiplied by the factor 1.56.

The prices to which these duties and rebates are applied shall be those applicable to the goods in question on the day of their shipment. The National Customs Administration shall notify these prices on a weekly basis, and may obtain information from other public bodies for that purpose.

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

¹⁷ Article 2 of Law No. 19.772 added the following paragraph to Article 12 of Law 18.525: The specific duties resulting from the application of this Article, added to the *ad valorem* duty, shall not exceed the base tariff rate bound by Chile under the World Trade Organization for the goods referred to in this Article, each import transaction being considered individually and using the c.i.f. value of the goods concerned in the transaction in question as a basis for calculation. To that end, the National Customs Service shall adopt the necessary measures to ensure that the said limit is maintained.

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

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

B. Products Subject to Chile's Price Band System

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

C. Total Applicable Duties

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

1. The ad valorem Duty

14. The *ad valorem* duty is the *applied* MFN rate which, under Chile's flat-tariff regime, is the same for all products. The MFN tariff rate *bound* by Chile in its WTO tariff schedule is 31.5 per cent. Chile has been reducing its *applied* MFN rates on an annual basis. The *applied ad valorem* rate in 2002 is 7 per cent.²¹ It is applied to the transaction value of the imported product to achieve the *ad valorem* duty for that product.

2. The Specific Price Band Duty

15. The specific duty (the price band duty) will be examined in the following subsections, where we discuss the determination of: (i) the *upper and lower*

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

²⁰ The following specific HTS subheadings are covered by the price band system: In the wheat or meslin product category, HTS subheading 1001.9000. In the wheat or meslin flour product category, HTS subheading 1101.0000. In the sugar product category, HTS subheading 1701.1100 cane sugar, 1701.1200 beet sugar, 1701.9100 sugar containing added flavouring or colouring matter, and 1701.9900 other. In the edible vegetable oils product category, HTS subheading 1507.1000 crude soya-bean oil, 1507.9000 other crude soya-bean oil, 1508.1000 crude ground-nut oil, 1508.9000 other crude ground-nut oil, 1509.1000 virgin oil, 1509.9000 other, 1510.0000 other oils, 1511.1000 crude palm oil, 1511.9000 other crude palm oil, 1512.1110 crude sunflower-seed oil, 1512.1120 crude safflower oil, 1512.1910 other sunflower-seed oil, 1512.1920 other safflower oil, 1512.2100 crude cotton-seed oil, 1512.2900 other crude cotton-seed oil, 1513.1100 crude coconut (copra) oil, 1513.1900 other crude coconut (copra) oil, 1513.2100 crude palm kernel or babassu oil, 1513.2900 other crude palm kernel or babassu oil, 1514.1000 rapeseed, colza or mustard oil, 1514.9000 other, 1515.2100 maize (corn) oil, 1515.2900 other maize (corn) oil, 1515.5000 sesame oil, and 1515.9000 other sesame oil.

²¹ Chile intends to achieve an applied rate of zero in the year 2010.

thresholds of the price bands; (ii) the weekly *reference prices*; and (iii) the calculation of *specific price band duties* for particular shipments.

(a) The "Price Bands"

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

17. These price bands are determined on an annual basis through Decrees issued by the Executive.²² The bands that apply to *wheat* and *wheat flour* are determined for the period 16 December – 15 December²³ and the band for *edible vegetable oils* corresponds to the period 1 November – 31 October.²⁴

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

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

(i) in the case of *edible vegetable oils*, the price used is that of crude soya bean oil²⁶, free on board (f.o.b.) Illinois, quoted on the Chicago Exchange;²⁷

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

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

(b) These average prices are adjusted to account for international inflation using an external price index calculated by Chile's Central Bank.²⁸

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

²³ The price band for wheat is used, however, to calculate the specific duty or rebate, which is then multiplied by a factor of 1.56 to obtain the specific duty or rebate for wheat flour. See Article 12 of Law 18,525, Argentina's first written submission to the Panel, para. 6 and footnote 7 thereto, and Chile's first written submission to the Panel, para. 15 and footnote 13.

²⁴ This overview does not cover the price band for sugar.

²⁵ "The calculations for each price made are made once a year, once all of the necessary elements are available, in other words, usually starting around February, as soon as the relevant inflation index calculated by the Central Bank of Chile on the basis of national foreign trade data is available." Chile's response to question 10(a) of the Panel.

²⁶ We note, however, that edible vegetable oils cover 25 tariff lines.

²⁷ Panel Report, para. 2.6. Chile's response to Question 9(e) of the Panel. However, the Secretariat Report in Chile's Trade Policy Review states that the international prices used for edible oils is the f.o.b. price of raw soya in New York. WT/TPR/S/28, Box III.1, p. 46. Argentina states in its first written submission to the Panel that the price used is that of crude soya oil f.o.b. New York.

²⁸ Law No. 18.525 states that the average prices shall be adjusted according to the percentage variation in the average price index relevant for Chile's foreign trade between the corresponding month and the last month in the year in which the specific duties are determined. At the oral hearing, Chile

- (c) Once adjusted for inflation, the compiled monthly prices are listed in descending order and the "extreme" values are eliminated.

In the case of *wheat* and *edible vegetable oils*, the prices that represent the highest 25 per cent and the lowest 25 per cent of the prices compiled are eliminated. For example, in the case of wheat and edible vegetable oils, the 15 highest and the 15 lowest prices of the 60 compiled prices are eliminated from the calculation

- (d) After the "extreme" values have been eliminated, the remaining highest and lowest prices are selected for the calculation of the price band thresholds.

For example, in the case of wheat and edible vegetable oils, of the 60 monthly prices compiled, the 16th and 44th highest monthly prices are selected for the calculation of the upper and the lower thresholds respectively.

- (e) Import costs are then added to the "highest and lowest prices" that have been selected in order to convert them to a cost, insurance and freight ("c.i.f.") basis.

These "import costs" include the *ad valorem* tariff and costs such as freight, insurance, opening of a letter of credit, interest on credit, taxes on credit, customs agents' fees, unloading, transport to the plant and wastage costs.²⁹

No published legislation or regulation sets out how these "import costs" are calculated.³⁰

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

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

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

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

further explained that this price index also reflects domestic inflation and foreign exchange rate fluctuations.

²⁹ Chile's first submission to the Panel, para. 15(4).

³⁰ Panel Report, para. 7.44.

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

(b) The "Reference Price"

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

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

23. There is no Chilean legislation or regulation, which specifies the international "markets of concern" to be used to calculate the applicable reference prices.³⁴ It seems, however, that the markets and qualities chosen are intended to be representative of products actually "liable" to be imported to Chile.³⁵

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

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

26. Contrary to the prices used for calculating the price bands, the lowest f.o.b. prices found in any market of concern and selected as reference prices are *not* adjusted for "usual import costs", and thus not converted to a c.i.f. basis.³⁸ We also

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

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

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

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

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

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

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

note that the reference price will be the *lowest* f.o.b. price in *any* market of concern, and thus will *not* be representative of an average of prices found in any given foreign market of concern.

(c) Calculating the specific price band duty

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

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

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

- (a) Upon arrival of the shipment, the appropriate weekly *reference price* is selected according to the date of embarkation.
- (b) The *reference price* is compared to the *upper and lower thresholds* of the relevant price band:
 - (i) If the weekly reference price falls between the upper and lower thresholds of the price band, no specific duty is levied.

In such case, only the *ad valorem* duty is applied (Chile's *applied* MFN rate is currently 7 per cent *ad valorem*).³⁹
 - (ii) If the weekly reference price is higher than the upper threshold of the price band, no specific duty is assessed. Instead, a *rebate* is granted, which is equal to the difference between the reference price and the upper threshold of the relevant price band.

The rebate is deducted from the *ad valorem* applied MFN duty. The total amount of duties on a product subject to the price band system can be as low as zero.
 - (iii) If the weekly reference price falls below the lower threshold of the price band, a specific duty equal to the difference between the reference price and the lower threshold is levied. In such case, the *ad valorem* duty will also be applied.

To make the price band system easier to administer, the annual decrees that establish the price bands contain a table that sets out a range of reference prices and the rebate or specific duty that will be applied in the case of each of those reference prices.⁴⁰ Once the reference price that ap-

³⁹ Chile's bound MFN tariff rate is at 31.5 per cent.

⁴⁰ Panel Report, para. 4.20.

plies for a particular week has been published, the corresponding specific price band duty or rebate for that reference price can be found in the table.⁴¹

30. In order not to impose duties in excess of the tariff rate *bound* in Chile's WTO schedule, the customs authorities would have to ensure that the combination of the *applied ad valorem* duty and the specific price band duty does not exceed 31.5 per cent of the transaction value of the shipment in question.

III. ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

A. *Claims of Error by Chile – Appellant*

1. *Article 11 of the DSU*

31. Chile submits that the Panel exceeded its mandate and acted inconsistently with Article 11 of the DSU in finding that the duties imposed under its price band system are "other duties or charges" that are prohibited under the second sentence of Article II:1(b) of the GATT 1994, because Argentina made no claim or argument under the second sentence of Article II:1(b).

32. Chile maintains that the Panel's finding under the second sentence of Article II:1(b) goes against Article 3.2 of the DSU, which in Chile's view is the "central element" of the dispute settlement system that ensures "security and predictability in the multilateral trading system."⁴² Chile stresses that the dispute settlement system can hardly be deemed predictable if panels find it within their discretion to make claims and arguments for the parties, and to proceed to make findings based on legal claims and arguments not presented without providing the parties with an opportunity for rebuttal.

33. Chile submits that the Panel's erroneous decision to make a finding under the second sentence of Article II:1(b) of the GATT 1994 deprived it of a fair right of response. Moreover, the Panel's approach resulted in inadequate argumentation of an issue of considerable importance to all WTO Members. Chile maintains that because the issue was never claimed or argued before the Panel, Chile made only "highly summary comments" in response to comments made by the United States (a third party) with respect to the second sentence of Article II:1(b).

34. Chile concedes that Argentina asked the Panel to rule on the consistency of the price band system with Article II:1(b) of the GATT 1994, but maintains that Argentina had made clear that its claim was for a violation of the first sentence of Article II:1(b), and that Argentina had never requested a finding or made any such claim or argument with respect to the second sentence of Article II:1(b). Chile asserts that all of Argentina's claims and arguments were predi-

⁴¹ If the weekly reference price is *within* the price band, only the *ad valorem* duty rate applies.

⁴² Chile's appellant's submission, para. 24.

cated on the view that the duties resulting from Chile's price band system are "ordinary customs duties" that had led or could lead to a violation of the first sentence of Article II:1(b).⁴³ Chile argues that, had Argentina sought to maintain that the duties resulting from Chile's price band system were "other duties or charges", it would simply have requested a finding under the second sentence of Article II:1(b), because Chile obviously had not scheduled anything in the column for "other duties and charges" and the price band duties would thus have been prohibited.

35. Chile asserts that the Panel made the same error as did the panel in *United States – Import Measures on Certain Products from the European Communities* ("US – Certain EC Products"). Chile points out that in that case, the Appellate Body concluded that the panel had erred under Article 11 of the DSU when it determined that the United States violated a provision for which the European Communities did not make a claim.⁴⁴ Chile recognizes that in that case, the Appellate Body also held that a panel could develop its own legal reasoning related to a claim or defence that had been properly put before the panel by one of the parties to the dispute. However, according to Chile, that finding applies only in cases where the complainant has made a claim, and has argued for a finding on an issue, even though the argument used to justify the claim may not have corresponded precisely to the interpretation ultimately adopted by the panel. Chile submits that, here, Argentina did not make a claim or submit legal arguments under the second sentence of Article II:1(b) of the GATT 1994, and thus the Panel was not entitled to develop its own legal reasoning with respect to such claim or argument.

2. Order of Analysis

36. Chile contends that the Panel erred in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT 1994, on the ground that Article 4.2 "deals more specifically and in detail with measures affecting market access of agricultural products."⁴⁵ The *Agreement on Agriculture* may, in some respects, be more specific and detailed than the GATT 1994, but Article 4.2 is clearly *not* more specific or detailed than Article II:1(b) with regard to tariff commitments.

37. Chile recalls, moreover, that the term "ordinary customs duties" was first used in Article II:1(b), which clearly pre-dates the *Agreement on Agriculture*. The drafters of Article 4.2 borrowed the term "ordinary customs duties" from Article II:1(b). To understand the meaning of that term, it would thus have been appropriate for the Panel to begin its analysis with Article II:1(b). Had the Panel done so, Chile suggests, it would most likely have avoided the error of inventing a new definition of ordinary customs duties that has no apparent basis in the text of Article II:1(b).

⁴³ Panel Report, paras. 4.5-4.7.

⁴⁴ Appellate Body Report, WT/DS165/AB/R, adopted 10 January 2001, paras. 110-114.

⁴⁵ Panel Report, para. 7.16.

3. Article 4.2 of the Agreement on Agriculture

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

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

40. Chile agrees with the Panel that the mere fact that a measure was not converted by a Member into an ordinary customs duty does not prove that the measure was not "of a kind which had been required to be converted". According to Chile, "the absence of conversions is a highly relevant fact", however⁴⁶, and the way in which the European Communities converted its variable import levy is particularly relevant because it involved binding the tariff, but left in place a system similar to Chile's price band system.⁴⁷ Thus, the European Communities converted its levies in a way that made it "crystal clear"⁴⁸ that the tariffs would continue to vary, although subject to a high absolute cap. Chile maintains that the Panel should have taken this evidence into account. It proves that the drafters of the *Agreement on Agriculture* accepted that a variable import levy could be converted into an ordinary customs duty by imposing a "cap" on the amount of duties that could be levied, even when those duties would fluctuate below that "cap" in relation to a domestic target price.

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

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

⁴⁷ *Ibid.*, para. 95.

⁴⁸ *Ibid.*, para. 92.

⁴⁹ Panel Report, para. 7.34.

42. Chile suggests, moreover, that the Panel acted inconsistently with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("the *Vienna Convention*")⁵⁰, by considering that it could "distill" the meaning of the terms "variable import levy" and "minimum import price" from selected Reports of GATT Committees and notifications of individual GATT Contracting Parties during a period before the launch of the Uruguay Round, although the Panel itself conceded that those documents do not constitute "preparatory work" within the meaning of Article 32 of the *Vienna Convention*. In making its "distillation", the Panel did not cite any evidence that the negotiators of the *Agreement on Agriculture* had even referred to the documents on which the Panel relied to "distill" its opinion of what was intended by the negotiators of that Agreement. The only justification provided by the Panel was that all GATT Contracting Parties "had access" to these documents. Chile concludes that the Panel appears to have "simply decided to invent its own definition of a variable import levy and minimum import price system, using pre-Uruguay Round documents developed for a different purpose."⁵¹

43. In Chile's view, the Panel then proceeded to assess incorrectly Chile's price band system by the standards it had "distilled" from those pre-Uruguay Round documents. It did not take proper account of the fact that the price band system tracks changes in world prices, moderating relatively high or low prices on a temporary basis, but always subject to a tariff binding, which prevents Chile from using the price band system to exclude goods below a target price. Chile stresses in this respect that it does not maintain target or support prices such that the lower threshold of the price band system operates as a "proxy" for internal prices.⁵²

44. Moreover, in Chile's view, the Panel introduced its own objectives of transparency and predictability when interpreting Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994, rather than focusing on the *Agreement on Agriculture*, which makes no mention of such objectives. Instead, its preamble clearly states that the long-term objective of the *Agreement on Agriculture* is "to provide for substantial progressive reductions in agriculture support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets."⁵³ According to Chile, the Panel's finding thereby produces an absurd result: contrary to the objective of obtaining lower tariffs in the *Agreement on Agriculture* and the GATT 1994, the Panel, in effect, finds the higher *bound* rate preferable to the lower *applied* rate under Chile's price band system.

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

⁵⁰ Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

⁵¹ Chile's appellant's submission, para. 104.

⁵² Panel Report, para. 7.45.

⁵³ *Agreement on Agriculture*, Preamble, para. 3.

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

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

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

48. Chile notes in this respect that, assuming the duties applied under the price band system were "other duties or charges", they would have been in violation of Article II:1(b) of the GATT 1994 from their inception in 1983, because Chile introduced the price band system *after* binding its duties on all the products concerned in 1980.

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

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

⁵⁴ Panel Report, para. 7.52.

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

51. Chile further maintains that the purpose of Article II:1(b) and the Understanding on Article II:1(b) was not to create some new class of charge that, although applied at a rate below the tariff binding, was nonetheless forbidden because it was not the right type or kind of duty. Rather, Chile contends, the purpose of the second sentence of Article II:1(b) and the Understanding on Article II:1(b) was to ensure that bindings on "ordinary customs duties" could not be circumvented by the creation of new types of duties or charges on imports or by increasing existing "other duties or charges".

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

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

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

B. Arguments of Argentina – Appellee

I. Article 11 of the DSU

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

56. Argentina asserts that it fully satisfied the requirements of Article 6.2 of the DSU, which requires that the request for the establishment of a panel identify the specific measures at issue and provide a brief summary of the legal basis of the complaint. Argentina contends that it clearly identified the measures at issue,

⁵⁶ Panel Report, para. 7.62.

⁵⁷ Chile's appellant's submission, para. 76.

namely Law 18.525 as amended by Law 18.591 and Law 19.546, as well as the regulations and complementary provisions and/or amendments, and that it identified the obligations of Article II as the legal basis for its claim.

57. Relying on the Appellate Body reports in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("EC – Bananas III")⁵⁸ and *Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products* ("Korea – Dairy")⁵⁹, Argentina argues that Article 6.2 of the DSU does not require a complainant to spell out the full text of the Articles of the GATT 1994 or other covered agreements supporting a particular claim⁶⁰, and that "whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis ... tak[ing] into account whether the ability of the respondent to defend itself was prejudiced ..."⁶¹

58. Argentina contends that Chile's allegation as to the lack of a claim, under the second sentence of Article II:1(b), in Argentina's request for the establishment of a panel, is in fact a complaint relating to the alleged lack of arguments relating to the two sentences of Article II:1(b). Argentina recalls that the Appellate Body has clarified that, as opposed to claims, which must be set out in the panel request, "arguments" supporting those claims may be set out and progressively clarified during the course of the panel proceedings.⁶² Argentina contends that this is what occurred in the proceedings before the Panel. Argentina argues that this appeal presents a different situation from that in *US – Certain EC Products*, where the panel made a finding on an issue for which a claim had not been made.

59. Argentina argues that, even if the Appellate Body determines that Article II:1(b) of the GATT 1994 sets forth more than one legal basis, it correctly identified the relevant specific legal basis. Argentina refers to *Thailand – Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("Thailand – H Beams"), a case involving multiple obligations stemming from the same article, where the Appellate Body concluded that whenever a paragraph informs the rest of an article, it suffices for the complainant to refer to the language of that paragraph in order for the claims under other sub-paragraphs of the article to be properly before the Panel.⁶³ The Appellate Body considered sufficient the simple listing of the article in question "[i]n view of the inter-linked nature of the obligations ... " in that article.⁶⁴ Argentina argues that the same conclusion applies in this case because the obligations in the first

⁵⁸ Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 141.

⁵⁹ Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, paras. 124 and 127.

⁶⁰ Argentina's appellee's submission, para. 20.

⁶¹ Appellate Body Report, *Korea – Dairy*, *supra*, footnote 59, para. 127.

⁶² Appellate Body Report, *EC – Bananas III*, *supra*, footnote 58, para. 141.

⁶³ Appellate Body Report, WT/DS122/AB/R, adopted 5 April 2001, paras. 90-93 and para. 106; Argentina's appellee's submission, para. 27.

⁶⁴ Appellate Body Report, *Thailand – H Beams*, *supra*, footnote 63, para. 93.

and second sentences of Article II:1(b) are inter-linked, as is evident from the use of the word "also" connecting the second sentence to the first. Argentina contends that Chile's assumption that the first and second sentences of Article II:1(b) are independent obligations is incorrect, because both sentences relate to the obligation of Members not to exceed their tariff bindings. Therefore, according to Argentina, the examination of Chile's price band duties' consistency with Article II:1(b) cannot exclude consideration of the second sentence of that Article.

60. Argentina maintains that, because the structure of Article II:1(b) is similar to that of Article III:2 of the GATT 1994, the statements of the Appellate Body in *Canada – Certain Measures Concerning Periodicals* ("*Canada – Periodicals*")⁶⁵ are relevant. Argentina recalls that the Appellate Body found in that case that it could move from an examination of the first sentence of Article III:2 of the GATT 1994 to an examination of the second sentence as "part of a logical continuum."⁶⁶

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

62. Argentina adds that two third parties—the European Communities and the United States—provided arguments regarding the second sentence of Article II:1(b) in responding to Question 3 of the Panel. According to Argentina, the arguments of the United States and the European Communities, supplementing its own arguments, provided a more than sufficient basis for the Panel to decide Argentina's claim under Article II:1(b). Moreover, Argentina argues that Chile's claim that it was deprived of a fair right of response regarding the second sentence of Article II:1(b)⁶⁸ is belied by the facts because Chile, like Argentina and the third parties, was itself asked to respond to Question 3 of the Panel on "other duties or charges" referred to in the second sentence of Article II:1(b). Accordingly, Chile was fully aware of the Panel's interest in the second sentence of Article II:1(b).

⁶⁵ Appellate Body Report, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449.

⁶⁶ *Ibid.*, at 469.

⁶⁷ Argentina's appellee's submission, para. 35.

⁶⁸ Chile's appellant's submission, para. 23.

63. Argentina argues that, in any event, even if none of the parties had advanced arguments regarding the second sentence of Article II:1(b), the Panel would have had the right, indeed the duty, to develop its own legal reasoning to support the proper resolution of Argentina's claim. Argentina recalls that in *European Communities – Measures Concerning Meat and Meat Hormones ("EC – Hormones")*, the Appellate Body explicitly ruled that nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties—or to develop its own legal reasoning—to support its own findings and conclusions on the matter under its consideration.⁶⁹

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

2. Order of Analysis

65. Argentina asks the Appellate Body, *as a preliminary matter*, to reject Chile's "claim" that the Panel erred in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT 1994. That claim is not properly before the Appellate Body because Chile failed to include it in its Notice of Appeal. Argentina notes that it was first made aware of "this aspect of Chile's challenge" when it received Chile's appellant's submission. According to Argentina, "the rules regarding notice of claims are designed to protect against precisely this type of situation."⁷¹

66. Argentina submits that—even if the Appellate Body were to find that Chile's "claim" was properly before it as a *procedural matter*—it should nevertheless reject the claim on *substantive grounds*. Argentina recalls the finding of the Appellate Body in *EC – Bananas III* that a panel should start its examination of a claim under the agreement which "deals specifically, and in detail" with the measure being challenged.⁷² Argentina agrees with the Panel that Article 4.2 of

⁶⁹ Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 156.

⁷⁰ Appellate Body Report, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, para. 266.

⁷¹ Argentina refers more specifically to Rule 20(2)(d) of the *Working Procedures for Appellate Review*, which provides in pertinent part that:

A Notice of Appeal shall include the following information:

...

(d) a brief statement of the nature of appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the Panel."

⁷² Appellate Body Report, *supra*, footnote 58, para. 204.

the *Agreement on Agriculture* "deals more specifically and in detail with measures affecting market access of agricultural products"⁷³ because Chile's price band system applies only to agricultural products, whereas Article II:1(b) applies generally to trade in goods.

67. According to Argentina, Chile's argument that Article 4.2 of the *Agreement on Agriculture* is not a specific or more detailed way of addressing the prohibition against exceeding tariff bindings under Article II:1(b) of the GATT 1994 is "flawed" because the obligation contained in Article 4.2 would be rendered meaningless if it were reduced, as Chile proposes, to a simple tariff measure.⁷⁴ Article 4.2 has nothing to do with the obligation to respect tariff bindings. Argentina submits that this has been recognized by all participants in these proceedings, even by Chile, which concedes that the prohibitions in Article 4.2 of the *Agreement on Agriculture* apply without regard to whether the measures breach a tariff binding.

3. Article 4.2 of the *Agreement on Agriculture*

68. Argentina endorses the Panel's finding that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*. According to Argentina, the Panel also came to the correct conclusion when it found that the duties resulting from Chile's price band system are not "ordinary customs duties" within the meaning of Article 4.2 and footnote 1 thereto.

69. Argentina submits that the Panel correctly applied the rules of interpretation under the *Vienna Convention* in its analysis of Article 4.2 and footnote 1 of the *Agreement on Agriculture*. Contrary to Chile's contention, the Panel did not proceed to analyze footnote 1 until after it had completed the analysis of the main text of Article 4.2 (on a textual and a contextual basis) and accounted for its object and purpose.

70. Argentina adds that the Panel acted consistently with Articles 31 and 32 of the *Vienna Convention* by resorting to the notifications of the GATT Contracting Parties and the Reports of the GATT Committees as supplementary means of interpretation. In doing so, the Panel examined documents which predated the entry into force of the Marrakesh Agreement Establishing the World Trade Organization (the "*WTO Agreement*"). In Argentina's view this was the correct way to proceed because those documents form part of the GATT *acquis*⁷⁵ and also fall into the category of all material which the parties had before them when drafting the final text.⁷⁶

⁷³ Panel Report, para. 7.16.

⁷⁴ Argentina's appellee's submission, para. 63.

⁷⁵ Appellate Body Report, United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, adopted 8 March 2002, para. 174: "Following the Vienna Convention approach, we have also looked to the GATT *acquis* and to the relevant negotiating history of the pertinent treaty provisions."

⁷⁶ Argentina refers to footnote 596 of the Panel Report, where the Panel quotes the Chairman of the ILC (Yb. ILC, 1966, Vol. I, Part II, 204 at para. 25).

71. Argentina points out that Chile fails to address the core issue of the Panel's findings that the price band system as such—the measure challenged by Argentina in these proceedings—is not simply a duty. Rather, it is a mechanism that imposes burdens on trade—such as lack of predictability and transparency—that are distinct from and, indeed, different in kind from ordinary customs duties. Argentina argues that Chile attempts to bridge the gap between ordinary customs duties and duties resulting from its price band system by arguing that a duty that varies by a formula is more predictable than one that varies by political decision. Argentina points out that the formula is itself based on a political decision and, moreover, the key is the variability of the duties imposed under the price band system. With the price band system one cannot know the actual duty. All that is known is a formula which will provide a number which changes over transactions. Thus Argentina concludes that, while Chile does have the power to set ordinary customs duties at or below its bound rate, this does not confer upon Chile the power to create an opaque mechanism by which it constantly varies its duties.

72. Argentina points out that, even without exceeding the bound level, the lower the applied *ad valorem* tariff (currently 7 per cent), the higher the additional specific duties resulting from the price band system. Consequently, when international prices are low, uncertainty increases, and the price band system's defective transmission of world prices insulates the domestic market from world market prices, up to the break-even prices. This inhibition of the transfer of world prices could be possible only through the application of something that is different from ordinary customs duties. According to Argentina, this is exactly the case of variable duties under the price band system, which are an exclusive function of exogenous factors, irrespective of either the transaction value, a characteristic of the product (that is, weight), or a combination thereof.

73. Argentina notes that, after making a finding as to what are the main characteristics of variable import levies and minimum import prices, the Panel concluded that a measure is similar "if, based on a weighing of the evidence before us, it shares sufficiently the fundamental characteristics outlined above."⁷⁷ Consequently, the Panel compared the price band system with the characteristics of those two listed measures in footnote 1 of Article 4.2 and found the price band system to be a "hybrid instrument."⁷⁸ According to Argentina, this clearly refutes Chile's assertion that the Panel decided to "invent its own definition"⁷⁹ of "variable import levy" and "minimum import price".

74. Finally, Argentina rejects Chile's assertion that the price band system and measures listed in footnote 1 to Article 4.2 are not similar. Argentina disagrees with Chile's contention that the Panel incorrectly assessed the price band system when it found that the lower threshold of the price band system can operate in practice as a "proxy" to a minimum import price. This is a factual finding arising

⁷⁷ Panel Report, para. 7.37.

⁷⁸ Panel Report, para. 7.46.

⁷⁹ Chile's appellant's submission, para. 104.

from the factual evidence put forward by Chile and Argentina during the Panel proceeding and, as such, is not subject to appellate review. Argentina believes that Chile fails to show that the measures are not "similar."

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

75. Argentina endorses the Panel's finding that Chile's price band system is "similar" to both a "variable import levy" and a "minimum import price," and that, therefore, the price band duties are *not* "ordinary customs duties", but, rather, are "other duties or charges of any kind". Argentina, moreover, agrees with the Panel that Chile's price band system is in violation of the second sentence of Article II:1(b) because Chile failed to record the duties resulting from its price band system in the "other duties and charges" column of its Schedule, as it should have done in the light of the Understanding on Article II:1(b).

76. Argentina submits that, for purposes of Article II:1(b), the Panel did not need to address the specific legal nature of the duties resulting from Chile's price band system because the legal nature of such duties would have become relevant only if the price band system were found to be consistent with Article 4.2 of the *Agreement on Agriculture*. Moreover, Argentina argues that the Panel could not have, in any event, analyzed the WTO-consistency of the price band duties in isolation from the price band system without infringing its obligations under Article 11 of the DSU.

77. Argentina also notes that, in the Panel proceedings, it did not only challenge the "duties" resulting from Chile's price band system. Rather, it challenged the price band system *as such* by arguing that the price band system "does not ensure certainty in respect of market access for agricultural products"⁸⁰ and "caused Chile to breach its commitments on tariff bindings in relation to the concessions set forth in its national schedule".⁸¹ In addition to the fact that the price band system infringes Article 4.2, Argentina argues that a separate violation under Article II:1(b) can and should be found since Chile—by its own admission—has imposed duties in excess of its tariff binding.

78. Argentina thus asks the Appellate Body to uphold the Panel's finding that duties resulting from Chile's price band system constitute "other duties or charges" within the meaning of the second sentence of Article II:1(b).

79. However, if the Appellate Body were to *reverse* the Panel's findings under Article 4.2 that the price band system constitutes a similar border measure which had to be converted into an "ordinary customs duty", and to find that the price band system does not impose an "other duty or charge" within the meaning of the second sentence of Article II:1(b), Argentina requests the Appellate Body to complete the Panel's analysis by making a finding that Chile's price band system, and the variable duties resulting from it, are inconsistent with the first sen-

⁸⁰ Argentina's appellee's submission, para. 149. See also WT/DS207/2.

⁸¹ Argentina's appellee's submission, para. 149. See also WT/DS207/2.

tence of Article II:1(b).⁸² According to Argentina, the Appellate Body would be able to complete the legal analysis in the case at hand because the factual findings of the Panel and the undisputed facts in the Panel record provide a sufficient basis for it to do so. In particular, Argentina notes that Chile has itself conceded that it has applied price band duties in excess of its tariff bindings.⁸³ Thus, Argentina concludes that the Appellate Body could find a violation of the first sentence of Article II:1(b) even if it were to find that the price band duties are "ordinary customs duties".⁸⁴

C. Arguments of the Third Participants

1. Australia

80. Australia considers that Chile's appeal raises important systemic issues concerning several of the covered agreements, in particular, the *Agreement on Agriculture*, and maintains that Article 4.2 of that Agreement prohibits WTO Members from introducing a price band system. In Australia's view, the term "variable import levy" in footnote 1 appears to refer to any *system* that allows for variation, but not to *ad hoc* changes that a government may make to the level of an applied tariff. The term "variable", therefore, seems to refer to variability that is inherent in a system, and not to "any variability". The existence of a binding in a Member's tariff schedule is not relevant for purposes of determining whether a measure is a prohibited "variable import levy" under Article 4.2. Rather, the question of whether a Member applies duties in excess of its tariff binding is an issue that should be examined under Article II of the GATT 1994 and not under Article 4.2 of the *Agreement on Agriculture*. With respect to the meaning of "similar border measures" in Article 4.2, Australia agrees with the United States that, to be "similar", it is sufficient for a border measure to be "similar" to any *one* of the measures listed in footnote 1—without having to be similar to *all* of those measures. Australia further agrees with the United States that, to be "similar" to a "variable import levy", a border measure does not need to share *all* the "fundamental characteristics" of such a levy.⁸⁵

2. Brazil

(a) Article 11 of the DSU

81. Brazil submits that the Panel's finding that Chile's price band system constitutes a violation of the second sentence of Article II:1(b) of the GATT 1994, is just a logical and necessary consequence of the Panel's finding that the price

⁸² In support of its argument, Argentina refers to the Appellate Body reports in *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031, para. 156, *Australia – Salmon*, *supra*, footnote 70, para. 117 and *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.

⁸³ Argentina's appellee's submission, para. 157.

⁸⁴ *Ibid.*

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

band system violates Article 4.2 of the *Agreement on Agriculture*. According to Brazil, GATT/WTO practice clearly sets out that panels are not compelled to accept the interpretations or legal reasoning developed by the parties to a dispute, even if all the parties to a dispute have similar or identical views.

(b) Order of Analysis

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

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

(c) Article 4.2 of the Agreement on Agriculture

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

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

3. Colombia

(a) Article 11 of the DSU

86. Colombia submits that the Panel acted inconsistently with Article 11 of the DSU by making a finding under the second sentence of Article II:1(b) of the

⁸⁶ Brazil's statement at the oral hearing.

⁸⁷ Brazil refers to para.. 7.18 of the Panel Report.

GATT 1994 and, in doing so, deprived the parties and third parties to the dispute of a fair right of response.

(b) Article 4.2 of the Agreement on Agriculture

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

88. Colombia argues that the Panel erred in concluding that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*. This error was a result of the erroneous interpretation that the Panel gave to the term "variable import levies". In Colombia's view, variable import levies were prohibited in Article 4.2 in order to prohibit a system which led to uncertainty resulting from the absence of any limitation on tariff variability. Article 4.2 cannot be interpreted in isolation from other Multilateral Trade Agreements, which provide for the elimination of certain measures through commitments that are not derived from Article 4.2.

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

4. Ecuador

(a) Article 11 of the DSU

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

(b) Order of Analysis

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

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

(c) Article 4.2 of the Agreement on Agriculture

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

93. In this respect, Ecuador argues that if, for instance, the reference price is not the *lowest* price on world markets but rather a price that is more representative of world market prices, there is no reason to consider that the domestic market would be insulated from world price trends. Ecuador adds that if a price band system operates on the basis of *ad valorem* tariffs applicable to the transaction value of the imported goods, the applicable duty will fall in proportion to the price of the goods.

94. Ecuador further submits that the Panel failed to take into account, in the interpretation of Article 4.2, Article XXXVIII:2(a) of the GATT 1994, which requires Members to devise measures designed to stabilize and improve conditions of world markets for primary (usually agricultural) products, including measures designed to attain stable, equitable and remunerative prices for their exports.

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

95. Ecuador maintains that the first sentence of Article II:1(b) merely lays down the obligation not to exceed tariff bindings. Article II does not prohibit the imposition of any type of duty or the use of a formula for calculating such a duty, nor does it preclude modifying the type of duty applied, provided that the tariff binding is not exceeded.

96. Ecuador argues that the Panel's interpretation, however, appears to place two additional obligations on WTO Members: (i) not to record customs duties other than those that are *ad valorem*, specific, or a combination thereof; and (ii) not to apply any kind of formula in setting such duties. Ecuador stresses that neither of these obligations is based on the ordinary meaning of Article II:1(b), read in its context, and in the light of its object and purpose.

97. Ecuador adds that in *Argentina – Textiles and Apparel*, the Appellate Body affirmed the freedom of Members to determine the types and characteristics of the duties that they apply, by specifying that the sole obligation imposed by Article II:1(b), and its first sentence in particular, was not to exceed bound ceilings.⁸⁹

98. Ecuador notes that all tariffs are linked to a variety of exogenous factors (e.g. tax revenue requirements, seasonal influence, development needs, and other

⁸⁹ Appellate Body Report, *supra*, footnote 55, para. 46.

political reasons) and concludes that there is no requirement, under the first sentence of Article II:1(b), to ban duties that are based on exogenous factors.

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

5. *European Communities*

(a) Article 11 of the DSU

100. The European Communities alleges that the Panel exceeded its terms of reference. According to the European Communities, the first and second sentences of Article II:1(b) contain distinct legal obligations. Therefore, where a Member makes reference to one of these obligations and not the other, the terms of reference of the panel will not include the latter.

101. The European Communities advances no specific arguments under Article 11 of the DSU. It claims that, as a third party, it is not in a position to comment on whether Chile's rights of defence were prejudiced by the lack of clarity in the terms of reference, but notes that the second sentence of Article II:1(b) "was not the subject of any detailed discussion in the proceedings before the Panel in which the European Communities was involved".⁹⁰ A panel is entitled to make a finding only if the complaining Member has actually made a claim with respect to a specific obligation. However, the European Communities contends that the question whether Argentina *actually* made a claim is an issue of fact that is tied to the determination of whether Chile's rights of defence were prejudiced, a subject on which it is not in a position to comment because, as a third party, it was not present during the entire Panel proceedings.

(b) Article 4.2 of the Agreement on Agriculture

102. The European Communities asserts that the Panel erred in its interpretation of Article 4.2 of the *Agreement on Agriculture*. The European Communities submits that the Uruguay Round tariffication process involved the transformation of non-tariff barriers into tariff equivalents and the binding of those tariffs. For products which were already subject to a bound customs duty, certain reductions were required. Unbound customs duties, on the other hand, were required to be bound, and then made subject to reduction commitments. According to the European Communities, Article 4.2 is designed to prevent a Member from using measures which were required to be tariffied. The European Communities con-

⁹⁰ European Communities' third participant's submission, para. 13.

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

103. With respect to Article 4.2, the European Communities notes that the Panel's definition of "variable import levies" fails to capture the essential characteristics of such levies. The first essential characteristic of a variable import levy is that they are not bound and can vary without any limit. The second is that, as a result of not being bound, variable import levies have the effect of completely insulating the domestic market from any possible price competition from imports.

104. The European Communities argues that this latter essential characteristic is common to all the other measures listed in footnote 1 to Article 4.2, that is, all those measures operate to prevent price competition on all or a part of all imports. This characteristic is not shared by tariffs, however, where price competition with domestic products is (at least theoretically) possible. As Article 4.2 prohibits border measures "similar" to those listed, it must prohibit measures which prevent price competition on part of or all imports. The European Communities submits that where a tariff binding exists, price competition is at least theoretically possible for all imports. It concludes that, if a measure allows the possibility of price competition (at least theoretically), then that measure cannot be a "similar border measure" within the meaning of Article 4.2 (because it does not share the "essential characteristics" of the measures listed in footnote 1). The European Communities adds that, in its view, a measure that shares a fundamental characteristic with one, or some, of the measures listed in footnote 1, but not *all* of them, is not prohibited by Article 4.2.⁹¹

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

105. The European Communities submits that the Panel erred in its interpretation of "ordinary customs duties" in the first sentence of Article II:1(b) of the GATT 1994. First, the Panel failed to examine the relevance of the word "customs", which serves to distinguish the "ordinary customs duties" referred to in the first sentence of Article II:1(b) from "other duties and charges" in the second sentence of that provision. The principal objective behind "ordinary customs duties" is the collection of revenue and the protection of domestic production. By contrast, "other duties and charges" are typically maintained in separate legislation that does not form part of the tariff legislation. Such duties often have additional objectives beyond simple protection and revenue collection. The European Communities mentions stamp taxes, deposit schemes, revenue duties and primage duties as examples of such "other duties and charges".

⁹¹ European Communities' responses to questioning at the oral hearing.

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

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

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

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

110. The European Communities maintains that the negotiators in the Uruguay Round had recognized the difficulty of defining "ordinary customs duties" in the context of discussing a proposal by New Zealand, which was later to lead to the Understanding on Article II:1(b). Given the lack of explicit instruction as to the type of duty required by the phrase "ordinary customs duty", it was not for the Panel to assume a definition prohibiting customs duties based on exogenous factors. In so doing, it lightly assumed that WTO Members had taken on a more

onerous obligation than that apparent from the text, contrary to the *in dubio mitius* principle referred to by the Appellate Body in *EC – Hormones*.⁹²

111. The European Communities seeks support for its reasoning in the findings of the Appellate Body in *Argentina – Textiles and Apparel*. According to the European Communities, the Appellate Body concluded in that case that Article II:1(b) does not provide for requirements as to the type of duty that a Member may apply; the essential obligation of Article II:1(b) is that customs duties should not be applied in excess of bound rates.⁹³

6. *United States*

(a) Article 11 of the DSU

112. The United States offers no opinion in its submission as to whether Argentina presented arguments or evidence with respect to claims arising under the second sentence of Article II:1(b). However, the United States suggests that the issue is one of burden of proof rather than one of an objective assessment of the matter under Article 11 of the DSU.

(b) Order of Analysis

113. The United States submits that the Panel followed the proper order of analysis in choosing to first examine Argentina's claim under Article 4.2 of the *Agreement on Agriculture* before examining its claim under Article II:1(b) of the GATT 1994. The Panel correctly reasoned that Chile's price band system applies exclusively to agricultural products and that Article 4.2 of the *Agreement on Agriculture* deals "more specifically and in detail" with measures affecting market access of agricultural products. In any event, according to the United States, the Panel's decision to proceed first with an assessment of Argentina's claim under Article 4.2 would not be a reversible error. Even if the Panel had commenced its work by interpreting Article II:1(b), the United States believes the Panel would have reached the same conclusions.

(c) Article 4.2 of the Agreement on Agriculture

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

115. The United States submits that Chile's interpretation of Article 4.2 is not grounded in the text of Article 4.2 or important context. Instead, Chile presents a selective reading of the context provided by the schedule of the European Communities and "a lengthy exposition of the 'original intent' of the Uruguay Round negotiators it finds in the history surrounding the price band system and the tariffication of the European Communities' variable import levies."⁹⁴ This alleged "evidence" regarding the European Communities' variable import levies can

⁹² Appellate Body Report, *supra*, footnote 69, footnote 154 to para. 165.

⁹³ Appellate Body Report, *Argentina – Textiles and Apparel*, *supra*, footnote 55, para. 46.

⁹⁴ United States' third participant's submission, para. 3.

form at most one part of a proper analysis of Article 4.2 under the customary rules of interpretation of public international law.⁹⁵ The United States notes, however, that an examination of the European Communities' schedule reveals that *all* of the products on which variable import levies existed are now subject to tariff bindings, yet these bindings contain only specific rates or *ad valorem* plus specific rates of duty in the ordinary customs duty column. The United States further notes Chile's argument that the European Communities' conversion of its variable import levies made clear that they would vary, but adds that Chile neglects to mention that the "duty-paid import price" commitments to which it refers are *not* expressed in the ordinary customs duty column; rather, they are recorded as two headnotes to Section I (on Agricultural Products) of the European Communities' Schedule. Furthermore, the United States asserts that "Chile implies incorrectly that these duties *must* vary according to a formula ... but these headnotes merely provide for a cap on the duty that the EC will apply on certain goods."⁹⁶

116. The United States also endorses the Panel's finding that, contrary to the suggestion of the European Communities and Chile, a variable levy cannot be distinguished from an ordinary customs duty simply because the latter is subject to a tariff binding. There is nothing in the texts of Article 4.2 or Article II:1(b) that suggests a variable import levy can exist *only* if it is not subject to a binding. If the Uruguay Round commitment concerning variable import levies was solely to prevent unbound levies, there would have been no need to include the variable import levy mechanism within Article 4.2.⁹⁷ Rather, it would have been sufficient to require that all agricultural tariffs be bound⁹⁸ because, as a result, variable import levies would have automatically ceased to exist. The United States also submits that a review of GATT documents reveals that there were numerous statements indicating that variable import levies could be subject to bindings without any suggestion that they would cease to be variable levies.⁹⁹

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

118. With respect to the meaning of "similar border measures" in Article 4.2, the United States notes that, in its view, to be "similar" to a border measure listed in footnote 1, it is sufficient for a border measure to be "similar" to any *one* of the measures listed in that footnote 1—without having to be similar to *all* of those measures. A fundamental characteristic of variable import levies is not that

⁹⁵ *Ibid.*, para. 11.

⁹⁶ *Ibid.*

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

⁹⁸ *Ibid.*

⁹⁹ United States' statement at the oral hearing.

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

they would *not* be subject to a binding. Even if it were, the United States maintains that to be "similar" to a "variable import levy", a border measure does not need to share *all* the "fundamental characteristics" of such a levy.¹⁰¹

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

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

7. *Venezuela*

(a) Article 11 of the DSU

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

(b) Order of Analysis

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

(c) Article 4.2 of the Agreement on Agriculture

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

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

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

124. Venezuela concludes that the Panel went beyond its terms of reference when, having found that certain elements of *one* price band system were inconsistent with Article 4.2 of the *Agreement on Agriculture*, it extended its reasoning to *include* any type of duty resulting from *any* price band system insofar as the calculation of such duty is based on exogenous factors. Venezuela submits that by doing so, the Panel substituted itself for the will of the Members and leg-

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

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

isolated in their place by making a distinction where the rules do not, thus creating additional obligations for WTO Members and diminishing their rights under the WTO.

IV. ISSUES RAISED IN THIS APPEAL

125. The following issues are raised in this appeal:

- (a) whether the Panel acted inconsistently with Article 11 of the DSU;
- (b) whether the Panel erred in choosing to examine Article 4.2 of the *Agreement on Agriculture* before examining Article II:1(b) of the GATT 1994;
- (c) whether, in examining Article 4.2 of the *Agreement on Agriculture*, the Panel erred in finding that:
 - (i) Chile's price band system constitutes a measure "similar" to a "variable import levy" and a "minimum import price system" within the meaning of footnote 1 of the *Agreement on Agriculture*;
 - (ii) the duties imposed under Chile's price band system are not "ordinary customs duties" within the meaning of Article 4.2 of the *Agreement on Agriculture*; and, ultimately, that
 - (iii) Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*; and
- (d) whether the Panel erred in finding that the price band duties imposed by Chile are "other duties or charges" and, therefore, inconsistent with the second sentence of Article II:1(b) of the GATT 1994.

V. AMENDMENT OF THE PRICE BAND SYSTEM DURING THE COURSE OF THE PANEL PROCEEDINGS

126. Before considering these issues, we find it necessary to address a preliminary question relating to the effect of the amendment that Chile made to its price band system during the course of the Panel proceedings. Earlier, we described Chile's price band system based on the factual findings in the Panel Report.¹⁰³ We observed that the price band system was established under Law No. 18.525 of 1986¹⁰⁴, and that the methodology for the calculation of the upper and lower thresholds of the price bands is set out in Article 12 of that Law. We also pointed out that Chile amended Article 12 by enacting Law 19.772 (the "Amendment") during the course of the Panel proceedings.¹⁰⁵ We understand the Amendment to

¹⁰³ See Section II of this Report.

¹⁰⁴ See *supra*, footnote 14.

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

provide, in relevant part, that the combination of the duties resulting from Chile's price band system added to the *ad valorem* duty shall not exceed the rate of 31.5 per cent *ad valorem* bound in Chile's WTO Schedule.¹⁰⁶ According to Chile:

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

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

¹⁰⁶ Article 2 of Law No. 19.772 added the following paragraph to Article 12 of Law 18.525: The specific duties resulting from the application of this Article, added to the *ad valorem* duty, shall not exceed the base tariff rate bound by Chile under the World Trade Organization for the goods referred to in this Article, each import transaction being considered individually and using the c.i.f. value of the goods concerned in the transaction in question as a basis for calculation. To that end, the National Customs Service shall adopt the necessary measures to ensure that the said limit is maintained.

¹⁰⁷ Chile's appellant's submission, footnote 2. See also Chile's statement that: Chile has been able, *more often than not*, to apply duties below the bound level ... (emphasis added)

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

In 1998, there was a precipitous decline in the world price of wheat and wheat flour followed in 1999 by a similar decline in the world price of edible vegetable oil, such that fully offsetting the decline in world prices in those products relative to the previous five years under the price band formula could not be done without breaching the 31.5% binding. *To avoid disastrous effects on Chilean farmers from the plummeting world prices, Chilean authorities chose to apply duties under the price band formula without regard to the cap. Recognizing that this was inconsistent with Chilean commitments under the WTO, the Government of Chile informed its trading partners of this situation and initiated informal consultations to obtain a waiver under Article XI of the Marrakesh Agreement. After several months of consultations, it became evident that Chile's main trading partners had strong opposition to the waiver. Instead, interested WTO members suggested that Chile either take safeguard action (during which time, the Chilean Congress was considering the implementation of a safeguard law) or renegotiate its tariff bindings according to Article XXVIII of GATT 1994. Chile chose to enact a safeguard law and took safeguard actions.** (emphasis added)

* See Law No. 19.612 of 28 May 1999, Official Journal of the Republic of Chile, 31 May 1999

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

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

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

129. The Panel recalled that previous panels had dealt with the issue of measures amended during dispute settlement proceedings, and quoted the following passage from the Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"):

... in previous GATT/WTO cases, where a measure included in the terms of reference was otherwise terminated or amended after the commencement of the panel proceedings, panels have nevertheless made findings in respect of such a measure.¹¹¹

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

¹⁰⁸ Panel Report, paras. 7.3 and 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 will not be breached in the future.

Chile's oral statement at the Panel's second meeting with the parties, para. 6.

¹⁰⁹ Panel Report, para. 7.5.

¹¹⁰ Argentina's response to question 45 of the Panel.

¹¹¹ Panel Report, WT/DS55/R and Corr.1,2,3,4, WT/DS59/R and Corr.1,2,3,4, WT/DS64/R and Corr.1,2,3,4, adopted 23 July 1998, DSR 1998:VI, 2201, para. 14.9.

¹¹² Panel Report, para. 7.7. In footnote 567 of the Panel Report, the Panel noted that the panel in *Indonesia – Autos* referred in this regard to:

... the panel report on *United States - Measures Affecting Imports of Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/R, adopted on 23 May 1997; the US restriction was withdrawn shortly before the issuance of the panel report; panel report on *EEC - Restrictions on Imports of Dessert Apples, Complaint by Chile*, adopted on 22 June 1989, BISD 36S/93; panel report on *EEC - Restrictions on Imports of Apples, Complaint by the United States*, adopted on 22 June 1989, BISD 36S/135; panel report on *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91; panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98; and panel report on *EEC - Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49. The panel noted that in the panel report on *United States - Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted on 7 November 1989, the challenged measure was

130. The Panel stated further:

... that *we would be prejudging our examination of Argentina's claims regarding the Chilean PBS if we were to accept without further analysis that the change introduced by Chile is relevant to the consistency of the Chilean PBS with its obligations under the WTO Agreement. We 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 would be acting in a manner inconsistent with our duties under Article 11 of the DSU if we were to refrain from making findings for the sole reason that Chile amended the challenged measure at a late stage of the proceedings.*¹¹³ (emphasis added)

The Panel concluded as follows:

We will therefore examine the Chilean PBS as challenged by Argentina in these proceedings, and make findings accordingly.¹¹⁴

131. In its appellant's submission, Chile describes the measure in this appeal as the price band system subject to a cap on the total duty applied equal to the bound Chilean rate of duty for the product concerned¹¹⁵ and as amended by Law No. 19.772. In response to questioning at the oral hearing, Chile explained that Law 19.772 was merely declaratory in nature, because the total amount of duties that could be applied on products subject to the price band system had been subject to a tariff binding since the Tokyo Round.¹¹⁶ According to Chile, the Amendment did not change this long-standing tariff binding; it merely "reinforced" Chile's existing international obligations.¹¹⁷ Chile observed that the Amendment served to "reassure" Chile's trading partners that there will be no recurrence of a breach by Chile of its tariff binding.¹¹⁸

amended during the panel process but the panel refused to take into account such amendment. We note that this was also the line taken by the Appellate Body in *Argentina - Textiles and Apparel*, WT/DS56/AB/R, adopted on 22 April 1998, para. 64.

¹¹³ Panel Report, para. 7.7.

¹¹⁴ *Ibid.*, para. 7.8.

¹¹⁵ Chile's appellant's submission, para. 11:

To the extent the reference price of the product concerned is below the bottom of the price band as of the date of exportation to Chile, the *ad valorem* duty is increased by that specific amount per tonne, *subject to a cap on the total duty applied equal to the bound Chilean rate of duty for the product concerned* (currently 31.5% as a result of a reduction agreed in the Uruguay Round). (emphasis added)

¹¹⁶ Chile's response to questioning at the oral hearing. Chile's tariff binding was at 35 per cent *ad valorem* after the Tokyo Round; it was reduced to 31.5 per cent *ad valorem* as of the conclusion of the Uruguay Round.

¹¹⁷ Chile's response to questioning at the oral hearing.

¹¹⁸ *Ibid.* According to Chile, Law 19.772 merely corrected a domestic administrative procedure of Chile's customs authorities.

132. Argentina does not state explicitly in its appellee's submission whether, in its view, the measure in issue is Chile's price band system "as amended" by Law 19.772, or the price band system as it stood before that Amendment. Nevertheless, Argentina addresses in detail¹¹⁹ Chile's arguments relating to Chile's price band system with a cap, and concludes that "the Panel's analysis is well-founded because it properly addressed Chile's arguments relating to the price band system with a cap."¹²⁰ (emphasis added) Earlier in its submission, Argentina notes that it "clearly identified the measures at issue: Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, as well as the regulations and complementary provisions and/or amendments."¹²¹ Thus, although Argentina does not explicitly refer to "Law 19.772" when describing the measure, it does refer to "amendments".

133. In response to questioning at the oral hearing, Argentina maintained that the measure in issue is the price band system as set out in the Panel's terms of reference, that is, *before* the Amendment. However, Argentina also noted that the Panel appeared to have ruled on the price band system as it stood both *before and after* the Amendment. Chile agreed with Argentina that the Panel ruled on both the original and the "amended" price band system.¹²² According to Argentina, it was appropriate for the Panel to do so in the light of arguments put forward by Chile in the Panel proceedings regarding the "amended" price band system. Argentina argues that it was also appropriate for Argentina to react to Chile's arguments that related to the Amendment. The question whether we take the Amendment into account is not a "problem of jurisdiction", according to Argentina, because, even after the Amendment, the "identity of the measure remains the same".¹²³ Argentina maintains that it is "in a position to receive an adjudication" from us on the "amended" price band system.¹²⁴

134. With these arguments in mind, we turn now to consider whether the measure in this appeal is the price band system as amended by Law 19.772, or the price band system as it existed before the Amendment.

135. First of all, we note that Argentina's request for the establishment of a panel refers to the measure in issue as the price band system "under Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, *as well as the regulations and complementary provisions and/or amendments*" (emphasis added). Such *amendments*, in our view, include Law 19.772. The broad scope of the Panel request suggests that Argentina intended the request to cover the measure even as amended. Thus, we conclude that Law 19.772 falls within the Panel's terms of reference.

136. We recall that, in *Brazil – Export Financing Programme for Aircraft*, a question arose as to the identity of the measure there. In that dispute, regulatory

¹¹⁹ Argentina's appellee's submission, paras. 115-123.

¹²⁰ *Ibid.*, para. 122.

¹²¹ *Ibid.*, para. 19.

¹²² Chile's response to questioning at the oral hearing.

¹²³ Argentina's response to questioning at the oral hearing.

¹²⁴ *Ibid.*

changes relevant to the measure were put in place after consultations were held, but before the panel was established. We determined that the regulatory changes "did not change the essence" of the measure:

We are confident that the specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX. Consultations were held by the parties on these subsidies, and it is these same subsidies that were referred to the DSB for the establishment of a panel. We emphasize that the regulatory instruments that came into effect in 1997 and 1998 *did not change the essence* of the export subsidies for regional aircraft under PROEX.¹²⁵ (emphasis added)

137. In this case, the facts are somewhat different, because the Amendment was enacted *after* the Panel had been established and *while* the Panel was engaged in considering the measure. However, we do not see why this difference should affect our approach in determining the identity of the measure. We understand the Amendment as having clarified the legislation that established Chile's price band system. However, the Amendment does not change the price band system into a measure *different* from the price band system that was in force before the Amendment. Rather, as we have pointed out, Article 2 of Law No. 19.772 simply amends Article 12 of Law No. 18.525 by *adding* a final paragraph to that provision. In its amended form, Law No. 18.525 incorporates the additional paragraph, making explicit that there is a cap on the amount of the total tariff that can be applied under the system at the tariff rate of 31.5 per cent *ad valorem*, which has been bound in Chile's Schedule since the entry into force of the *WTO Agreement*.

138. We note, moreover, that the panel in *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear (EC)*"), decided to examine *modifications* made to the measure in issue *during* the panel proceedings, on the ground that the modifications in question did:

... *not constitute entirely new safeguard measures* in the sense that they were based on a different safeguard investigation, but are *instead modifications of the legal form of the original definitive measure, which remains in force in substance* and which is the subject of the complaint.¹²⁶ (emphasis added)

Although we were not asked to review that particular finding on appeal, we agree with that panel's approach, which is based on sound reasoning and is consistent with our reasoning here.

139. We understand that, like the safeguard measure in the *Argentina – Footwear (EC)* case, Chile's price band system remains essentially the same after the enactment of Law 19.772. The measure is not, in its essence, any different because of that Amendment. Therefore, we conclude that the measure before us in

¹²⁵ Appellate Body Report, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para. 132.

¹²⁶ Panel Report, WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575, para. 8.45.

this appeal includes Law 19.772, because that law amends Chile's price band system without *changing its essence*.

140. Our conclusion is supported by the object and purpose of the WTO dispute settlement system. Article 3.7 of the DSU provides, in relevant part, that:

The aim of the dispute settlement mechanism is *to secure a positive solution to a dispute*. (emphasis added)

141. This is affirmed in Article 3.4 of the DSU, which stipulates:

Recommendations or rulings made by the DSB shall be aimed at achieving a *satisfactory settlement of the matter* in accordance with the rights and obligations under this Understanding and under the covered agreements. (emphasis added)

142. We also observed, in *Australia – Salmon*, that the:

... aim [of the dispute settlement system] is to resolve the matter at issue and "to secure a positive solution to a dispute". To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members."¹²⁷ (emphasis added)

143. Although we made this statement in a somewhat different context—relating to when panels exercise judicial economy—we believe that these general principles and considerations confirm our conclusion in this appeal. We consider it appropriate for us to rule on the price band system as currently in force in Chile, that is, as amended by Law 19.772, to "secure a positive solution to the dispute" and to make "sufficiently precise recommendations and rulings so as to allow for prompt compliance". Further, as we have observed, the participants to this dispute do not object to our doing so.

144. We emphasize that we do not mean to condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel or by us. We do not suggest that this occurred in this case. However, generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a "moving target". If the terms of reference in a dispute are broad enough to include amendments to a measure—as they are in this case—and if it is necessary to consider an amendment in order to secure a positive solution to the dispute—as it is here—then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute.

¹²⁷ Appellate Body Report, *supra*, footnote 70, para. 223.

VI. ARTICLE 11 OF THE DSU

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

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

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

The second sentence of that provision states:

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

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

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

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

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

¹²⁸ Panel Report, para. 7.104.

ond 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.¹²⁹

The Panel observed that Chile did not record its price band system in its Schedule under the column for "other duties and charges" as governed by the *second* sentence:

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.¹³⁰ (emphasis added)

The Panel concluded that:

... the Chilean PBS duties are inconsistent with Article II:1(b) of the GATT 1994.¹³¹

149. Chile appeals this finding, and argues that the Panel ruled on a claim that was neither made nor argued. Chile maintains that the Panel exceeded its mandate and deprived Chile of a "fair right of response".¹³² In addressing this issue, we will examine, first, whether Argentina made a claim under the second sentence of Article II:1(b) of the GATT 1994, and, next, whether the Panel acted inconsistently with Article 11 of the DSU in making a finding under that sentence. To determine whether Argentina made a claim under the second sentence of Article II:1(b), we look first to Argentina's request for the establishment of a panel, which determines the Panel's terms of reference. Argentina's request reads in relevant part:

Under Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, as well as the regulations and complementary provisions and/or amendments, Chile applies a PBS which is inconsistent with *various provisions of the GATT 1994* and with the Agreement on Agriculture.

The price band system does not ensure certainty in respect of market access for agricultural products and has caused Chile to breach its commitments on tariff bindings in relation to the concessions set forth in its national schedule. Argentina submits that the said legislation is inconsistent with *Article II of the GATT 1994* and with Article 4 of the Agreement on Agriculture.¹³³ (emphasis added)

¹²⁹ Panel Report, para. 7.105.

¹³⁰ *Ibid.*, para. 7.107.

¹³¹ *Ibid.*, para. 7.108.

¹³² Chile's appellant's submission, para. 23.

¹³³ WT/DS207/2, 19 January 2001.

150. The Panel request refers to Article II of the GATT 1994 in general terms. No specific reference is made to any of the seven paragraphs or eight subparagraphs of Article II of the GATT 1994. Argentina's request clearly does not limit the scope of Argentina's claims to the *first* sentence of Article II:1(b). Therefore, we find that Article II in its entirety—including the second sentence of Article II:1(b)—is within the Panel's terms of reference.

151. This, however, is not the end of our inquiry on this issue. Chile does not dispute that Argentina included Article II:1(b) in the request for the establishment of a panel.¹³⁴ However, Chile submits that making a general reference to Article II in the Panel request is not dispositive of whether Argentina *has actually made a claim* under the *second* sentence of Article II:1(b), and, thus, of whether the Panel was entitled to make a finding under that provision.

152. Chile argues that Argentina did not make a claim under Article II:1(b) because Argentina did not articulate such a claim in any of its submissions before the Panel. In making this argument, Chile relies on our Report in *US – Certain EC Products*, where we said, with respect to a claim relating to another provision of the covered agreements:

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

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

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

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

¹³⁴ We note that Chile has not challenged the sufficiency of the request for establishment of a panel under Article 6.2 of the DSU. This was confirmed by Chile at the oral hearing. Therefore, we need not and do not decide whether the request for establishment of a panel would or would not be sufficient under Article 6.2 of the DSU.

¹³⁵ Appellate Body Report, *supra*, footnote 44, para. 112. We also stated in that case: "An analysis of the Panel record shows that, with the exception of two instances during the Panel proceedings, the European Communities did not refer *specifically* to Article 23.2(a) of the DSU ... Our reading of the Panel record shows us that, throughout the Panel proceedings in this case, the European Communities made *arguments* relating only to its claims that the United States acted inconsistently with Article 23.1 and Article 23.2(c) of the DSU." (footnotes omitted, emphasis in original). Appellate Body Report, para. 112. We noted as well that: "The Panel record does show that the European Communities made several references to what it termed the 'unilateral determination' of the United States. However, ... [a]t no point did the European Communities link the notion of a 'unilateral determination' on the part of the United States with a violation of Article 23.2(a)." Appellate Body Report, para. 113.

The PBS also violates Article II:1(b) because, by its structure, design and mode of application, it *potentially* leads to the application of specific duties in violation of the bound tariff of 31.5 per cent.¹³⁶ (emphasis added)

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

156. In its first submission, Argentina focused on the argument that Chile exceeded its bound rate of 31.5 per cent in imposing price band duties. Argentina must necessarily have been referring in this submission only to Chile's obligations under the first sentence of Article II:1(b), because 31.5 per cent is the rate that Chile has bound in the column of its Schedule for *ordinary customs duties*. Ordinary customs duties are governed by the *first* sentence of Article II:1(b); they are not relevant to the *second* sentence. Argentina could not have been referring in this submission to Chile's obligations under the second sentence of Article II:1(b), because Chile has not scheduled any other duties or charges governed by that sentence. Argentina referred also in this submission to the "structure, design and mode of application"¹³⁷ of Chile's price band system as being *potentially* violative of the 31.5 per cent bound rate, but this rate applies only to duties falling under the first sentence of Article II:1(b).

157. We conclude, therefore, that Argentina did not articulate a claim under the second sentence of Article II:1(b) in its first submission.

158. However, as Argentina points out, we ruled in *EC – Bananas III* that:

There is *no requirement* in the DSU or in GATT practice for arguments *on all claims* relating to the matter referred to the DSB *to be set out in a complaining party's first written submission* to the panel.

...

We do *not* agree with the Panel's statement that a "*failure to make a claim in the first written submission cannot be remedied by later submissions* or by incorporating the claims and arguments of other complainants".¹³⁸ (emphasis added)

For this reason, it is necessary to determine whether Argentina articulated a claim under the second sentence of Article II:1(b) in subsequent submissions to the Panel.

¹³⁶ Panel Report, paras. 4.5.-4.7; Argentina's first written submission to the Panel, pp. 8 and 16.

¹³⁷ Argentina's second oral statement to the Panel, para. 4. Panel Report, para. 4.7.

¹³⁸ Appellate Body Report, *supra*, footnote 58, paras. 145, 147.

159. Argentina concedes that it directed most of its arguments during the Panel proceedings to the first sentence of Article II:1(b).¹³⁹ However, Argentina states that it addressed the second sentence of that provision in its response to Question 3 posed by the Panel, which reads in relevant part as follows:¹⁴⁰

[Response to Question 3(b):] Under Article II:1(b) of the GATT 1994, other duties or charges are merely those that do not constitute "ordinary customs duties", such as the other duties or charges which appear in columns 6 and 8 of the national schedules, as appropriate.

[Response to Question 3(c):] "Other duties or charges of any kind" within the meaning of Article II:1(b) of the GATT 1994 cannot be considered as "similar border measures other than ordinary customs duties".

[Response to Question 3(d):] The bound duty level for what is considered to be "other duties and charges of any kind" is the rate registered in that column. Consequently, that level is the one to be considered in determining inconsistency with Article II:1(b) of the GATT 1994, without prejudice to the consistency of other duties or charges with other obligations under the GATT 1994.

160. Argentina contends that, in this response to Question 3 of the Panel, there are arguments relating to a claim under the *second* sentence of Article II:1(b). Yet this response sets out only a general description of Argentina's interpretation of the second sentence of Article II:1(b), and one that was offered by Argentina only because the Panel asked for it. There is, in this response, no discussion

¹³⁹ Argentina's appellee's submission, para. 35.

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

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

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

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

whatsoever of Chile's price band system, or of how it relates to the obligation in that sentence. Nor is there any suggestion in this response that Chile's price band system is in violation of the second sentence of Article II:1(b). Furthermore, Argentina expresses no view in this response as to how the concept of "other duties or charges", within the meaning of the second sentence of Article II:1(b), could or would relate to the claims it raised. We note as well that Argentina did not refer at all to these responses in subsequent proceedings before the Panel.

161. Argentina also asserts that it articulated a claim under the second sentence of Article II:1(b) in its rebuttal submission¹⁴¹, where Argentina argues:

23. Argentina repeats once again that it does not question and never has questioned Chile's right to apply specific duties, as long as those duties are consistent with multilateral rules and regulations. However, the Chilean PBS is not a specific duty. Indeed, by its structure, design and mode of application, the PBS violates Article II:1(b) of the GATT 1994, since it has the potential to cause Chile to exceed its tariff binding. (underlining in original)

24. This is so because, as just stated, we are not dealing with a specific duty which constitutes an "ordinary customs duty" – a duty which, since it does not result in the levying of duties in excess of the bound rate, would not be the subject of a complaint by Argentina with respect to Article II:1(b) of the GATT 1994. Here, we are dealing with a surcharge whose structure, design and mode of application potentially leads to a violation of Chile's binding.

162. Neither of these paragraphs cited by Argentina from its rebuttal submission even mentions the second sentence of Article II:1(b). Moreover, these paragraphs appear at the beginning of a section in the rebuttal submission, entitled "Potential violation", in which Argentina seeks to explain its argument that Chile's price band system potentially violates the bound 31.5 per cent tariff rate. As we have already noted, that argument cannot be related to the *second* sentence of Article II:1(b), because that sentence has nothing to do with the bound 31.5 per cent tariff rate. Moreover, Chile concedes that it did not schedule its price band system under the column for "other duties or charges" governed by the second sentence of Article II:1(b). Therefore, if a violation of the second sentence were in issue, it would not be "potential," but certain.

163. Argentina contends also that two third parties—the United States and the European Communities—"provided argumentation regarding the second sentence of Article II:1(b)."¹⁴² In support of this contention, Argentina cites those third parties' responses to Question 3 posed by the Panel. However, even if these responses could be interpreted in the way Argentina would have us do—an issue which we need not decide in this appeal—these responses could not, in any event, assist Argentina in making a claim under the second sentence of Article II:1(b). These are the statements of third parties to this dispute. Third parties to a

¹⁴¹ Argentina's rebuttal submission to the Panel, paras. 23 and 24.

¹⁴² Argentina's appellee's submission, para. 39.

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

164. In addition, Argentina contends that it made a claim under the second sentence of Article II:1(b) in the context of its arguments to the Panel under Article 4.2 of the *Agreement on Agriculture*, where it argued that duties resulting from Chile's price band system were not ordinary customs duties for the purposes of Article 4.2.¹⁴³ With this argument, Argentina appears to suggest that a claim may be made implicitly, and need not be made explicitly. We do not agree. The requirements of due process and orderly procedure dictate that claims must be made explicitly in WTO dispute settlement. Only in this way will the panel, other parties, and third parties understand that a specific claim has been made, be aware of its dimensions, and have an adequate opportunity to address and respond to it. WTO Members must not be left to wonder what specific claims have been made against them in dispute settlement. As we said in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (India – Patents)*:

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

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

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

... nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own

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

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

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

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

legal reasoning – to support its own findings and conclusions on the matter under its consideration.¹⁴⁶

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

168. Contrary to what Argentina argues, given our finding that Argentina has not made a *claim* under the *second* sentence of Article II:1(b), the Panel in this case had neither a "right" nor a "duty" to develop its own legal reasoning to support a claim under the second sentence. The Panel was not entitled to make a claim for Argentina¹⁴⁹, or to develop its own legal reasoning on a provision that was not at issue.¹⁵⁰

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

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

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

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

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

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

Article 11

Function of Panels

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

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

171. In contrast, Argentina argues that the Panel acted consistently with Article 11. Argentina submits that the standard for breaches of Article 11 is "very high"¹⁵², and asserts that the Panel did not "deliberately disregard" or "refuse to consider" or "wilfully distort" or "misrepresent" the evidence before it.¹⁵³ Argentina also claims that Chile did not "demonstrate in any way that the Panel committed an 'egregious error that calls into question the good faith' of the Panel."¹⁵⁴ In Argentina's view, Chile has not demonstrated that the Panel in this case abused its discretion in a manner that comes even close to the level of gravity required to sustain a claim under Article 11 of the DSU.

172. We agree with Argentina that the Panel did not refuse to consider, did not distort, and did not misrepresent any evidence relating to Chile's alleged violation of the second sentence of Article II:1(b). Indeed, there was no such evidence before the Panel. Nor, in our view, did the Panel commit an error that in any way calls into question the Panel's good faith. But the obligations under Article 11 of the DSU go beyond a panel's appreciation of the evidence before it. Article 11 obliges panels not only to make "an objective assessment of the facts of the case", but also "an objective assessment of the matter before it."

173. In this case, the Panel made a finding on a claim that was *not* made by Argentina. Having determined that the duties resulting from Chile's price band system could not be assessed under the first sentence¹⁵⁵ of Article II:1(b) of the GATT 1994, the Panel then proceeded to examine the measure under the second sentence of that provision. In so doing, the Panel assessed a provision that was

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

¹⁵² Argentina's statement at the oral hearing.

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

¹⁵⁴ *Ibid.*

¹⁵⁵ Panel Report, para. 7.104.

not a part "of the matter before it". As we have explained, the terms of reference were broad enough to have included a claim under the second sentence of Article II:1(b). However, Argentina did not articulate a claim under that sentence; nor did Argentina submit any arguments on the consistency of Chile's price band system with the second sentence. Therefore, as with our finding in *US – Certain EC Products*, the second sentence of Article II:1(b) was not the subject of a claim before the Panel. Because it made a finding on a provision that was not before it, the Panel, therefore, did not make an objective assessment *of the matter before it*, as required by Article 11. Rather, the Panel made a finding on a matter that was *not* before it. In doing so, the Panel acted *ultra petita* and inconsistently with Article 11 of the DSU.

174. There is, furthermore, the requirement of due process. As Argentina made no claim under the second sentence of Article II:1(b) of the GATT 1994, Chile was entitled to assume that the second sentence was not in issue in the dispute, and that there was no need to offer a defence against a claim under that sentence. We agree with Chile that, by making a finding on the second sentence—a claim that was neither made nor argued—the Panel deprived Chile of a "fair right of response".¹⁵⁶

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

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

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

¹⁵⁶ Chile's appellant's submission, para. 23.

¹⁵⁷ Appellate Body Report, *supra*, footnote 144, para. 94.

¹⁵⁸ Appellate Body Report, *supra*, footnote 70, para. 278.

VII. ORDER OF ANALYSIS

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

179. Before addressing the substance of Chile's argument, we note that Argentina raises a procedural objection, alleging that Chile introduced this point for the first time in its appellant's submission, when, as Argentina sees it, Chile should have included this "allegation of error" in its Notice of Appeal pursuant to Rule 20(2)(d) of the *Working Procedures for Appellate Review*.¹⁵⁹

180. We addressed a similar issue in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*. There, we stated that:

The *Working Procedures for Appellate Review* enjoin the appellant to be *brief* in its notice of appeal in setting out "the nature of the appeal, including the allegations of errors". We believe that, in principle, the "nature of the appeal" and "the allegations of errors" are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel which are being appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission.¹⁶⁰ (underlining added, emphasis in original)

181. Further, in *EC – Bananas III*, we stated, in the context of Article 6.2 of the DSU, that:

In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.

...

¹⁵⁹ Rule 20(2)(d) of the *Working Procedures for Appellate Review* provides in pertinent part that:
A Notice of Appeal shall include the following information:

...

(d) a brief statement of the nature of appeal, including the *allegations of errors* in the issues of law covered in the panel report and legal interpretations developed by the Panel. (emphasis added)

¹⁶⁰ Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 95.

Article 6.2 of the DSU requires that the *claims* but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel ...¹⁶¹ (emphasis in original)

182. In our view, this distinction between claims and legal arguments under Article 6.2 of the DSU is also relevant to the distinction between "allegations of error" and legal arguments as contemplated by Rule 20 of the *Working Procedures*. Bearing this distinction in mind, we do *not* agree with Argentina that Chile's arguments regarding the order of analysis chosen by the Panel amount to a separate "allegation of error" that Chile *should have*—or *could have*—included in its Notice of Appeal. In fact, we do not see, nor has Argentina explained, what *separate* "allegation of error" could have been made, or what legal basis for such "allegation of error" there could have been. Rather than making a separate "allegation of error", Chile has, in our view, simply set out a *legal argument* in support of the issues it raised on appeal relating to Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994.¹⁶²

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

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

Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.¹⁶³ (underlining added)

Applying this reasoning, the Panel concluded that it should begin by examining Argentina's claims under Article 4.2 of the *Agreement on Agriculture*, because that Agreement "deals more specifically and in detail with measures affecting market access of agricultural products".¹⁶⁴

185. On appeal, Chile questions this decision by the Panel, and maintains that Article 4.2 of the *Agreement on Agriculture* "clearly is not specific or more detailed than Article II:1(b) with regard to tariff commitments". In Chile's view, Article II:1(b) deals with tariff bindings, whereas Article 4.2 deals with non-

¹⁶¹ Appellate Body Report, *EC – Bananas III*, *supra*, footnote 58, paras. 141, 143.

¹⁶² Indeed, Chile suggests in paragraph 34 of its appellant's submission that, had the Panel begun with Article II:1(b), it would "most likely have avoided the error of inventing a new definition of 'ordinary customs duties' which has no apparent basis in the text of Article II:1(b)." Thus Chile is in fact making a legal argument in support of a substantive claim under Article II:1(b).

¹⁶³ Appellate Body Report, *supra*, footnote 58, para. 204.

¹⁶⁴ Panel Report, para. 7.16.

tariff measures.¹⁶⁵ Thus, as Chile sees it, the two provisions deal with *different* subjects. Accordingly, Chile appears to argue that the approach we articulated in *EC – Bananas III* does not apply to a relationship between two provisions that do not concern the same subject.

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

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

187. With these considerations in mind, we turn now to Chile's contention that Article 4.2 of the *Agreement on Agriculture* "is not a specific or more detailed way of addressing the prohibition against exceeding tariff bindings under Article II:1(b)".¹⁶⁷ Our consideration of this argument requires a comparison of these two provisions in these two covered agreements. Article 4.1 of the *Agreement on Agriculture* explains that market access concessions for agricultural products relate to tariff bindings and to reductions of tariffs, as well as to other market access commitments that can be found in Members' Schedules. Article 4.2 requires Members not to maintain "any measures of the kind which have been required to be converted into ordinary customs duties", and provides an illustrative list of measures "other than ordinary customs duties". Article 4.2 prevents WTO Members from *circumventing* their commitments on "ordinary customs duties" by prohibiting them from "maintaining, reverting to, or resorting to" measures other than "ordinary customs duties". The first sentence of Article II:1(b) of the GATT 1994 *also* deals with "ordinary customs duties", by requiring Members *no* to impose "ordinary customs duties" in excess of those recorded in their Schedules. Thus, the obligations in Article 4.2 of the *Agreement on Agriculture* and those in the first sentence of Article II:1(b) of the GATT both deal with "ordinary customs duties" and market access for imported products. As we see it, the difference between the two provisions is that Article 4.2 of the *Agreement on Agriculture* deals *more specifically* with preventing the circumvention of tariff commitments on *agricultural products* than does the first sentence of Article II:1(b) of the GATT 1994. Thus, in our view, this argument by Chile is flawed.

188. Chile argues, as well, that the drafters of Article 4.2 of the *Agreement on Agriculture* borrowed the term "ordinary customs duties" from Article II:1(b) of the GATT 1947, and that, therefore, Article II:1(b) of the GATT 1994 should be

¹⁶⁵ Chile's response to questioning at the oral hearing.

¹⁶⁶ Appellate Body Report, *supra*, footnote 58, para. 155.

¹⁶⁷ Chile's appellant's submission, para. 29.

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

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

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

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

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

longer be levied—no matter what the level of those duties may be. Without a price band system, there could be no price band duties.

191. We therefore conclude that the Panel did not err in choosing to examine Argentina's claim under Article 4.2 of the *Agreement on Agriculture* before examining Argentina's claim under Article II:1(b) of the GATT 1994. Our own analysis will follow the same order.

VIII. ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

192. Argentina argued before the Panel that Chile's price band system is a measure "of the kind which has been required to be converted into ordinary customs duties" and which, by the terms of Article 4.2 of the *Agreement on Agriculture*, Members are required not to "maintain". Argentina claimed that, in maintaining the price band system, Chile is acting inconsistently with Article 4.2.

193. In reply, Chile contended before the Panel that Chile's price band system is *not* a measure "of the kind which has been required to be converted into ordinary customs duties" by virtue of Article 4.2 of the *Agreement on Agriculture*. According to Chile, the duties resulting from Chile's price band system are "ordinary customs duties", and Chile's price band system—which is merely a system for determining the level of those duties—is, therefore, consistent with Article 4.2.

194. The Panel found Chile's price band system to be inconsistent with Chile's obligations under Article 4.2 of the *Agreement on Agriculture*. The Panel concluded 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.*¹⁷⁰

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

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

¹⁷⁰ Panel Report, para. 7.102.

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

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

197. We are certainly aware of the importance of agricultural and primary products to many developing country Members of the WTO. We are mindful also that the significance of trade in such products is reflected in a number of places in the covered agreements, including the *Agreement on Agriculture*. In the preamble to the *Agreement on Agriculture*, it is said that developed country Members agreed that, in implementing their commitments on market access, they "would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members".¹⁷⁴ In addition, the *Agreement on Agriculture* allows for certain special and differential treatment for developing country Members relating to the treatment of agricultural products. Article 15 is the general provision of the *Agreement on Agriculture* dealing with special and differential treatment for developing country Members. It stipulates that such treatment "shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments."¹⁷⁵ Thus, special and differential treatment for developing country Members applies, under the *Agreement on Agriculture*, only where and to the extent that it is specifically provided for in that Agreement.

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

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

¹⁷² *Ibid.*, recital 3.

¹⁷³ *Ibid.*, recital 4.

¹⁷⁴ *Ibid.*, recital 5.

¹⁷⁵ Article 15 on "Special Treatment" provides in relevant part:

In keeping with the recognition that differential and more favourable treatment for developing country Members is an integral part of the negotiation, special and differential treatment in respect of commitments shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments.

countries from some of the requirements of Article 4.2, these are not relevant here.

199. In these circumstances, although the participants in this dispute are developing country Members, we are not required to apply any of these specialized provisions in coming to our decision in this appeal. Moreover, both Chile and Argentina confirmed, in response to questioning at the oral hearing, that the fact that they both are developing countries has no relevance in this dispute.

200. That said, we turn now to Article 4, which is the main provision of Part III of the *Agreement on Agriculture*. As its title indicates, Article 4 deals with "Market Access".¹⁷⁶ During the course of the Uruguay Round, negotiators identified certain border measures which have in common that they restrict the volume or distort the price of imports of agricultural products. The negotiators decided that these border measures should be converted into ordinary customs duties, with a view to ensuring enhanced market access for such imports. Thus, they envisioned that ordinary customs duties would, in principle, become the only form of border protection. As ordinary customs duties are more transparent and more easily quantifiable than non-tariff barriers, they are also more easily compared between trading partners, and thus the maximum amount of such duties can be more easily reduced in future multilateral trade negotiations. The Uruguay Round negotiators agreed that market access would be improved—both in the short term and in the long term—through bindings and reductions of tariffs and minimum access requirements, which were to be recorded in Members' Schedules.

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

Market Access

1. Market access concessions contained in Schedules relate to bindings and reductions of tariffs, and to other market-access commitments as specified therein.
2. Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties¹, except as otherwise provided for in Article 5 and Annex 5.

¹These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enter-

¹⁷⁶ Part III contains only one other provision, namely, Article 5, which provides for a special safeguard mechanism that may be used to derogate from the requirements of Article 4 when certain conditions are met. We will discuss Article 5 later in this section.

prises, 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.

202. In our examination of the issues appealed relating to Article 4.2 and to footnote 1, we will address the Panel's general interpretation of both before discussing, in detail, the specific issues raised by Chile regarding these provisions. Then we will review the Panel's assessment of Chile's price band system in the light of our general interpretation of Article 4.2, and also of our interpretations of the specific categories of measures listed in footnote 1 to which the parties and the Panel referred. These categories include "variable import levies", "minimum import prices" and "similar border measures other than ordinary customs duties".

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

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

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

205. We begin with a consideration of the use of the present perfect tense in the phrase "any measures of the kind which *have been required* to be converted into ordinary customs duties". Chile sees a special significance in the use of this tense; Argentina does not. Chile asserts that the use of the present perfect tense (that is, "*have been required* to be converted") in Article 4.2 should be borne in mind when interpreting this provision.¹⁷⁹ In Chile's view, it is "highly rele-

¹⁷⁷ Article 31 of the *Vienna Convention*.

¹⁷⁸ Preamble of the *Agreement on Agriculture*, recital 5.

¹⁷⁹ Chile criticizes the Panel's order of analysis within Article 4. In Chile's view, the Panel moved too quickly from interpreting the terms "any measures of the kind" in paragraph 2 to the specific categories of measures listed in footnote 1. Chile alleges that, in doing so, the Panel failed to attribute

vant"¹⁸⁰, for the interpretation of Article 4.2, that no country *actually converted* a price band system into tariffs during the Uruguay Round negotiations, and also that no Member *requested* Chile to convert Chile's price band system into tariffs during those negotiations. Chile concedes, however, that a measure is not necessarily consistent with Article 4.2 simply because the measure was neither actually converted nor requested to be converted by the end of the Uruguay Round.¹⁸¹

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

207. If Article 4.2 were to read "any measures of the kind which *are* required to be converted", this would imply that if a Member—for whatever reason—had failed, by the end of the Uruguay Round negotiations, to convert a measure within the meaning of Article 4.2, it could, *even today*, replace that measure with

sufficient significance to the entire phrase "*which have been required to be converted into ordinary customs duties*" (emphasis added) in the main text of paragraph 2, except to note that this wording did not necessarily mean that only the measures that were actually converted were banned. Chile refers in particular to paragraphs 7.18-7.19 of the Panel Report. Chile's appellant's submission, para. 87. We note, however, that the text of paragraph 2 itself directs the interpreter to footnote 1. Given that, in interpreting Article 4.2, we address the terms of the provision in a different sequence than did the Panel, and because the result of our interpretation is essentially the same as that reached by the Panel, we do not find it necessary to address Chile's contention in more detail.

¹⁸⁰ Chile's response to questioning at the oral hearing.

¹⁸¹ Chile's appellant's submission, para. 81.

¹⁸² G. Leech and J. Svartvik, *A Communicative Grammar of English*, (Longman, 1979), paras 112-119. R. Quirk and S. Greenbaum, *A University Grammar of English*, (Longman, 1979), paras. 328-330.

ordinary customs duties in excess of bound tariff rates.¹⁸³ But, as Chile and Argentina have agreed, this is clearly not so.¹⁸⁴ It seems to us that Article 4.2 was drafted in the present perfect tense to ensure that measures that were required to be converted as a result of the Uruguay Round—but were not converted—could not be maintained, by virtue of that Article, from the date of the entry into force of the *WTO Agreement* on 1 January 1995.

208. Thus, contrary to what Chile argues, giving meaning and effect to the use of the present perfect tense in the phrase "have been required" does not suggest that the scope of the phrase "any measures of the kind which have been required to be converted into ordinary customs duties" must be limited only to those measures which were *actually* converted, or were *requested* to be converted, into ordinary customs duties by the end of the Uruguay Round. Indeed, in our view, such an interpretation would fail to give meaning and effect to the word "any" and the phrase "of the kind", which are descriptive of the word "measures" in that provision. A plain reading of these words suggests that the drafters intended to cover a broad category of measures. We do not see how proper meaning and effect could be accorded to the word "any" and the phrase "of the kind" in Article 4.2 if that provision were read to include only those specific measures that were singled out to be converted into ordinary customs duties by negotiating partners in the course of the Uruguay Round.

209. The wording of footnote 1 to the *Agreement on Agriculture* confirms our interpretation. The footnote imparts meaning to Article 4.2 by enumerating examples of "measures of the kind which have been required to be converted", and which Members must not maintain, revert to, or resort to, from the date of the entry into force of the *WTO Agreement*. Specifically, and as both participants agree¹⁸⁵, the use of the word "include" in the footnote indicates that the list of measures is illustrative, not exhaustive. And, clearly, the existence of footnote 1 suggests that there will be "measures of the kind which have been required to be converted" that were *not* specifically identified during the Uruguay Round negotiations. Thus, in our view, the illustrative nature of this list lends support to our interpretation that the measures covered by Article 4.2 are not limited only to those that were *actually* converted, or were requested to be converted, into ordinary customs duties during the Uruguay Round.

210. Footnote 1 also refers to a residual category of "similar border measures other than ordinary customs duties", which indicates that the drafters of the *Agreement* did not seek to identify all "measures which have been required to be converted" during the Uruguay Round negotiations. The existence of this residual category confirms our interpretation that Article 4.2 covers more than merely the measures that had been specifically identified or challenged by other negotiating partners in the course of the Uruguay Round.

¹⁸³ Bound tariffs could, however, be renegotiated pursuant to Article XXVIII of the GATT 1994.

¹⁸⁴ At the oral hearing, the participants and third participants agreed that such replacement rights expired as of the entry into force of the *WTO Agreement*.

¹⁸⁵ Participants' responses to questioning at the oral hearing.

211. Further, the context of Article 4.2 confirms our interpretation. Article 5.1 of the *Agreement on Agriculture*, the only provision in addition to Article 4 that is included in Part III of that Agreement, specifies that a Member may, under certain conditions, impose a special safeguard on imports of an agricultural product "in respect of which measures referred to in [Article 4.2] *have been converted* into an ordinary customs duty". (emphasis added) In our view, the phrase "have been required to be converted" in Article 4.2 has a broader connotation than the phrase "have been converted" in Article 5.1.¹⁸⁶ Therefore, it is perfectly apt that Article 5.1 speaks of such special safeguards only with respect to those agricultural products for which measures covered by Article 4.2 "have been converted"—that is, have in fact already been converted—into ordinary customs duties. Article 5.1 illustrates that, where the drafters of the *Agreement on Agriculture* wanted to limit the application of a rule to measures that have *actually* been converted, they used specific language expressing that limitation.

212. Thus, the obligation in Article 4.2 not to "maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties" applies from the date of the entry into force of the *WTO Agreement*—regardless of whether or not a Member converted any such measures into ordinary customs duties before the conclusion of the Uruguay Round. The mere fact that no trading partner of a Member singled out a specific "measure of the kind" by the end of the Uruguay Round by requesting that it be converted into ordinary customs duties, does not mean that such a measure enjoys immunity from challenge in WTO dispute settlement. The obligation "not [to] maintain" such measures underscores that Members must not continue to apply measures covered by Article 4.2 from the date of entry into force of the *WTO Agreement*.¹⁸⁷

213. Chile's argument that it is "highly relevant" that no country that had a price band system in place before the conclusion of the Uruguay Round actually converted it into ordinary customs duties¹⁸⁸ gives rise to another question, namely: is this practice relevant in interpreting Article 4.2 because it constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", within the meaning of the customary rule of interpretation codified in Article 31(3)(b) of the *Vienna Convention*? In our Report in *Japan – Taxes on Alcoholic Beverages*, we defined such "subsequent practice" as:

... a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern

¹⁸⁶ In this context, we note that a special safeguard can be imposed only on those agricultural products for which a Member has reserved its right to do so in its Schedule.

¹⁸⁷ The obligation in Article 4.2 "not [to] resort to" can be understood as meaning that Members must not introduce new measures "of the kind" that it has not had in place in the past; the obligation "not [to] revert to" can be read in the sense that Members may not, at some later stage after the entry into force of the WTO, re-enact measures prohibited by Article 4.2. At the oral hearing, the participants agreed that the obligations not to "resort to, or revert to" prohibited measures are less relevant to this dispute than the obligation to "not maintain" such measures.

¹⁸⁸ Chile's appellant's submission, para. 95.

implying the agreement of the parties [to a treaty] regarding its interpretation.¹⁸⁹

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

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

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

217. Article 5, also found in Part III of the *Agreement on Agriculture* on "Market Access", lends contextual support to our interpretation of Article 4.2. In our view, the existence of a market access exemption in the form of a special safe-

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

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

¹⁹¹ *Ibid.*

guard provision under Article 5 implies that Article 4.2 should *not* be interpreted in a way that permits Members to maintain measures that a Member would not be permitted to maintain *but for* Article 5, and, much less, measures that are even more trade-distorting than special safeguards. In particular, if Article 4.2 were interpreted in a way that allowed Members to maintain measures that operate in a way similar to a special safeguard within the meaning of Article 5—but without respecting the conditions set out in that provision for invoking such measures—it would be difficult to see how proper meaning and effect could be given to those conditions set forth in Article 5.¹⁹²

B. Assessment of Chile's Price Band System in the Light of Article 4.2 and Footnote 1

218. We turn now to the Panel's finding that Chile's price band system is a border measure similar to a variable import levy and a minimum import price within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*.¹⁹³

219. Footnote 1 lists six categories of border measures and a residual category of such measures that are *included* in "measures of the kind which have been required to be converted into ordinary customs duties" within the meaning of Article 4.2.¹⁹⁴ The list is illustrative, and includes "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". These kinds of measures were identified by the negotiators of the *Agreement on Agriculture* as measures that had to be converted into ordinary customs duties in order to ensure enhanced market access for imports of agricultural products.

220. Before the Panel, Argentina alleged that Chile's price band system is a "minimum import price" or a "variable import levy" system or, in any event, a "similar border measure other than ordinary customs duties", and that, because of the prohibition of such measures in Article 4.2, Chile's price band system must not be maintained.¹⁹⁵

221. A plain reading of Article 4.2 and footnote 1 makes clear that, if Chile's price band system falls within any *one* of the categories of measures listed in footnote 1, it is among the "measures of the kind which have been required to be converted into ordinary customs duties", and thus must not be maintained, re-

¹⁹² We note that Chile has not reserved, in its Schedule, the right to apply special safeguards. In response to questioning at the oral hearing, no participant suggested that the interpretation of Article 4.2 should be different depending on whether or not a Member reserved such a right.

¹⁹³ Panel Report, paras. 7.47, 7.65 and 7.102.

¹⁹⁴ Footnote 1 exempts "measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of the GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the *WTO Agreement*." In their responses to questioning at the oral hearing, the participants agreed that these "measures" are not relevant in this appeal.

¹⁹⁵ Panel Report, para. 7.20.

sorted to, or reverted to, as of the date of entry into force of the *WTO Agreement*.¹⁹⁶ Therefore, we will examine whether Chile's price band system falls within one or more of the categories of measures that are prohibited by Article 4.2 and footnote 1.

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

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

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

224. At the outset, we stress that, as Argentina argues¹⁹⁸, the Panel's characterization of its finding "as a factual matter" does not mean that the issue whether Chile's price band system is a border measure similar to a variable import levy or a minimum import price is shielded from appellate review. This is a question of law, and not of fact, and thus is clearly within our jurisdiction under Article 17.6 of the DSU.¹⁹⁹ As we said in our Report in *EC – Hormones*, the assessment of the consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is an issue of legal characterization.²⁰⁰ The mere assertion by a panel that its conclusion is a "factual matter" does not make

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

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

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

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

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

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

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

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

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

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

226. We agree with the first part of the Panel's definition of the term "similar" as "having a resemblance or likeness", "of the same nature or kind", and "having characteristics in common".²⁰² However, in our view, the Panel went unnecessarily far in focusing on the degree to which two measures share characteristics of a "fundamental" nature. We see no basis for determining similarity by relying on characteristics of a "fundamental" nature. The Panel seems to substitute for the task of defining the term "similar" that of defining the term "fundamental". This merely complicates matters, because it raises the question of how to distinguish "fundamental" characteristics from those of a *less than* "fundamental" nature. The better and appropriate approach is to determine similarity by asking the question whether two or more things have likeness or resemblance sufficient to be similar to each other. In our view, the task of determining whether something is similar to something else must be approached on an empirical basis.

227. As suggested by Argentina, the Panel decided to assess Chile's price band system by comparing it to several individual categories of measures listed in footnote 1. Before looking at these categories of measures, we note that *all* of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural prod-

²⁰¹ Panel Report, para. 7.26.

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

ucts in ways different from the ways that ordinary customs duties do. Moreover, *all* of these measures have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market. However, even if Chile's price band system were to share these common characteristics with all of these border measures, it would not be sufficient to make that system a "similar border measure" within the meaning of footnote 1. There must be something more. To be "similar", Chile's price band system—in its specific factual configuration—must have, to recall the dictionary definitions we mentioned, sufficient "resemblance or likeness to", or be "of the same nature or kind" as, *at least one* of the specific categories of measures listed in footnote 1.

228. Before addressing the issue of *how much* or *what kind* of "similarity" Chile's price band system must display to be a measure prohibited by Article 4.2, it is necessary for us to identify *with what* that system is required to be similar. Any examination of "similarity" presupposes a *comparative* analysis. Thus, to determine whether Chile's price band system is "similar" within the meaning of footnote 1, it is necessary to identify *with which categories* that system must be compared. The Panel compared Chile's price band system with the same categories as those identified by Argentina. While Chile disagreed with the conclusions the Panel reached in relying on that comparison, Chile does not dispute the choice of those categories.

229. In assessing whether Chile's price band system is a "similar border measure", the Panel compared Chile's system to "variable import levies" and "minimum import prices" within the meaning of footnote 1. WTO Members have not chosen to define any of these "terms of art" in the *Agreement on Agriculture* or anywhere else in the *WTO Agreement*. The Panel concluded that it could not develop an interpretation of the term "variable import levies" solely on the basis of the methods of interpretation codified in Article 31 of the *Vienna Convention*.²⁰³ The Panel decided, therefore, to have recourse to "supplementary means of interpretation" within the meaning of Article 32 of that Convention. This led to the Panel's identification of what the Panel described as "fundamental characteristics" of "variable import levies" and "minimum import prices".²⁰⁴

²⁰³ Panel Report, para. 7.35.

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

- (a) Variable levies generally operate on the basis of two prices: a threshold, or minimum import entry price and a border or c.i.f. price for imports. The threshold price may be derived from and linked to the internal market price as such, or it may correspond to a governmentally determined (guide or threshold) price which is above the domestic market price. The import border or price reference may correspond to individual shipment prices but is more often an administratively determined lowest world market offer price.
- (b) A variable levy generally represents the difference between the threshold or minimum import entry price and the lowest world market offer price for the product concerned. In other words, the variable levy changes systematically in response to movements in either or both of these price parameters.
- (c) Variable levies generally operate so as to prevent the entry of imports priced below the threshold or minimum entry price. In this respect, that is, when

230. In response to our questioning at the oral hearing, the participants said that they agree with these characteristics, although Chile believes that the Panel's list is incomplete.²⁰⁵ However, we do not believe that the Panel properly applied Article 32 of the *Vienna Convention* in its analysis;²⁰⁶ nor do we find it useful to endorse the characteristics identified by the Panel through this process as being of a "fundamental" nature.

231. Instead, we proceed to interpret the terms "variable import levies" and "minimum import prices, using the customary rules of interpretation as codified in the *Vienna Convention*. As always, in employing these rules, we discuss the ordinary meaning of these terms in their context, and in the light of their object and purpose.

232. We begin with the interpretation of "variable import levies". In examining the ordinary meaning of the term "*variable import levies*" as it appears in footnote 1, we note that a "levy" is a duty, tax, charge, or other exaction usually imposed or raised by legal execution or process.²⁰⁷ An "import" levy is, of course, a duty assessed upon importation. A levy is "variable" when it is "liable to

prevailing world market prices are low relative to the threshold price, the protective effect of a variable levy rises, in terms of the fiscal charge imposed on imports, whereas this charge declines in the case of *ad valorem* tariffs or remains constant in the case of specific duties.

(d) In addition to their protective effects, the stabilization effects of variable levies generally play a key role in insulating the domestic market from external price variations.

(e) Notifications on minimum import prices indicate that these measures are generally not dissimilar from variable levies in many respects, including in terms of their protective and stabilization effects, but that their mode of operation is generally less complicated. Whereas variable import levies are generally based on the difference between the governmentally determined threshold and the lowest world market offer price for the product concerned, minimum import price schemes generally operate in relation to the actual transaction value of the imports. If the price of an individual consignment is below a specified minimum import price, an additional charge is imposed corresponding to the difference.

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

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

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

²⁰⁶ Panel Report, para. 7.35. The Panel attempted to "distill" fundamental characteristics of "variable import levies" and "minimum import prices" from GATT 1947 committee reports and other documents from the period between 1958-1986. (See Panel Report, para. 7.35). Although the Panel conceded that these documents were not "preparatory works" within the meaning of Article 32, it considered them to form part of the "circumstances of the conclusion" of the *WTO Agreement*, because Uruguay Round negotiators "had access" to these documents during the negotiations. (See Panel Report, footnote 596). However, in response to questioning at the oral hearing, the participants did not contest that the Panel acted, in accordance with Article 13 of the DSU within its authority "to seek information from any relevant source" (although Chile maintained that the documents referred to by the Panel would not qualify as "supplementary means of interpretation" within the meaning of Article 32 of the *Vienna Convention*).

²⁰⁷ *The New Shorter Oxford English Dictionary, supra*, footnote 190, p. 1574.

vary".²⁰⁸ This feature alone, however, is not conclusive as to what constitutes a "variable import levy" within the meaning of footnote 1. An "ordinary customs duty" could also fit this description. A Member may, fully in accordance with Article II of the GATT 1994, exact a duty upon importation and periodically change the rate at which it applies that duty (provided the changed rates remain *below* the tariff rates bound in the Member's Schedule).²⁰⁹ This change in the *applied* rate of duty could be made, for example, through an act of a Member's legislature or executive at any time. Moreover, 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". Thus, the mere fact that an import duty can be varied cannot, alone, bring that duty within the category of "variable import levies" for purposes of footnote 1.

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

234. However, in our view, the presence of a formula causing automatic and continuous variability of duties is a *necessary*, but by no means a *sufficient*, condition for a particular measure to be a "variable import levy" within the meaning of footnote 1.²¹⁰ "Variable import levies" have additional features that undermine the object and purpose of Article 4, which is to achieve improved market access conditions for imports of agricultural products by permitting only the application of ordinary customs duties. These additional features include a lack of transparency and a lack of predictability in the level of duties that will result from such measures. This lack of transparency and this lack of predictability are liable to restrict the volume of imports. As Argentina points out, an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be.²¹¹ This lack of transparency and predictability

²⁰⁸ *Ibid.*, p. 3547.

²⁰⁹ Appellate Body Report, *Argentina – Textiles and Apparel*, *supra*, footnote 55, para. 46.

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

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

will also contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.

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

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

[these] 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.²¹³

237. The Panel also said that minimum import prices "are generally not dissimilar from variable import levies in many respects, including in terms of their protective and stabilization effects, but that their mode of operation is generally less complicated."²¹⁴ The main difference between minimum import prices and variable import levies is, according to the Panel, that "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, while minimum import price schemes generally operate in relation to the *actual transaction value* of the imports."²¹⁵ (emphasis added)

238. In response to questioning at the oral hearing, the participants said they do not object to the Panel's definition of a "minimum import price". Their disagreement relates instead to whether Chile's price band system is *similar* to a minimum import price system prohibited by Article 4.2.

239. We turn next to the Panel's determination that Chile's price band system is a border measure *similar* to "variable import levies" and "minimum import prices". We must determine whether Chile's price band system—in its particular features—shares sufficient features with these two categories of prohibited measures to resemble, or "be of the same nature or kind" and, thus, also to be prohibited by Article 4.2.

240. The Panel described Chile's price band system as having an "inherently unstable, intransparent and unpredictable nature ...".²¹⁶ Indeed, the Panel saw "a considerable lack of transparency and unpredictability" in the measure.²¹⁷ On appeal, Argentina emphasizes that the combination of a lack of transparency and a lack of predictability are the features of Chile's price band system that, most of

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

²¹³ Panel Report, para. 7.36(e).

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ Panel Report, para. 7.61.

²¹⁷ *Ibid.*, para. 7.44.

all, make it "similar" to "variable import levies" within the meaning of footnote 1.²¹⁸

241. We note that it is undisputed between the participants that a formula inherent in Chile's price band system causes and ensures automatic and continuous variability of the duties resulting from that system. However, one of Chile's arguments on appeal relates to the particular formula used in establishing the price bands in Chile's system. Chile alleges that the Panel did not take sufficient account of the fact that the lower and upper thresholds of Chile's price bands vary in relation to "world prices", and not in relation to domestic prices, or to some Chilean target price.²¹⁹ Chile argues that its price band system compares "current world prices" with "historic world prices" over a five-year period, rather than comparing them with prices on Chile's domestic market. Chile maintains that the lower thresholds of Chile's price bands are different in this respect from the floor or minimum price that the Panel thought was one of the characteristics of both variable import levies and minimum import price systems.²²⁰

242. The Panel stated that:

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

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

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

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

²¹⁸ Argentina's appellee's submission, paras. 80, 122 and 147.

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

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

²²¹ Panel Report, para. 7.45.

employed, including for inflation, operates in practice as a "proxy" for such internal prices.²²²

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

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

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

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

246. We agree with the Panel's view—to a point. But we believe that the Panel placed too much emphasis on whether or not Chile's price bands are related to domestic target prices or domestic market prices. In our view—even though Chile's price bands are set in relation to world prices from a past five-year period—Chile's price band system can still have the *effect* of impeding the transmission of international price developments to the domestic market in a way similar to that of other categories of prohibited measures listed in footnote 1. There are factors other than world market prices that are relevant to the assessment of Chile's price bands. The prices that represent the highest 25 per cent as well as the lowest 25 per cent of the world prices from the past five years are discarded in selecting the "highest and lowest f.o.b. prices" for the determination of Chile's annual price bands. Furthermore, we place considerable importance on the intransparent and unpredictable way in which the "highest and lowest f.o.b. prices" that have been selected are converted to a c.i.f. basis by adding "import

²²² *Ibid.*

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

²²⁴ Panel Report, para. 7.45.

costs". As Chile concedes, no published legislation or regulation sets out how these "import costs" are calculated.²²⁵

247. In addition to the lack of transparency and the lack of predictability that are inherent in how Chile's price bands are established, we see similar shortcomings in the way the other essential element of Chile's price band system—the reference price—is determined. As we have explained, the duties resulting from Chile's price band system are equal to the difference between the price band thresholds and the reference price. Chile sets the reference price on a weekly basis, and it does so in a way that is neither transparent nor predictable.

248. The Panel described the particular reference price used in Chile's price band system in the following terms:

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.²²⁶

249. Under Chile's price band system, the price used to set the weekly reference price is the lowest f.o.b. price observed, at the time of embarkation, in any foreign "market of concern" to Chile for "qualities of products actually liable to be imported to Chile".²²⁷ No Chilean legislation or regulation specifies how the international "markets of concern" and the "qualities of concern" are selected.²²⁸ Thus, it is not by any means certain that the weekly reference price is representative of the current world market price. Moreover, the weekly reference price used under Chile's price band system is certainly *not* representative of an average of current lowest prices found in *all* markets of concern. As a result, the process of selecting the reference price is not transparent, and it is not predictable for traders.

250. Furthermore, under Chile's system, the same weekly reference price applies to imports of *all* goods falling within the same product category, regardless of the origin of the goods, and regardless of the transaction value of the shipment. Moreover, unlike with the five-year average monthly prices used in the calculation of Chile's annual price bands, the lowest "market of concern" price used to determine the weekly reference price is not adjusted for "import costs", and thus is not converted from an f.o.b. basis to a c.i.f. basis. This is likely to inflate the amount of specific duties applied under Chile's price band system, because these duties are imposed in an amount equal to the difference between Chile's *annual* price band thresholds, which are based on *higher* c.i.f. prices, and Chile's *weekly* reference prices, which are based on *lower* f.o.b. prices.

²²⁵ Chile's responses to questioning at the oral hearing.

²²⁶ Panel Report, para. 7.45.

²²⁷ Chile's response to questioning at the oral hearing. Chile informed the Panel that, "the weekly reference price corresponds to the lowest f.o.b. price for wheat during that week for the markets and qualities of concern to Chile, i.e. for the wheat actually liable to be imported". Chile's response to question 9(c) of the Panel.

²²⁸ Chile's response to questioning at the oral hearing.

Therefore, the way in which Chile's weekly reference prices are determined contributes to giving Chile's price band system the effect of impeding the transmission of international price developments to Chile's market.

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

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

253. However, Chile argues that, in making its finding, the Panel failed to take proper account of the fact that the total amount of duties that may be levied as a result of Chile's price band system is "capped" at the level of the tariff rate of 31.5 per cent *ad valorem* bound in Chile's Schedule. According to Chile, the existence of this cap differentiates Chile's price band system from a "variable import levy". Chile argues that Chile's price band system enables imports to enter Chile's market below the lower thresholds of Chile's price bands when world market prices drop below a certain level, while allowing imports to enter at duty rates that can be as low as zero when the weekly reference prices rise above the upper thresholds of Chile's price bands. Chile submits that the cap makes Chile's price band system less distortive and less insulating than if Chile simply levied duties at its bound tariff level.²²⁹

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

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

255. The context of Article 4.2 lends support to this interpretation. That context includes the *Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraph 6 and 10 of this Annex ("Guidelines")*, which are an Attachment to *Annex 5 on Special Treatment with respect to Paragraph 2 of Article 4*. Both the Attachment and the Annex form part of the *Agreement on Agriculture*. Paragraph 6 of the Guidelines²³¹ envisages that tariff equivalents resulting from conversion of measures within the meaning of Article 4.2 may *exceed previous bound rates*. This implies that, even if the product to which that measure applied was in fact subject to a tariff binding before the Uruguay Round, conversion of that measure may nevertheless have been required. Therefore, a measure cannot be excluded *per se* from the scope of Article 4.2 simply because the products to which that measure applies are subject to a tariff binding.

256. Relevant context can also be found in Articles II and XI of the GATT 1994. If Members were free to apply a measure with a "cap"—which, in the absence of that "cap", would be a prohibited "variable import levy"—Article 4.2 would, in our view, add little to the longstanding requirements of Articles II:1(b) and XI:1 of the GATT 1947. In fact, Chile concedes that the scope of measures prohibited by Article 4.2 extends beyond the tariffs in excess of bound rates that are prohibited by Article II and the "restrictions other than taxes, duties and charges" that are prohibited by Article XI:1.²³² In any event, it

ties' pre-Uruguay Round variable import levies and its post-Uruguay Round converted systems are not at issue in this appeal. Chile's appellant's submission, paras. 91-92.

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

The General Agreement contains no provision on the use of 'variable import levies'.

It is obvious that *if any such duty or levy is imposed on a 'bound' item*, the rate must not be raised in excess of what is permitted by Article II (emphasis added)

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

²³¹ Paragraph 6 provides:

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

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

is difficult to see why Uruguay Round negotiators would "compensate" Members for converting prohibited measures by permitting them to raise tariffs on certain products, while permitting those Members to retain those measures and, at the same time, impose those higher tariffs on those same products. It is not clear why, if this were so, a Member would ever have converted a measure. All that a Member would have had to do to comply with Article 4.2 would have been to adopt a tariff binding—even at a higher level—on the products covered by the original measure. Had this been the intention of the Uruguay Round negotiators, there would have been no need to list price-based measures in footnote 1 among the categories of measures prohibited by Article 4.2. The drafters of the *Agreement on Agriculture* simply could have adopted a requirement that all tariffs on agricultural products be bound.

257. Contrary to Chile's view, we are not persuaded that the presence or the absence of a cap is essential in determining whether or not Chile's price band system is similar to a measure prohibited by Article 4.2. Chile's tariff binding will impose a limit on the total amount of duties that may be applied, and thus permit fluctuations in world market prices to be reflected in Chile's market, in cases when the duties resulting from Chile's price band system, when added to the applied *ad valorem* duty, exceed that tariff binding. However, the existence of the tariff binding will not eliminate the distortion in the transmission of world market prices to Chile's market in all other cases, where the combination of the duties resulting from Chile's price band system, when added to the applied *ad valorem* duty, remains below Chile's bound rate of 31.5 per cent *ad valorem*.²³³

258. Moreover, contrary to what Chile argues, Chile's price band system is not necessarily less trade-distorting. Nor does it insulate Chile's domestic market less, than it would, if Chile simply imposed duties at the *bound* tariff level of 31.5 per cent.²³⁴ As Argentina stresses, the amount of a duty is not the only concern of Chile's trading partners. As Argentina argues, significant for traders, also, are the lack of transparency of certain features of Chile's price band system; the unpredictability of the level of duties; and the automaticity, the frequency, and the extent to which the duties fluctuate. These specific characteristics of Chile's price band system prevent enhanced market access for imports of agricultural products, contrary to the object and purpose of Article 4.

259. The fact that duties resulting from Chile's price band system are "capped" at 31.5 per cent *ad valorem* merely reduces the extent of the trade distortions in that system by reducing the extent to which those duties fluctuate. It does not, however, eliminate those distortions. Moreover, the cap does not *eliminate* the lack of transparency, or the lack of predictability, in the fluctuation of the duties resulting from Chile's price band system. Thus, the fact that Chile's price band system is subject to a "cap" may be said to make this system *less* inconsistent with Article 4.2. But this is not enough. Article 4.2 not only prohibits "similar border measures" from being applied to *some* products, or to *some* shipments of

²³³ Panel Report, footnote 608.

²³⁴ Chile's appellant's submission, para. 108.

some products with low transaction values, or the imposition of duties on *some* products in an amount *beyond* the level of a bound tariff rate. Article 4.2 prohibits the application of such "similar border measures" to *all* products in *all* cases.

260. Therefore, contrary to what Chile contends, Chile's price band system does not simply ensure a reasonable margin of fluctuation of domestic prices.²³⁵ In our view, "such reasonable margin of fluctuation" would mean that duties resulting from Chile's price band system would ensure that declines in world prices would not be *fully* reflected in domestic prices. However, when international prices *fall*, and when the weekly reference prices are below the lower thresholds of Chile's price bands, the total duties applied to particular shipments will, in many cases, result in an overall entry price of that shipment that *rises* rather than *falls*.²³⁶ Therefore, Chile's price band system does not merely moderate the effect of fluctuations in world market prices on Chile's market because it does not ensure that the entry price of imports to Chile falls in tandem with falling world market prices—albeit to a lesser extent than the decrease in those prices. Nor does it tend only to "compensate" for these price declines. Instead, specific duties resulting from Chile's price band system tend to "overcompensate" for them, and to elevate the entry price of imports to Chile above the lower threshold of the relevant price band. In these circumstances, the entry price of such imports to Chile under Chile's price band system is even higher than if Chile simply applied a minimum import price at the level of the lower threshold of a Chilean price band. Therefore, we disagree with Chile that its price band system simply "moderates the effect of fluctuations in international prices on Chile's market".²³⁷ Chile's price band system tends to "overcompensate" for the effect of decreases in international prices on the domestic market when weekly reference prices are set below the lower threshold of the relevant price band—up to the level at which Chile's tariff binding imposes a limit on the amount of duties that can be levied.

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

262. We, therefore, uphold the Panel's finding, in paragraph 7.47 of the Panel Report, that Chile's price band system is a "border measure similar to 'variable

²³⁵ See Article 12 of Law 18.525. Chile's appellant's submission, para. 12.

²³⁶ This is so because, when the weekly reference price is below the lower threshold of a Chilean price band, the specific duties resulting from Chile's price band system are equal to the difference between the lower price band threshold and the f.o.b. reference price, while the total duties applied to a particular shipment are added to that shipment's c.i.f. transaction value.

²³⁷ Panel Report, para. 4.49.

import levies' and 'minimum import prices'" within the meaning of footnote 1 and Article 4.2 of the *Agreement on Agriculture*.

263. We turn now to examine the Panel's findings regarding the meaning of the term "ordinary customs duties" under Article 4.2 of the *Agreement on Agriculture*. We look first to the Panel's consideration of that term, and then review the Panel's interpretation in the light of Chile's objections on appeal.

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

264. The Panel observed, first, that a measure of the kind which has been required to be *converted into* ordinary customs duties pursuant to Article 4.2 of the *Agreement on Agriculture* "is necessarily *not*, at the same time, an ordinary customs duty."²³⁸ Accordingly, the Panel found that "a measure which is 'similar to' any of the measures listed in footnote 1 will also be 'other than ordinary customs duties'."²³⁹ The Panel concluded, therefore, that a finding that Chile's price band system is "other than an ordinary customs duty" could "be expected to reinforce" its finding that Chile's price band system is similar to a variable import levy and a minimum import price.²⁴⁰ For this reason, the Panel went on to examine whether Chile's price band system is "other than an ordinary customs duty" within the meaning of Article 4.2 of the *Agreement on Agriculture*. The Panel found that Article II:1(b) of GATT 1994 provides relevant context for the interpretation of the term "ordinary customs duties" in Article 4.2 of the *Agreement on Agriculture*.²⁴¹

265. The Panel observed that neither Article 4.2 of the *Agreement on Agriculture* nor Article II:1(b) of the GATT 1994 defines explicitly what should be understood by "ordinary customs duties".²⁴² From an examination of the ordinary meaning of the term in the three official languages of the WTO²⁴³, the Panel

²³⁸ Panel Report, para. 7.24. The Panel notes that this is, of course, subject to the proviso that such measure is not maintained under balance-of-payments provisions or other general, non-agriculture-specific provisions of the GATT 1994 or the other Multilateral Trade Agreements in Annex 1A to the *WTO Agreement*.

²³⁹ Panel Report, para. 7.24.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*, para. 7.49.

²⁴² The Panel noted that these provisions do "give some indication as to what is *not* an 'ordinary' customs duty. On the one hand, Article II:1(b) of the 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 that cannot be considered 'ordinary' customs duties. 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 earlier, all the measures listed in footnote 1 to Article 4.2 are, by definition, not 'ordinary' customs duties". Panel Report, para. 7.50.

²⁴³ The Panel reasoned: "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, common-

concluded that the term should be considered from two perspectives—one "empirical" and one "normative". The Panel explained:

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

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

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

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

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

place, mundane'. '*Propiamente dicho*' has been translated as 'true (something)' or '(something)' in the strict sense". '*Proprement dit*' has been explained as '*au sens exact et restreint, au sens propre*' and '*stricto sensu*'. Panel Report, para. 7.51.

²⁴⁴ Panel Report, para. 7.51.

²⁴⁵ *Ibid.*, para. 7.52.

²⁴⁶ Panel Report, footnote 624 to para. 7.52.

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

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

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

270. On appeal, Chile challenges the Panel's interpretation that the term "ordinary customs duties" has a *normative* connotation. Chile also contests the Panel's interpretation that "ordinary customs duties" must not be applied on the basis of *exogenous* factors such as, *inter alia*, fluctuating world market prices, and argues that a decision to apply a duty at less than the bound rate will *always* be based on exogenous factors. We share Chile's misgivings about the Panel's definition of "ordinary customs duties".

271. We do not agree with the Panel's reasoning that, necessarily, "[a]s a *normative* matter, ... those scheduled duties always relate to either the value of the imported goods, in the case of *ad valorem* duties, or the volume of the imported goods, in the case of specific duties."²⁵⁰ (emphasis in original, underlining added) Indeed, the Panel came to this conclusion by interpreting the French and Spanish versions of the term "ordinary customs duty" to mean something *different* from the ordinary meaning of the English version of that term. It is difficult to see how, in doing so, the Panel took into account the rule of interpretation codified in Article 33(4) of the *Vienna Convention* whereby "when a comparison of the authentic texts discloses a difference of meaning ..., the meaning which best *reconciles* the texts ... shall be adopted." (emphasis added).

272. We also find it difficult to understand how the Panel could find "normative" support for its reasoning by examining the Schedules of WTO Members.

²⁴⁷ Panel Report, para. 7.52.

²⁴⁸ *Ibid.*, para. 7.62.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*, para. 7.52.

We have observed in a previous case that "[t]he ordinary meaning of the term 'concessions' suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations".²⁵¹ A Member's Schedule imposes obligations on the Member who has made the concessions. The Schedule of one Member, and even the scheduling practice of a number of Members, is not relevant in interpreting the meaning of a treaty provision, unless that practice amounts to "subsequent practice in the application of the treaty" within the meaning of Article 31(3)(b) of the *Vienna Convention*.²⁵² In this case the Panel Report contains no support for the conclusion that the scheduling activity of WTO Members amounts to "subsequent practice".

273. Surely Members will ordinarily take into account the interests of domestic consumers and domestic producers in setting their *applied* tariff rates at a certain level. In doing so, they will doubtless take into account factors such as world market prices and domestic price developments. These are *exogenous* factors, as the Panel used that term. According to the Panel, duties that are calculated on the basis of such *exogenous* factors are *not* ordinary customs duties. This would imply that such duties be *prohibited* under Article II:1(b) of the GATT unless recorded in the "other duties or charges" column of a Member's Schedule. We see no legal basis for such a conclusion.²⁵³

274. Moreover, not each and every duty that is calculated on the basis of the *value* and/or *volume* of imports is necessarily an "ordinary customs duty". For example, in the case at hand, the *ad valorem* duty is calculated on the *value* of the imports. The calculation of the *specific* duty resulting from Chile's price band system is, on the other hand, based, not only on the difference between the lower threshold of the price band and the applicable reference price, but also on the *volume* per unit of the imports.

275. We further note, in examining Article 4.2 of the *Agreement on Agriculture*, that the *second* sentence of Article II:1(b) of the GATT 1994, does *not* specify what form "other duties or charges" must take to qualify as such within the meaning of that sentence. The Panel's own approach of reviewing Members' Schedules reveals that many, if not most, "other duties or charges" are expressed in *ad valorem* and/or specific terms, which does not, of course, make them "ordinary customs duties" under the first sentence of Article II:1(b).

²⁵¹ Appellate Body Report, *EC – Bananas III*, *supra*, footnote 58, para. 154. Panel Report in *United States Restrictions on Imports of Sugar*, adopted 22 June 1989, BISD 36S/331, para. 5.2.

²⁵² Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, paras. 84, 90 and 93. See also our paras. 213-214 of this Report.

²⁵³ We stated in *Argentina – Textiles and Apparel*, *supra*, footnote 55, para. 46, that "a tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to apply a rate of duty that is less than that provided for in its Schedule." Thus, the fact that the "cap" (recorded in the ordinary customs duty" column of a schedule) is a specific or an *ad valorem* duty does not mean that a Member will not apply a tariff at a lower rate, or that the rate it applies will not be based on what the Panel calls "*exogenous*" factors. Indeed, as we noted above, it is difficult to conceive that a Member would ever make changes to its applied tariff rate except based on *exogenous* factors such as the interests of domestic consumers or producers.

276. As context for this phrase in Article 4.2 of the *Agreement on Agriculture*, we observe that Article II:2 of the GATT 1994 sets out examples of measures that do *not* qualify as either "ordinary customs duties" or "other duties or charges". These measures include charges equivalent to internal taxes, anti-dumping and countervailing duties, and fees or other charges commensurate with the cost of services rendered. They too may be based on the value and/or volume of imports, and yet Article II:2 distinguishes them from "ordinary customs duties" by providing that "[n]othing in [Article II] shall prevent any Member from imposing" them "at any time on the importation of any product".

277. Contextual support for interpreting the term "ordinary customs duties" also appears in Annex 5 to the *Agreement on Agriculture*. Annex 5, read together with the Attachment to Annex 5 ("*Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in Paragraphs 6 and 10 of this Annex*"), contemplates the calculation of "tariff equivalents" in a way that would result in ordinary customs duties "expressed as *ad valorem* or specific rates". We do not find an obligation in either of those provisions that would require Members to refrain from basing their duties on what the Panel calls "exogenous factors". Rather, all that is required is that "ordinary customs duties" be expressed in the *form* of "*ad valorem* or specific rates".

278. In the light of the foregoing, we disagree with the Panel's definition of "ordinary customs duties" and, therefore, we *reverse* the Panel's finding, in paragraph 7.52 of the Panel Report, that the term "ordinary customs duty", as used in Article 4.2 of the *Agreement on Agriculture*, is to be understood as "referring to a customs duty which is not applied to factors of an exogenous nature".²⁵⁴

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

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

IX. ARTICLE II:1(b) OF THE GATT 1994

281. In addressing Argentina's claim under Article II:1(b) of the GATT 1994, the Panel recalled that it had found Chile's price band system to be a border measure "other than an ordinary customs duty", which is prohibited under Article

²⁵⁴ In doing so, we wish to underline that we are not saying that Chile's price band duties *are* "ordinary customs duties" within the meaning of Article 4.2 of the *Agreement on Agriculture*. We are merely saying that Chile's price band duties take the *form* of "ordinary customs duties", rather than seeking to qualify them as "ordinary customs duties" or as "any other duties or charges".

4.2 of the *Agreement on Agriculture*. Having also found that "ordinary customs duties" must have the same meaning in Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994, the Panel then concluded that duties resulting from Chile's price band system do not constitute "ordinary customs duties" and that, therefore, "their consistency with Article II:1(b) cannot be assessed under the first sentence of that provision."²⁵⁵

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

If other duties or charges were not recorded but are nevertheless levied, they are inconsistent with the *second* 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 price band system in the "other duties and charges" column of its Schedule.²⁵⁶ (emphasis added)

283. Based on this reasoning, the Panel then concluded that:

... the Chilean PBS duties are inconsistent with Article II:1(b) of the GATT 1994.²⁵⁷

284. On appeal, Chile argues that the Panel erred in finding that the duties resulting from Chile's price band system are "other duties or charges" prohibited by the second sentence of Article II:1(b).

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

286. Argentina asks us to rule that Chile's price band system is inconsistent with the *first* sentence of Article II:1(b). Argentina's request is, however, conditioned on our reversal of the Panel's finding that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*. As this condition has not been fulfilled, and as Chile has not requested a finding with respect to the *first* sentence of Article II:1(b), we do not see it as necessary for us to rule on whether Chile's price band system is inconsistent with the first sentence of Article II:1(b) of the GATT 1994.

287. In this respect, we also recall our earlier conclusion on the issue of the order of analysis between Article 4.2 of the *Agreement on Agriculture* and Article II:1(b) of the GATT 1994. We said that, if we were to find that Chile's price band system is inconsistent with Article 4.2 of the *Agreement of Agriculture*, we would not need to make a separate finding on whether Chile's price band system

²⁵⁵ Panel Report, para. 7.104.

²⁵⁶ *Ibid.*, para. 7.107.

²⁵⁷ *Ibid.*, para. 7.108.

also results in a violation of Article II:1(b) of the GATT 1994 to resolve this dispute.²⁵⁸ Thus, we make no ruling on Article II:1(b) of the GATT 1994.

X. FINDINGS AND CONCLUSIONS

288. For the reasons set out in this Report, the Appellate Body:

- (a) finds that the Panel acted inconsistently with Article 11 of the DSU by making its finding, in paragraph 7.108 of the Panel Report, that the duties resulting from Chile's price band system are inconsistent with Article II:1(b) of the GATT 1994, on the basis of the *second* sentence of that provision, which was not before the Panel, and, therefore, reverses this finding;
- (b) decides that the Panel did not err in choosing to examine Argentina's claim under Article 4.2 of the *Agreement on Agriculture* before examining Argentina's claim under Article II:1(b) of the GATT 1994;
- (c) with respect to Article 4.2 of the *Agreement on Agriculture*:
 - (i) upholds the Panel's finding, in paragraphs 7.47 and 7.65 of the Panel Report, that Chile's price band system is a border measure that is similar to variable import levies and minimum import prices;
 - (ii) reverses the Panel's finding, in paragraphs 7.52 and 7.60 of the Panel Report, that an "ordinary customs duty" is to be understood as "referring to a customs duty which is not applied on the basis of factors of an exogenous nature";
 - (iii) upholds the Panel's finding, in paragraphs 7.102 and 8.1(a) of the Panel Report, that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture*;
- (d) decides, in the light of these findings, that it is not necessary to rule on whether Chile's price band system is consistent with the *first* sentence of Article II:1(b) of the GATT 1994.

289. The Appellate Body recommends that the DSB request Chile to bring its price band system, as found, in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement.

²⁵⁸ See para. 190 of this Report.

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

Report of the Panel

WT/DS207/R

*Adopted by the Dispute Settlement Body
on 23 October 2002,
as Modified by the Appellate Body Report*

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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

¹ WT/DS207/1.

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 covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.5 On 17 May 2001, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Hardeep Puri
Members: Mr. Ho-Young Ahn
Mr. Michael Gifford

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.

² WT/DS207/2.

³ WT/DS207/3.

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, Argentina submitted general comments to the interim report. An Interim Review meeting was held with the parties on 14 March 2002. The Panel gave the parties the opportunity to submit further comments the following day. The Panel submitted its final report to the parties on 4 April 2002.

II. FACTUAL ASPECTS

2.1 The dispute concerns two distinctive matters: (A) Chile's Price Band System ("PBS") and (B) Chile's provisional and definitive safeguards measures on imports of wheat, wheat flour and edible vegetable oils, as well as the extension of those measures.

A. *Chile's Price Band System*

1. *Regulatory Framework*

2.2 Chile's regulations on its PBS are contained in Law 18.525 on the Rules on the Importation of Goods⁴, as amended. In particular, Article 12 of Law 18.525 provides for the methodology for the calculation of the price bands. This Article reads as follows:⁵

"For the sole purpose of ensuring a reasonable margin of fluctuation of domestic wheat, oil-seeds, edible vegetable oils and sugar prices in relation to the international prices for such products, specific duties are hereby established in United States dollars per tariff unit, or *ad valorem* duties, or both, and rebates on the amounts payable as *ad valorem* duties established in the Customs Tariff, which could affect the importation of such goods.

The amount of these duties and rebates, established in accordance with the procedure laid down in this Article, shall be determined annually by the President of the Republic, in terms which, applied to the price levels attained by the products in question on the international markets, make it possible to maintain a minimum cost and a maximum import cost for the said products during the internal marketing season for the domestic production.

⁴ Law 18.525, Official Journal of the Republic of Chile, 30 June 1986.

⁵ Consolidated version of Law 18.525, Official Journal of the Republic of Chile, 30 June 1986 as amended by Law No. 18.591, Official Journal, 3 January 1987 and by Law No. 18.573, Official Journal, 2 December 1987. This consolidated text was included in Annex CHL-2 to Chile's First Written Submission (footnotes omitted).

For the determination of the costs mentioned in the preceding paragraph, the monthly average international prices recorded in the most relevant markets during an immediately preceding period of five calendar years for wheat, oil-seed and edible vegetable oils and ten calendar years for sugar shall be taken into consideration. These averages shall be adjusted by the percentage variation of the relevant average price index for Chile's foreign trade between the month to which they correspond and the last month of the year prior to that of the determination of the amount of duties or rebates, as certified by the Central Bank of Chile. They shall then be arranged in descending order and up to 25 per cent of the highest values and up to 25 per cent of the lowest values for wheat, oil-seed and edible vegetable oils and up to 35 per cent of the highest values and up to 35 per cent of the lowest values for sugar shall be removed. To the resulting extreme values there shall be added the normal tariffs and costs arising from the process of importation of the said products. The duties and rebates determined for wheat shall also apply to meslin and wheat flour. In this last case, duties and rebates established for wheat shall be multiplied by the factor 1.56.

The prices to which these duties and rebates are applied shall be those applicable to the goods in question on the day of their shipment. The National Customs Administration shall notify these prices on a weekly basis, and may obtain information from other public bodies for that purpose."

2.3 Chile submitted a copy of Law No. 19.772⁶, amending Article 12 of Law 18.525 at the second substantive meeting. Article 2 of Law No. 19.772, which entered into force on 19 November 2001, adds the following paragraph to Article 12 of Law 18.525:

"The specific duties resulting from the application of this Article, added to the *ad valorem* duty, shall not exceed the base tariff rate bound by Chile under the World Trade Organization for the goods referred to in this Article, each import transaction being considered individually and using the c.i.f. value of the goods concerned in the transaction in question as a basis for calculation. To that end, the National Customs Service shall adopt the necessary measures to ensure that the said limit is maintained."

2. *Workings of the PBS*

2.4 As a matter of practice, Chile's applied tariff rates are significantly below its bound rate. In the case of wheat, wheat flour, and edible vegetable oils, the applied rate can be increased by means of duty increases provided through the

⁶ Official Journal of the Republic of Chile, 19 November 2001.

operation of the PBS.⁷ In each case, the PBS involves an upper and a lower threshold determined on the basis of certain international prices. The bands for each product are determined once every year through a Presidential decree when a table is published containing reference prices and related specific duties. Chile also sets weekly "reference prices" based on prices in certain foreign markets. A duty increase is triggered when the "reference price", lies below the lower threshold of the band. The duty increase is equivalent to the absolute difference between the lower threshold of the band and the "reference price". Conversely, a tariff rebate is triggered when the "reference price" lies above the price that determines the upper threshold of the band. The rebate (which cannot be greater than the applied *ad valorem* rate) is equivalent to the absolute difference between the "reference price" and the upper threshold of the band.

2.5 Article 12 of Law No. 18.525 foresees the application of specific duties expressed in US dollars per tariff unit or *ad valorem* duties, or both, as well as rebates on the amount payable as specific or *ad valorem* duties or both. For this purpose, Article 12 empowers the President of the Republic of Chile to issue decrees determining the price bands annually. These bands are calculated on the basis of average monthly prices observed for the last 60 months on specific exchanges. In the case of wheat, the calculation is based on Hard Red Winter No. 2, f.o.b. Gulf (Kansas Exchange), 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

⁷ As indicated in paragraph 2.3 above, Chile has informed the Panel that pursuant to Law 19.772 effective on 19 November 2001, the combination of the applied *ad valorem* rate and the PBS duty increase are capped at the bound *ad valorem* rate. Prior to that, the combination did at times surpass the bound rate.

⁸ See Chile's response to question 10 (CHL) of the Panel.

⁹ Article 12 of Law 18.525 and its amendment stipulates that the duties and rebates applicable to wheat flour shall be the same as for wheat, adjusted by a conversion factor of 1.41. This conversion factor was raised to 1.56 by Law 19.446 (extended by Law 19.604) (see Annex ARG-2).

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* duty equal to the difference between the upper threshold and the reference price.

B. Chile's Safeguard Measures

1. Regulatory Framework

2.8 The Chilean regulatory framework for the conduction of safeguards investigations and the eventual imposition of safeguards measures is contained in Law No. 19.612 of 28 May 1999¹² and its implementing Decree No. 909 of the Ministry of Finance of 17 June 1999.¹³ Chile notified both legal instruments to the WTO on 23 June 1999.¹⁴

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

¹⁰ With respect to wheat, these "markets of concern" include Argentina, Canada Australia and the United States. See Chile's response to question 9(c) (CHL) of the Panel.

¹¹ See Chile's response question 9 (CHL) of the Panel.

¹² Official Journal of the Republic of Chile, 31 May 1999.

¹³ Official Journal of the Republic of Chile, 25 June 1999.

¹⁴ Document G/SG/N/1/CHL/2 of 24 August 1999 containing Law 19.612 and Law 18.525 (as amended by Law 19.612) as well as Decree 909/99 of the Ministry of Finance.

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 determined by the mechanism set out in Article 12 of Law 18.525

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.

[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

²⁰ Exempt Decree No. 9 of the Ministry of Finance.

²¹ Published in the Official Journal on 25 November 2000.

²² Document G/SG/N/14/CHL/1 of 22 December 2000.

²³ Chile stated that the extension measure for edible vegetable oils expired on 26 November 2001 (Exempt Decree No. 559 from the Ministry of Finance).

²⁴ See Chile's response to question 16 (ARG, CHL) of the Panel.

²⁵ Document G/SG/N/10/CHL/1/Suppl. 3 of 16 August 2001.

- 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 II.1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture;
 - find that: (i) both the provisional and definitive measures that are the subject of consultations and this procedure are not in force; and (ii) the extension measures, the only ones in effect at present, were not the subject of WTO consultations, and therefore that the Panel should not rule on whether the measures in effect are consistent with specific provisions of the WTO Agreements;
 - in the event that the Panel considers that it can rule on the consistency of the Chilean measures with Articles 2, 3, 4, 6, and 12 of the Agreement on Safeguards, as well as Article XIX of the GATT 1994, conclude that these are in compliance with the aforementioned Articles.

IV. ARGUMENTS OF THE PARTIES

A. *Arguments Relating to Chile's Price Band System*

1. *Procedural Arguments*

(a) Burden of Proof

4.1 **Argentina** refers to Article 3.8 of the DSU which reads:

"In cases where there is an infringement of obligations assumed under a covered agreement, the action is *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge."

4.2 As regards the alleged violation of Article II:1(b) of the GATT 1994, **Argentina** claims that it has established a *prima facie* case before the Panel by providing evidence and legal arguments that suffice to demonstrate that the Chilean measure at issue (the PBS) is inconsistent with Chile's obligations under Article II:1(b) of the GATT 1994. Consequently, Argentina contends that Chile has acknowledged that it imposed duties in excess of its tariff binding. Nor has it refuted the argument that the PBS potentially violates Chile's commitments in its national schedule. As regards the alleged violation of Article 4.2 of the Agreement on Agriculture, **Argentina** claims that, by presenting legal arguments sufficient to demonstrate that the Chilean measure under review (the PBS) is inconsistent with Chile's obligations under Article 4.2 of the Agreement on Agricul-

ture, since it is among the "measures of the kind which have been required to be converted", it has once again established a prima facie case before the Panel. Argentina contends that, as in the case of Article II:1(b), Chile has not only failed to provide any evidence or arguments to refute Argentina's claims, but on the contrary, it has acknowledged that the PBS imposes a "levy" on "imports" which "varies" according to the day of shipment.²⁶

4.3 **Argentina** also claims that, given that Chile is maintaining mandatory legislation contrary to the provisions of the Agreement, there is a presumption of nullification or impairment of the rights accruing to Argentina and it is therefore up to Chile to rebut the charge.²⁷ Argentina further alleges that the Chilean PBS does not qualify for any of the exceptions provided for either in Article 5 (special safeguard provisions) or in Annex 5 of the Agreement on Agriculture. As regards the special safeguard provisions in Article 5 of the Agreement on Agriculture, Argentina considers that the Chilean PBS does not qualify for the Article 4.2 exception for two reasons: (i) the possibility 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

²⁶ Argentina refers to para. 38 of Chile's First Written Submission.

²⁷ See Argentina's First Written Submission, para. 61.

²⁸ See Chile's First Written Submission, para. 43.

²⁹ See Argentina's Second Oral Statement, para. 4.

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 Chile³⁴ in the Dispute Settlement Body, to various documents relating to its safeguards investigation³⁵ as well as Chile's First Written Submission³⁶ 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 claims³⁹, 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 Article II.1(b), as confirmed by the actual documentation processed by Chilean customs.⁴⁰ Argentina considers that this confirms that violation is not merely a theoretical possibility, but is something that actually occurred and that will necessarily continue to occur if the system in force is maintained.⁴¹ If Chile were to apply a specific duty whose *ad valorem* equivalent did not violate its tariff binding, its acknowledgement, that "[t]he Government of Chile therefore deliberately decided to allow the price band to operate at full regime, failing to comply with its commitment"⁴² would, according to Argentina, be absurd.⁴³

4.9 **Chile** acknowledges that the total tariff applied to imports of milling wheat has, on occasion, exceeded Chile's tariff binding under the GATT 1947. Chile observes that with respect to the 1990-1995 period, this happened during 1990 and 1991. Chile submits that the reasons why it exceeded its tariff binding under the GATT 1947 can be found in the existence of unforeseen circumstances which, at the time, caused a spectacular fall in the price of imports of certain

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.

⁴⁰ See Argentina's First Written Submission, para. 47, and Annex ARG-15.

⁴¹ See Argentina's First Oral Statement, paras. 7-8.

⁴² Argentina quotes para. 25 of Chile's First Written Submission.

⁴³ See Argentina's First Oral Statement, para. 9.

products included in the price band. Chile claims that these circumstances were of so extraordinary a nature that Chile, at the time, could not reasonably foresee that a situation in which it was forced to exceed its tariff binding under the GATT 1947 – subsequently under the GATT 1994 – would recur. Chile stresses that these circumstances were not only extraordinary for Chile, but for the other GATT contracting parties as well, including Argentina and the third parties to this Panel. Indeed, Chile submits these countries never filed a complaint to the effect that their rights under the Treaty were being affected by the PBS nor did they challenge the system and its operation during the Uruguay Round negotiations, in spite of their knowledge that Chile had exceeded its bound tariff owing to *force majeure*.⁴⁴

4.10 **Argentina** contends that Chile has not refuted Argentina's allegations that it has actually exceeded its bound tariff, and that, as its previous recognition in this respect in various WTO fora indicate, Chile has not even tried to refute them. Argentina further submits that, added to all this is the evidence that Chile itself has contributed to these proceedings in its note dated 5 October 2001, in which its Permanent Representative to the WTO provides a series of statistical tables as a supplement to its reply to question 12(b) of the Panel. In Argentina's view, these tables specifically show that in all of the monthly series for "other wheat and meslin" (tariff heading 1001.90.00) from January 1998 to January 2001, the Chilean Ministry of Finance itself confirms that Chilean Customs systematically and continuously levied amounts ranging from 36.1 per cent to 67.1 per cent on average for the month of December 1999 on the totality of imports from any WTO Member, exceeding its bound duty. Examining the same submission by Chile with respect to edible vegetable oils, Argentina finds that the figures indicate that the binding was systematically exceeded as from June 1999. Argentina submits that these figures reach as much as 70.8 per cent in some instances, i.e. more than double Chile's binding under the WTO.⁴⁵

(ii) Can the PBS as such Lead to Customs Duties Higher than Bound Tariffs

4.11 **Argentina** claims that the PBS potentially violates Article II:1(b) of the GATT 1994. Argentina argues that the obligation contained in Article II:1(b) of the GATT has been clearly specified by GATT/WTO precedent. In this regard, Argentina claims that it has been pointed out that, when a bound tariff has been recorded in a Member's schedule, that bound tariff constitutes a maximum limit of the duties that can legally be applied to products subject to the binding or, in the circumstances of this case, the limit for the combination of the normal customs duty and the specific 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

⁴⁴ See Chile's response to question 12(c) (CHL) of the Panel.

⁴⁵ See Argentina's Rebuttal, paras. 18-21 and Annex ARG40.

⁴⁶ See Argentina's First Written Submission, para. 23.

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 mathematical formulation of the working of the Chilean PBS which presumes that there are only two relevant prices to be considered for the purposes of such an analysis, i.e. the "transaction price" and the "reference price" and that these prices are, in general, not equal. Argentina argues that its analysis⁵¹ shows that, when the c.i.f. import price and the f.o.b. reference price for a given shipment are below the price band floor beyond a point X (the "break even point"), the result of applying the variable specific duty is to exceed the WTO bound ceiling. In other words, Argentina explains, in order to demonstrate that the bound rate has been exceeded, the specific duty must be converted into an *ad valorem* tariff, for which purpose the c.i.f. import price appearing in the invoices is used. Argentina argues that, at least in circumstances in which the reference price and the c.i.f. invoice price are below the break even point, the bound tariff (31.5 per cent) will be exceeded by the sum of the general tariff (8 per cent) and the specific price band tariff converted into an *ad valorem* rate.⁵² Argentina further submits that the bound level would also be violated in either of the two following situations: if the transaction price were equal to the mentioned break even price and the reference price were lower than both, or if the reference price were equal to the break even price and the transaction price were lower than both.⁵³ Consequently, Argentina argues, the lack of a so-called "cap system", added to the discretion allowed in fixing the reference price, means that in a low international price scenario, the effective level of *ad valorem* equivalents levied can exceed the bound level in Chile's National Schedule for the products subject to the band.⁵⁴

4.12 In reference to the above⁵⁵, **Chile** states that Argentina acknowledges that the duty may be, and generally has been lower, than Chile's bound tariff and that, in fact, when international prices are high, the PBS may lower the import duty even as far as zero.⁵⁶

4.13 In **Argentina's** view, the mandatory nature of the Law and the decrees establishing the specific duties leave no alternative to Chile's customs officials

⁴⁷ See Argentina's First Written Submission, para. 25.

⁴⁸ See Argentina's First Oral Statement, para. 4.

⁴⁹ See Argentina's First Written Submission, para. 27.

⁵⁰ See Argentina's First Written Submission, para. 28.

⁵¹ See Argentina's First Written Submission, paras. 29-30 and Annex ARG-12.

⁵² See Argentina's First Written Submission, para. 31.

⁵³ See Argentina's Rebuttal, para. 25.

⁵⁴ See Argentina's Rebuttal, para. 26.

⁵⁵ Chile refers to para. 28 of Argentina's First Written Submission.

⁵⁶ See Chile's First Written Submission, para. 19.

but to levy the duty which, depending on the price of the goods, could potentially - at a certain price level - lead to a breach in Chile's WTO obligations. Argentina affirms that neither Chilean law nor its implementing regulations impose any limit that could prevent this from happening. Argentina further asserts that the Law as such, being mandatory, necessarily leads - in accordance with the fluctuation of international prices - to the violation of tariff commitments.⁵⁷ Argentina considers that Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") and GATT/WTO precedents confirm that legislative provisions as such, however they may be applied in specific cases, 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 According to Argentina, the acknowledgement by Chile that the bound rate has been exceeded proves that even if Article 12 of Law 18.525 were to be interpreted as not being mandatory, but as granting discretionary powers to the Executive, it would nevertheless have to be considered inconsistent with Article II:1(b) of the GATT 1994.⁶⁰

4.14 **Chile** argues that paragraph (a) of Article II:1 of the GATT lays down a general prohibition on granting to imports treatment less favourable than that provided in the Member's Schedule. Paragraph (b), Chile says, "prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule".⁶¹ In Chile's view, Article II simply acts as a ceiling for customs duties so that Members are obliged to refrain from imposing import duties or other import charges that exceed the tariff commitments a Member has fixed in its own Schedule. Chile contends that specific tariff systems are not inconsistent with the obligations laid down in Article II:1(b) of the GATT. In reference to the Appellate Body's ruling in *Argentina – Footwear (EC)*, Chile concludes that the sole fact that a PBS imposes a specific import duty as well as an 8 per cent *ad valorem* duty (and in some instances a reduced *ad valorem* duty), does not mean that the Law is inconsistent with the obligation under Article II:1(b). As long as the Chilean PBS involves the application of a tariff duty which, when translated into *ad valorem* terms does not exceed Chile's commitment to 31.5 per cent, the PBS, in Chile's view, is not inconsistent with the obligations under Article II:1(b).⁶² Thus, Chile contends, so long as the rate of duty applied is at, or below, the bound rate, Article II does not prohibit the application of any rate of duty, whether expressed in specific or *ad valorem* terms, or some combination of specific and *ad valorem* terms. Chile further claims that Article II does not pre-

⁵⁷ See Argentina's First Written Submission, para. 32.

⁵⁸ See Argentina's First Written Submission, para. 36 and footnote 25.

⁵⁹ WT/DS152/R, paras. 7.118 and 7.125.

⁶⁰ See Argentina's First Written Submission, para. 43 and footnote 25.

⁶¹ See Chile's First Written Submission, para. 21.

⁶² See Chile's First Written Submission, para. 23. See also para. 23 of Chile's First Oral Statement.

vent a party from changing the rate of duty that is applied, provided that the bound ceiling rate is respected.⁶³

4.15 **Argentina** claims that, contrary to the above⁶⁴, it in no way it questions Chile's right to apply specific duties on its imports. Argentina explains that what it is saying is that the PBS inevitably leads to the possibility of levying duties in excess of Chile's tariff binding, and this is in fact what happened.⁶⁵ Argentina further clarifies that the Chilean PBS is not a specific duty. In Argentina's view, we are not dealing with a specific duty which constitutes an "ordinary customs duty" - a duty which, since it does not result in the levying of duties in excess of the bound rate, would not be the subject of a complaint by Argentina with respect to Article II:1(b) of the GATT 1994. Argentina considers that the PBS is a surcharge whose structure, design and mode of application potentially leads to a violation of Chile's binding.⁶⁶

4.16 **Argentina** considers that it is neither the intentions or the declarations of Chile with respect to its readiness to obtain a waiver nor the issue of whether or not it deliberately permitted the full-scale application of the price band that the Panel should be evaluating. Rather, in Argentina's view, what counts in determining consistency or inconsistency is whether by its structure and design, the system could cause Chile to impose customs duties in excess of its tariff bindings in its National Schedule. Argentina submits that the example given starting with paragraph 29 of Argentina's First Written 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 override existing law to the extent there is a conflict, and cannot be amended by future law. Chile argues that, from a legal point of view, the system cannot automatically exceed the bound rate.⁶⁸ In response to a question of the Panel, Chile explains that, as both the legislation governing the price band and the Marrakesh Agreement Establishing the WTO with its annexed Agreements, are part of the Chilean legal order, the customs authorities are subject to that order. Chile claims that there

⁶³ See Chile's First Oral Statement, para. 24.

⁶⁴ Argentina refers to paras. 22 and 23 of Chile's First Written Submission.

⁶⁵ See Argentina's First Oral Statement, para. 7.

⁶⁶ See Argentina's Rebuttal, paras. 23-24.

⁶⁷ See Argentina's First Oral Statement, paras. 15-17.

⁶⁸ See Chile's First Oral Statement, para. 63.

was no reason to presume that the duties resulting from the application of the PBS would exceed the WTO tariff binding.⁶⁹ To prevent this from happening again, it further explains, Chile has adopted a new law that assures that the duties created under the PBS will not exceed Chile's bound rates.⁷⁰

4.18 **Chile** argues that its Government deliberately decided to allow the price band to operate at full regime, failing to comply with its commitment, in order to protect thousands of small-scale agricultural producers with low incomes from an economic and social catastrophe. Chile adds that its Government first informed its trade partners of the situation and started informal consultations with the view to obtaining a waiver from Chile's commitments under the WTO Agreements pursuant to Article IX of the WTO Agreement. Chile claims that it adopted this course of action in order to give temporary relief to producers who faced a financial crisis. According to Chile, its major trade partners were opposed to the granting of such a waiver and instead suggested that Chile should apply a safeguard or renegotiate the tariff bound under Article XXVIII of the GATT 1994.⁷¹ Chile argues that this was when Chile imposed a safeguard measure under Article XIX of the GATT and the Agreement on Safeguards, which has been contested by Argentina. Chile then claims that the above shows that Chile's failure to comply with its commitments was not the result of the automatic functioning of the PBS but was the result of a deliberate decision by its Government, which then did everything possible to obtain the required legal backing in accordance with the WTO's relevant provisions.⁷² Chile further argues that the situation at the root of the problem was not of its but rather was due to the massive subsidization from some other prominent countries.⁷³

4.19 **Argentina** submits that Chile's argument to the effect that Chile's failure to comply with its commitments was not the result of the automatic functioning of the PBS but was the result of a deliberate decision by its Government⁷⁴, is incomprehensible because it is the system itself, by its very structure and design, that automatically leads to the violation since it lacks any safety mechanism against exceeding the bound rate. Argentina argues that a customs official has no choice but to impose the duties established by the system, regardless of whether the Chilean Government deliberately permits it or not. And indeed, Argentina affirms, far from supporting Chile's attempt at 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

⁶⁹ See Chile's response to question 12 (CHL) of the Panel.

⁷⁰ See Annex CHL-7.

⁷¹ See also Chile's First Oral Statement, para. 30.

⁷² See Chile's First Written Submission, para. 25.

⁷³ See Chile's First Oral Statement, para. 30.

⁷⁴ See Argentina's First Oral Statement, para. 9, which refers to para. 25 of Chile's First Written Submission.

⁷⁵ See Argentina's First Oral Statement, para. 13.

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 claim⁷⁹, 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

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.

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 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 system's structure, design and mode of application.⁸³

4.22 At the second substantive meeting, **Chile** indicates that Chile's domestic measures have now been strengthened by Law 19.722 which makes explicit that there is such an automatic cap system that will prevent recurrence of a breach of the binding in circumstances not justified under WTO rules.⁸⁴

4.23 Regarding the new legislation presented by Chile, **Argentina** declares that it is not in position to confirm the precise content of the Chilean exhibit given that Argentina does not have adequate information to express a definitive view on this issue. On the other hand, Argentina argues, the PBS has already caused nullification or impairment to Argentina and in this regard Argentina wants to reserve its rights. Argentina submits that in case of no ruling by the Panel, Chile could easily change its law. Additionally, in case the Panel follows Argentina's suggestion and rules on the issues as reflected in Argentina's request for the establishment of the Panel, the Panel's report will have a normative value which Chile will have to take into account. Argentina concludes that the new Chilean law, from Argentina's point of view, shows that Chile acknowledges that its PBS violates Article II of GATT 1994.⁸⁵

(iii) Article XIX as an Exception to Article II of the GATT 1994

4.24 **Chile** argues that Article XIX constitutes an exception to the other WTO rules, including those in Article II of the GATT 1994.⁸⁶ In particular, Chile contends that Article XIX explicitly provides that a Member country "shall be free" to suspend an obligation or withdraw or modify a concession where necessary to prevent or remedy serious injury.⁸⁷ It submits that Article XIX and the Agreement on Safeguards allow a temporary waiver of concessions and the suspension of certain commitments. Chile claims that a Member country that has adopted a safeguard measure under Article XIX and the Agreement on Safeguards has not

⁸² See Argentina's Rebuttal, para. 28 which refers to Chile's response to question 10(k) of the Panel.

⁸³ See Argentina's Rebuttal, para. 28 which refers to Chile's response to question 12(a) of the Panel.

⁸⁴ See Chile's Second Oral Statement, para. 11.

⁸⁵ See Argentina's response to question 45 (ARG) of the Panel.

⁸⁶ See Chile's First Written Submission, para. 26.

⁸⁷ See Chile's First Oral Statement, para. 28.

violated its commitments on tariff concessions as long as the safeguard measure remains in force, which is currently the case for Chile.⁸⁸

4.25 **Argentina** submits that Chile's argument on Article XIX of the GATT 1994 whereby this would provide Chile with a legal umbrella enabling it to exceed the bound tariff, is erroneous from a legal point of view and should be rejected by the Panel. Argentina does not deny that it is theoretically possible, in applying a safeguard, to exceed the bound level, since safeguards are applied as a temporary measure in emergency situations to provide relief for the affected industry, subject to the requirements laid down in the Agreement on Safeguards. However, Argentina goes on to explain that, following the sequence of that Agreement, the bound rate may only legitimately be exceeded once the requirements of the Agreement on Safeguards have been met, and not in a case such as this one, where the bound level was exceeded before the requirements for applying safeguards had been verified. Argentina contends that the central issue in its claim in this respect is not the failure to comply with Article XIX and the Agreement on Safeguards, but the violation of Article II.1(b). It claims that the Panel will evaluate the consistency of the Chilean safeguard measure with Article XIX and the Agreement on Safeguards at the appropriate time. At this point, Argentina argues, the Panel is called upon to rule on the inconsistency of the PBS with Article II.1(b). Argentina submits that this is an independent claim, with a different and separate legal basis from the safeguards claim, and happens to coincide for a limited period of time with the period of application of the safeguards for certain 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 applied to cover up or justify the violation of obligations arising from the national schedules. In Argentina's view, it would be unthinkable for the Panel even to consider such a possibility. Argentina submits that Chile is trying to distort the content of the obligations imposed by Article XIX of the GATT 1994 and the Agreement on Safeguards.⁹¹

⁸⁸ See Chile's First Written Submission, para. 26.

⁸⁹ Argentina refers to Document G/SG/Q2/CHL/5 of 27 September 2000, p. 6, response to question 19. See Argentina's First Oral Statement, paras. 18-22 and footnote 7.

⁹⁰ See Argentina's First Oral Statement, paras. 18-22.

⁹¹ See Argentina's Rebuttal, para. 32.

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

4.27 **Argentina** considers that the PBS, in addition to violating the obligations contained in Article II:1(b) of the GATT 1994, is inconsistent with Article 4.2 of the Agreement on Agriculture because by its structure and design it lacks, as an instrument limiting access to markets, the kind of transparency and predictability that only ordinary customs duties can provide. Argentina submits that, in spite of the express prohibition contained in Article 4.2 of the Agreement on Agriculture, Chile maintains a measure which should have been tariffed and included in its Schedule.⁹²

(i) Whether the PBS is a Measure Prohibited under Article 4.2 and Should Have Been Tariffed

4.28 **Argentina** argues that, prior to the negotiation of the WTO Agreement on Agriculture, a number of countries used a wide variety of non-tariff measures to limit imports of agricultural products. One of the most important results of the negotiations was the agreement to "tariff" these measures - i.e. to prohibit the use of all non-tariff measures with respect to agricultural products, and to require their replacement with bound tariffs. This was achieved in Article 4.2 of the WTO Agreement on Agriculture.⁹³ Argentina claims that the scope of Article 4.2 of the Agreement on Agriculture is all-inclusive and, therefore, no non-tariff measures of any kind can be maintained. It explains that, although an illustrative list of non-tariff measures is provided, in which variable levies are specifically included, Article 4.2 of the Agreement on Agriculture also expressly covers "similar border measures other than ordinary customs duties".⁹⁴

4.29 **Argentina** claims that Chile could have tariffed its non-tariff measures at the time of the Uruguay Round adopting a level of protection higher than the current bound rate of 31.5 per cent. Since it did not do so, it is in violation of Article 4.2 of the Agreement on Agriculture because any variable duty applied on an agricultural product – regardless of its "quantum" with respect to its binding – is inconsistent with Article 4.2, which was designed precisely to avoid such a situation.⁹⁵ Argentina submits that the Chilean PBS fits perfectly into the category of measures that Article 4.2, footnote 1, identifies as being as inconsistent with the obligations negotiated under the Agreement on 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

⁹² See Argentina's Rebuttal, paras. 34-35.

⁹³ See Argentina's First Written Submission, para. 49.

⁹⁴ See Argentina's First Written Submission, para. 51.

⁹⁵ See Argentina's First Written Submission, paras. 57-58.

⁹⁶ See Argentina's First Written Submission, para. 59.

⁹⁷ See Argentina's First Written Submission, para. 57.

4.30 **Argentina** submits that even if the PBS were not considered a variable levy, it is a similar measure which should have been tariffed 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 tariffed in the Uruguay Round, which was not tariffed, 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 tariffed but in fact had to be tariffed⁹⁹, 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

⁹⁸ See Argentina's First Oral Statement, paras. 39-40.

⁹⁹ Chile refers to paras. 57-58 of Argentina's First Written Submission.

¹⁰⁰ See Chile's First Written Submission, para. 42.

¹⁰¹ See Chile's First Written Submission, para. 30.

¹⁰² See also Chile's First Oral Statement, paras. 34-36.

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 Round tariff schedules, which were negotiated during and after the drafting of the text of Article 4.2 and which entered into force at the same time as the Agreement on Agriculture manifest the results of the "conversion" process.* Chile explains that these negotiations and the results of those negotiations are relevant context in seeking to understand whether a particular measure is one of the "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 Argentina¹⁰⁶, 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

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.

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 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 have been required to be converted into ordinary customs duties". Consequently, in Chile's view, 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. Chile argues that the drafters did not have the intention to include a total prohibition of non-tariff measures but, instead, they introduce 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.^{110 111}

4.36 **Chile** explains that there is also no definition of the "inclusive" terms of footnote 1, which is an odd mix of measures. Not all of those measures are prohibited under any other rule of the WTO, though arguably many were prohibited and many or most have been subject to abuses of various sorts over the years. In these circumstances, Chile argues, it is particularly important in trying to discern

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.

¹¹⁰ See Chile's First Written Submission, paras. 54-56.

¹¹¹ Chile cites the Appellate Body report on *US – Gasoline* (WT/DS2/AB/R) adopted 20 May 1996, DSR 1996:I,3, p.17.

the meaning of Article 4.2 to examine the contemporaneous practice in the tariff agreements of the Members and negotiators in determining which measures were considered to be of the "type" which had to have been converted, and which were not. Chile affirms that the intent cannot be determined simply by looking at the bare words of individual "measures" listed in footnote 1 to Article 4.2. For example, Chile explains that footnote 1 refers to "non-tariff measures maintained through state-trading enterprises". Chile considers that such a term, taken literally, could mean any action of a state agency or state-owned enterprise. In Chile's view, however, it is obvious that Members did not have to convert all their state enterprise activities into tariffs, nor did they have to abolish those enterprises or activities or convert them into ordinary customs duties. Chile claims that such a broad reading was not intended derives knowledge from the contemporaneous conduct of the negotiators. Similarly, Chile argues, it is evident that neither Chile, nor, insofar as Chile is aware, any other Member was required or even urged to "convert" a PBS. Chile contends that these measures were at all times openly and transparently maintained, but, because they were not non-tariff barriers, they were not required to be converted into some new form of ordinary duties.¹¹²

4.37 **Chile** notes that Article 4.2 is different from other obligations not only in its peculiar syntax, which it claims must be given meaning, but because the conversion process involved a privilege as well as an obligation. Chile argues that measures that were properly subject to Article 4.2 were not simply required to be eliminated or modified, as in ordinary WTO rules, but that, instead, the requirement was to change the form of the trade restriction from a non-tariff barrier to a tariff barrier. Chile claims that, together with the "requirement" to remove certain measures, came the right to increase duties without compensation to other trading partners, even if the duties had been bound at a lower level. Chile argues that the tariff rate quotas that were allowed, at tariffs often enormously higher than previous bound rates, have frequently proven to be scarcely less effective protection than the non-tariff barriers they replaced. Chile claims that this element of privilege was even greater, considering that many of the measures that were required to be converted were at risk of being found inconsistent with GATT rules or losing privileged waivers. Chile concludes that there was little or no incentive to refuse to "convert" a measure, if that had been believed to be legally "required", since conversion carried the privilege of substantially raising duties on the "converted" product, without the need to compensate trading partners, as is normally required under Article II and Article XXVIII. Chile states that, having waited, Argentina is now saying that Chile must eliminate the PBS because it is banned by Article 4.2, but it is also saying that it is too late for Chile to get the offsetting benefit of increasing its tariffs. Chile contends that such an argument cannot be sustained. Chile claims that the reason why Chile did not convert its price band mechanism was and is that Article 4.2 did not require such a conversion and certainly does not now require simple elimination of the price band without tariffication. While Argentina and others may have wanted to ne-

¹¹² See Chile's First Oral Statement, paras. 53-56.

gotiate a ban that would have included price band systems, that was not what was agreed.¹¹³

4.38 **Chile** submits that the unusual use of the present perfect tense – "have been required" - can be easily understood in the context of the agricultural negotiations during the Uruguay Round. Chile argues that Article 4.2 logically refers to measures of the kind which, at the time the WTO entered into force, "have been required" to be converted. This was not the case for the price bands of Chile and other countries. In this regard, Chile claims that it was not required and would not be required to convert its PBS because it already operated as a tariff and not as a non-tariff measure, and was therefore already subject to binding in accordance with Article II.¹¹⁴ Chile refers to Article 31.3(b) of the Vienna Convention which provides that "Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation shall be taken into account, together with the context" when interpreting its terms. In this regard, Chile refers to the interpretation by the Appellate Body of the "essence" of such subsequent practice whereby this lies in 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".¹¹⁵ Chile considers that the subsequent practice supports Chile's position as regards Article 4.2. In Chile's view, this subsequent practice convincingly shows 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 goes further to argue that the first evidence of State practice is precisely the Chilean PBS which was implemented in the 1980s and is still in place today. Chile notes that Argentina's first written submission does not refer to any record of the negotiations of the Agreement on Agriculture that proves that Chile was asked to convert its price bands into tariff measures. Chile therefore concludes that the system was not a measure of the kind "which have been required to be converted" in order to allow Chile to sign the WTO Agreements. Chile submits that, in addition to the Chilean PBS, there are other systems with duties that vary according to external factors and some that common sense leads one to equate with variable levies, and which are not required to be converted into a fixed tariff regime. In this regard, Chile refers to Argentina's customs duty on sugar imports¹¹⁶ and to the EU current duty system on imports of wheat and other cereals.¹¹⁷ In Chile's view, this evidence of practices by States is not confined simply to countries that import agricultural products but also includes major agricultural exporters. In Chile's opinion, it is possible that many

¹¹³ See Chile's First Oral Statement, paras. 57-61.

¹¹⁴ See Chile's First Written Submission, para. 57.

¹¹⁵ Chile refers to *Japan – Alcoholic Beverages* (Appellate Body report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, DSR 1996:I, 97), p. 13.

¹¹⁶ Chile refers to Decree No. 797/92 of 19 May 1992 of the Argentine Ministry of the Economy, Public Works and Services (Official Journal of 21 May 2001).

¹¹⁷ Chile refers to the Commission Regulation (EC) No. 1249/96 of 28 June 1996 on rules of application for Council Regulation (EEC) No. 1766/92 on cereal sector import duties.

agricultural exporting countries might initially have wished to prohibit all levies that fluctuated or varied for any reason and some Members certainly envisaged the possibility of exerting pressure to impose this interpretation of Article 4.2 during the tariff negotiations that accompanied negotiations on the text of the Agreement on Agriculture. Nevertheless, Chile argues, irrespective of the original negotiating goals of some of the Members, the prohibition now claimed by Argentina was not agreed. Chile further notes that the agricultural exporters did not wish to eliminate the Chilean PBS as a whole because it is transparent and predictable and can result in the application of duties lower than the bound tariff. Chile concludes by saying that this evidence of State practice (and consequently of the general context of Article 4.2) is "concordant, common and consistent" not only with the ordinary meaning of the terms contained in Article 4.2, but also with the objective and purpose of this Article.¹¹⁸

4.39 **Chile** contends that the object and purpose of the Agreement on Agriculture is consistent with Chile's interpretation of Article 4.2. This object and purpose, Chile claims, can easily be seen in its provisions, including the Preamble, and in the structure and outcome of the negotiations on agriculture during the Uruguay Round. The Preamble to the Agreement on Agriculture starts by indicating that Members have decided "to establish a basis for initiating a process of reform of trade in agriculture in line with the objectives of the negotiations as set out in the Punta del Este Declaration". It continues by "Recalling" that the "long-term" objectives of the process include "a fair and market-oriented agricultural trading system" and "substantial progressive reductions in agricultural support and protection sustained over an agreed period of time". One apparently more short-term commitment is "to achieving specific binding commitments" in several areas, including "market access". Chile also refers to the Punta del Este Ministerial Declaration as it fixes the goals for the forthcoming negotiations on agriculture.¹¹⁹ In Chile's view, it is obvious that the object and purpose of the Uruguay Round negotiations was to reduce barriers to trade in agricultural products, while at the same time acknowledging that it would be a long-term process. It further notes that Article 20 of the Agreement on Agriculture underlines this by calling for negotiations to continue the reform process and stating that further commitments will be necessary to achieve the long-term objectives envisaged in the Preamble. Argentina's interpretation of Article 4.2, Chile claims, is not in harmony with this object and purpose. In this regard, Chile argues that Argentina suggests that, Chile could have raised its tariff protection for the products in question through tariffication, which is contrary to Chile's decision to lower the tariff.¹²⁰ Furthermore, it claims that Argentina appears to believe that Chile should have applied a single invariable duty on all imports. Chile contends that the result would undoubtedly be less liberalization of trade than that currently

¹¹⁸ See Chile's First Written Submission, paras. 58-65.

¹¹⁹ See para. 68 of Chile's First Written Submission.

¹²⁰ Chile refers to para. 57 of Argentina's First Written Submission.

existing under the PBS, in which the tariff usually applied is much lower than the bound tariff that Chile has the right to apply.¹²¹

4.40 **Argentina** submits that, contrary to what Chile argues, Article 4.2 and its footnote No. 1 are not open to different interpretations, as this would be contrary to the interpretation of treaties in accordance with the Vienna Convention. In Argentina's view, an interpretation of the text as well as the context, object and purpose of the Agreement indicates that mechanisms such as the price band are clearly covered by the said Article. In other words, even if the PBS were not considered to be a variable levy, it is clearly a similar border measure regulated by Article 4.2 of the Agreement on Agriculture which constitutes a "*lex specialis*" vis-à-vis the GATT 1994. Argentina considers that the determining criterion for the inclusion of these mechanisms among the measures which have been required to be converted into ordinary customs duties does not, and cannot be an exhaustive list of the different schemes. Argentina contends that this is due to the obvious impossibility of listing all of the measures which, by their nature, are infinite, since they depend exclusively on human ingenuity in designing any non-tariff barrier.¹²²

4.41 **Argentina** argues that an intelligent interpretation of Article 4.2 of the Agreement on Agriculture must also take account of the principle of effectiveness (*ut res magis valeat quam pereat*), a fundamental principle in the interpretation of treaties which forms part of the general rule of interpretation laid down in Article 31 of the Vienna Convention. Argentina submits that, in the framework of the WTO, this principle has been upheld in the case *US - Gasoline* and has been recognized and applied systematically in successive rulings of the Appellate Body.¹²³ Argentina 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 Agriculture¹²⁵ 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,

¹²¹ See Chile's First Written Submission, paras. 66-70.

¹²² See Argentina's Rebuttal, paras. 38-39.

¹²³ See Argentina's Rebuttal, para. 40 and footnote 26.

¹²⁴ Chile's response to question 12(d) of the Panel.

¹²⁵ Argentina cites the following: "The rule of effectiveness merely means that a treaty clause must be interpreted in such a way as to enable it to 'display its practical or useful effects', or in more modern terms, to fulfil its object and purpose." Conf. Diaz de Velasco, *Instituciones de Derecho Público*, Ed. Tecnos, 1996, p. 188.

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 tariffed, i.e. converted into an ordinary customs duty, since the Chilean bound tariff was 35 per cent¹²⁷ 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 only trade restrictive effect of the price band system is caused by the imposition of a duty. Since under the rules of the GATT, Chile's obligation is to respect its tariff binding, Chile could honour this obligation by applying its duty at the bound level of 31.5 per cent at all times. Instead, Chile applies a 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

¹²⁶ See Argentina's Rebuttal, paras. 41-43.

¹²⁷ See Argentina's First Oral Statement, para. 29, which refers to para. 24 of Chile's First Written Submission.

¹²⁸ See Argentina's First Oral Statement, paras. 25-29.

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* to deprive the obligation contained in Article 4.2 of the Agreement on Agriculture of its content, when that principle – as defined by the Appellate Body¹³³ – is only relevant as a supplementary means of interpretation, to which there is no need to resort in this case.¹³⁴ Argentina explains that Chile does this by shifting the responsibility for requiring it to convert its system into a tariff to the complainant. It adds that the obligation not to maintain a measure that is incompatible with its WTO obligations rests with Chile (Article XVI.4 of the WTO Agreement). Argentina having provided sufficient evidence to prove that the Chilean PBS is a "variable levy" or a "similar measure", in the absence of

¹²⁹ See Chile's Rebuttal, paras. 35-36.

¹³⁰ See Chile's Rebuttal, para. 37.

¹³¹ Chile quotes the Appellate Body report on *EC – Hormones* (WT/DS26/AB/R, WT/DS48/AB/R) adopted on 13 February 1998, footnote 268 (DSR 1998:I, 135).

¹³² See Chile's Rebuttal, para. 38.

¹³³ Argentina refers to the Appellate Body report on *EC – Hormones* (WT/DS26/AB/R, WT/DS48/AB/R) adopted on 13 February 1998, footnote 268, (DSR 1998:I, 135).

¹³⁴ See Argentina's Second Oral Statement, para. 28.

any rebuttal by Chile, there is no reason to resort to a supplementary means of interpretation (*in dubio mitius*) when Article 31 of the Vienna Convention suffices to clarify the meaning of the provision (Article 4.2 of the Agreement on Agriculture: prohibition to maintain), and to apply it to the facts of the case. In other words, the PBS is included among the "measures of the kind" which have been required to be converted into ordinary customs duties precisely because it is a "variable levy" or "similar measure".¹³⁵

(ii) Whether the PBS is a Variable Levy or a Similar Border Measure

4.47 **Argentina** argues that the term "variable levies" means "complex systems of import surcharges intended to ensure that the price of a product on the domestic market remains unchanged regardless of price fluctuations in exporting countries".¹³⁶ With this definition in mind, Argentina considers that the Chilean PBS unquestionably applies variable levies on imports of wheat, wheat flour and edible vegetable oils. Argentina explains that, when the Chilean customs reference price is lower than the floor of the price band, the shipment is subject to a variable specific duty (in addition to the customs duty normally applied) amounting to the difference between the price band floor and the f.o.b. reference price provided by customs for the day on which the bill of lading of the imported goods in question was issued. The percentage of such duties applied to each shipment would vary according to the c.i.f. price.¹³⁷ The nature of the PBS as a variable tariff, in Argentina's view, is recognized by the WTO Secretariat's 1997 Report on Trade Policy Review of Chile, where it is said that "[t]he price stabilization mechanism works as a variable levy since the duty imposed on these goods varies according to their import price."^{138 139} Argentina further submits that Chile itself has admitted that its system imposes a "levy" on "imports" which "varies" according to the day of shipment.¹⁴⁰ Consequently, Argentina claims, it is a variable import levy.¹⁴¹

4.48 **Argentina** initially argues that, since, in the PBS, a specific duty is a variable which depends on the relationship between domestic prices and export prices, the system defines the specific duty (variable in accordance with the f.o.b. reference price of the day) to be applied for each shipment. According to Argentina, this results in a different tariff for each shipment that was sought to be eliminated via the tariffication process of the Uruguay Round for agricultural products. It is Argentina's view that, under the PBS, Chile imposes more than

¹³⁵ See Argentina's Second Oral Statement, para. 29.

¹³⁶ Argentina is using a definition provided in Goode, Walter, Dictionary of Trade Policy Terms (Centre for International Economic Studies, University of Adelaide, 1997), p. 250. See Argentina's First Written Submission, para. 52.

¹³⁷ See Argentina's First Written Submission, para. 54.

¹³⁸ Argentina quotes the Trade Policy Review Body, Trade Policy Review of Chile, Report by the Secretariat, WT/TPR/S/28 (7 August 1997), para. 38.

¹³⁹ See Argentina's First Written Submission, para. 55.

¹⁴⁰ Argentina refers to para. 38 of Chile's First Written Submission.

¹⁴¹ See Argentina's Rebuttal, para. 49.

"ordinary customs duties". Argentina alleges that, on shipments whose price is below the floor of the price band, Chile imposes a border adjustment measure which is a form of variable tariff. Argentina argues that, regardless of what a Member might choose to call its border adjustment measure, that measure is prohibited if it is anything other than "ordinary customs duties".¹⁴²

4.49 **Chile** argues that the Agreement on Agriculture does not contain any definition of what is meant by variable levy nor is there any definition elsewhere in the WTO. Chile considers that it is apparent that it is not sufficient simply to say that any levy that varies is a "variable levy", because all levies in one sense or another vary. In Chile's view, a uniform specific duty varies when measured in *ad valorem* terms, and an *ad valorem* duty by definition produces a different specific rate of duty, dependent on the value of a product.¹⁴³ Chile further claims that the definition used by Argentina¹⁴⁴ is based on a commentator's views and does not actually support Argentina's position either. Chile argues that its price band mechanism does not keep the domestic market price unchanged, nor is it intended or designed to do so. Rather, it continues, Chile's system is designed to moderate the effect of fluctuations in international prices on the Chilean market.¹⁴⁵ Chile submits that, in its PBS, the critical variable is the difference between world prices at the time of shipment and world prices over 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 Argentina¹⁴⁷, **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

¹⁴² See Argentina's First Written Submission, para. 56.

¹⁴³ See Chile's First Oral Statement, para. 38.

¹⁴⁴ See Argentina's First Written Submission, para. 52.

¹⁴⁵ See Chile's First Oral Statement, para. 40.

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.

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, similarly, there are trade operations carried out in better conditions than those foreseen when establishing the weekly reference price, which means 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

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.

¹⁵⁴ See Chile's response to question 46 (CHL) of the Panel.

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 levy¹⁵⁶ 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

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.

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 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 utilizing 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

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.

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

4.58 **Chile** argues that, in reference to the example of the EC's variable levies, unlike PBSs or other ordinary duties, a variable levy, like other typical non-tariff barriers, removes any incentive to compete on price in the products concerned. Chile submits that the special scope of application of Article 4.2 reflects the consensus that existed among those taking part in the negotiations on agriculture in the Uruguay Round that it was necessary to discourage non-tariff barriers because they are less transparent and give a higher and more unconditional level of protection than tariffs. Chile claims that its PBS, however, imposes a specific tariff on certain agricultural products. It further explains that, even though the duty applied varies, it does not change according to the import price or the domestic market price in Chile, but compensates for the difference between a representative global price and a price fixed in the same way corresponding to the previous five years, deducting maximum and minimum prices.¹⁶⁶

4.59 **Argentina** submits that, the first step, according to the procedure for interpretation laid down by the Vienna Convention, would be to produce a textual definition of the concept of "variable levy", a definition which, in Argentina's view, does have its importance as a means of defining the scope of the obligations, and ensures that the literal meaning incorporates the economic and commercial reality that the words are supposed to reflect. Argentina contends that a variable levy can be defined textually as a customs charge in the form of a levy, duty or fee which varies over time – in other words, a duty applied by customs with an in-built pattern of variation based on extraneous factors and which is designed to increase or reduce the isolation of the domestic market. According to

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.

¹⁶⁶ See Chile's First Written Submission, para. 49.

Argentina, in GATT/WTO terms, and from a legal point of view based on a textual interpretation, the parameters defining the variation of a levy must be extraneous to the transaction price or the physical characteristics of the product, which are the elements of "ordinary customs duties" *par excellence*. Argentina claims that an interpretation of the words of Article 4.2 such as the one mentioned in the previous paragraphs is supported by the Article's context, Article 4.1, and the title of the Article, which refer, respectively, to the national schedules as the instrument in which the commitments must be specified, i.e. the result of the tariffing and the market access, which is ultimately what is affected by systems such as the PBS – illegal under Article 4.2 because their effects are reflected in the greater or lesser isolation they cause. Argentina submits that, if it is argued that a textual and contextual basis is not sufficient to define a variable levy, one should turn to the object and purpose of the provision, in accordance with Article 31 of the Vienna Convention, i.e. making the rules and disciplines of the GATT/WTO in the agricultural sector more effective.^{167 168}

4.60 **Argentina** furthermore does not agree with Chile's argument whereby it assimilates all variable levies with those applied by the European Communities "at the time the negotiations were held".¹⁶⁹ Argentina argues that Chile's extensive comparison and contrast of its price band system with that of the European Communities does not alter the fact that Chile's measure is a variable levy which, like the EC's measure, is specifically designed to ensure that local producers remain isolated from price competition from more efficient foreign producers.¹⁷⁰ Argentina claims that Chile, in differentiating its system from the one applied by the European Communities (which would seem to be the only definition that Chile accepts of a variable levy), defines its PBS exactly as Argentina defines a variable levy in paragraph 53 of its first written submission. In that paragraph, Argentina states, elaborating on the definition of variable levies in paragraph 52, that it considers a variable levy to be "a duty which varies in accordance with the export market price." Argentina argues that, similarly, Chile maintains that "the Chilean PBS, however, imposes a specific tariff on certain agricultural products. Even though the duty applied varies, it does not change according to the import 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 Argentina submits that this Chilean definition coincides precisely with Argentina's definition of a variable levy. It further argues that this definition by Chile reinforces the concept of variability of the levy. In reference to paragraph 38 of Chile's written submission, Argentina claims that Chile recognizes firstly that the levy varies, and secondly, that it varies at least in

¹⁶⁷ Argentina refers to the Preamble to the Agreement on Agriculture speaks of "... correcting and preventing restrictions and distortions in world agricultural markets".

¹⁶⁸ See Argentina's Rebuttal, paras. 45-47.

¹⁶⁹ See First Written Submission by Chile, para. 49.

¹⁷⁰ See Argentina's Rebuttal, para. 48.

¹⁷¹ Argentina refers to para. 49 *in fine* of Chile's First Written Submission.

accordance with Argentina's second observation concerning the concept of a variable levy, i.e. in accordance with the export market price.¹⁷²

4.61 **Argentina** contends that the test for determining whether a PBS is or is not a measure of this kind begins with an analysis of the characteristics in order to determine to what extent the particular characteristics of variable levies (i.e. variability, application at the border, and existence of determining extraneous factors) contributes to the objective of ensuring greater or lesser isolation of the domestic market. Argentina argues that, even if it were argued that the Chilean PBS is any way different from a variable levy, it cannot be denied that it comprises the elements that are common to that type of levy. Argentina claims that absolute identity is certainly not required; what is required is a resemblance or similar nature, in other words the mechanisms, structures and mode of application must resemble each other. In Argentina's view, it is important to see whether the measure under examination, in this case the Chilean PBS, fits with the final objective of Article 4.2 of the Agreement on Agriculture and its footnote in particular, and with the objective of tariffication of agriculture in general, in conformity with the Agreement – i.e. to enhance transparency through the establishment of tariffs that discipline agricultural trade and to improve the predictability of such trade through "specific binding commitments" in the area of "market access". Argentina submits that, if upon examining the most common elements of a variable levy the PBS were considered to lack absolute identity and therefore fall outside that category, the economic effects of the PBS surely constitute a clear basis for determining the degree of "similarity" of the measure within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture.¹⁷³

4.62 **Chile** submits that its PBS is not a "similar border measure" because neither by its operation nor in its context is it similar to the non-tariff barriers described in footnote 1, but rather it corresponds to the category of measure which, in accordance with this footnote, fall outside its scope.¹⁷⁴ Chile considers that footnote 1 makes explicit that "similar border measures" do *not* include ordinary customs duties. Chile submits that the Chilean price band mechanism restricts trade only through duties, and that these duties do not operate as a minimum price system or other non-tariff barrier. Rather, Chile explains, the PBS, like other ordinary duties, allows price competition.¹⁷⁵ Chile notes that, although the Agreement on Agriculture does not define "ordinary customs duties", it is obvious that the PBS falls within the term because it only imposes duties. In Chile's view, the system is subject to the obligations in Article II of the GATT 1994, in the same way as all the other products subject to a bound tariff as such. Chile argues that no waivers are envisaged and conformity with the WTO Agreement is not due to any agriculture-specific provision. Chile claims that, consequently,

¹⁷² See Argentina's First Oral Statement, paras. 33-37.

¹⁷³ See Argentina's Rebuttal, paras. 55-57.

¹⁷⁴ See Chile's First Written Submission, para. 46.

¹⁷⁵ See Chile's First Oral Statement, para. 48.

the most reasonable interpretation of the text of footnote 1 is that the PBS is outside the scope of the measures covered by the obligations in Article 4.2.¹⁷⁶

4.63 **Argentina** argues against Chile's statement that "the price band system ... corresponds to the category of measure which, in accordance with this footnote, fall outside its scope".¹⁷⁷ Argentina 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 provision."¹⁷⁸ Consequently, Argentina rejects Chile's argument that "... the most reasonable interpretation of the text of footnote 1 is that the price band system is outside the scope of the measures covered by the obligations in Article 4.2."^{179 180}

4.64 In **Chile's** view, a "minimum import system" or a "variable levy" might be considered a non-tariff measure insofar as the systems could operate to exclude low-priced goods and preclude price competition. However, Chile adds, it must be conceded that a prohibitive tariff has similar effects, but clearly is not prohibited by Article 4.2. Thus, Chile concludes, given the imprecision of the language of Article 4.2, it may be necessary, as with other measures, to examine which of such measures were considered to be of the type that required conversion into ordinary customs duties in the Uruguay Round. Chile is not aware of any objective test of "similarity" within Article 4.2 or elsewhere in the WTO. In Chile's view, it seems probable that the category of "similar border measures" was intended to capture measures that were the same as those "required to be converted", but which were simply labelled differently. Given the vagueness of the terms for those measures specifically named and given the apparent absurdity

¹⁷⁶ See Chile's First Written Submission, para. 47.

¹⁷⁷ Argentina refers to para. 46 of Chile's First Written Submission.

¹⁷⁸ Argentina refers to para. 47 of Chile's First Written Submission.

¹⁷⁹ *Ibid.*

¹⁸⁰ See Argentina's Rebuttal, paras. 79-83.

of a literal or dictionary approach, Chile considers that it is evident that a cautious approach is necessary, and that it would be prudent to decide cases as narrowly as possible, rather than attempting on the basis of a single dispute to enunciate broad rules not written in the text and not agreed by the negotiators.¹⁸¹

4.65 **Argentina** contends that the essential features that determine whether a measure is a "variable levy" or a "minimum import price" basically relate to the effects of the measure. Argentina considers that the basic effects of a variable levy or minimum import price, as well as any other non-tariff measure within the meaning of Article 4.2 of the Agreement on Agriculture, are lack of transparency and predictability and consequent nullification or impairment of market access. In Argentina's view, the degree of similarity must once again be analysed in terms of undesired economic effects (mentioned in the reply to question 6(a)) which are present to a greater or lesser degree in the case of all "measures of the kind which have been required to be converted into ordinary customs duty", whether those listed specifically in footnote 1 to Article 4.2 of the Agreement on Agriculture or those covered by the concept of "similar border measures other than ordinary customs duties".¹⁸²

4.66 **Chile** agrees that the mere fact that a duty may or does vary does not mean that the duty is a prohibited variable levy. In Chile's view, were the rule otherwise, a Member could never change its 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 goods below a certain price. However, Chile affirms, it must be conceded that there is no such test in the language of the Agreement, and it is easy to demonstrate that the negotiators of the Agreement on Agriculture allowed conversion into ordinary duties in a way that is often prohibitive of any imports not within the preferential tariff rate quota. Chile considers that, in such circumstances, it may be that the European Communities are correct to say that the dispositive issue, at least in the case of a measure whose restriction is accomplished through a customs duty, is whether there is a ceiling binding, in which case the frequency, scope or criteria for variability are irrelevant under Article 4.2.¹⁸³

4.67 **Argentina** submits that an infringement of Article 4.2 of the Agreement on Agriculture is not contingent on whether or not the bound tariff has been violated. It further states that if, as Chile claims, the variability of a measure were irrelevant as long as the bound level was not exceeded, Article 4.2 of the Agree-

¹⁸¹ See Chile's response to question 6 (ALL) of the Panel.

¹⁸² See Argentina's response to question 6 (ALL) of the Panel.

¹⁸³ See Chile's response to question 8 (ALL) of the Panel.

ment on Agriculture and its footnote would lose their effectiveness in that the obligation would be limited exclusively to the application of "cap" mechanisms to the different variable levy schemes, making their mandatory tariffication as stipulated in Article 4.2 of the Agreement on Agriculture unnecessary and rendering their operation immutable. In Argentina's view, there is no legal justification whatsoever for such an interpretation, which would in any case be absurd from an economic standpoint. Argentina is of the opinion that Chile cannot disregard the value of certainty in economics and trade and the inconvenience of having to deal with such volatile access mechanisms as variable levies. Indeed, it says, the use of the PBS is yet another factor of uncertainty, and compared with ordinary customs duties which, as already stated¹⁸⁴, are not subject to the variability of the system at issue, it would add to the cost of any commercial planning scheme.¹⁸⁵

4.68 **Argentina** submits that Chile has recognized that the category "similar border measures" was included in footnote 1 to Article 4.2 of the Agreement on Agriculture for the purposes of disciplining similar measures to those which have been required to be converted, but which were labelled differently.¹⁸⁶ Argentina contends that this is exactly what the price band system is. In Argentina's view, it is therefore contradictory for Chile to maintain, on the one hand, that it is unaware of the existence of a similarity test for categorising a measure as one of those which must be tariffied, while on the other hand recognizing what that category includes.¹⁸⁷

4.69 **Argentina** further contends that the only alternative for defining whether a measure such as the PBS is a variable levy or a similar border measure is to analyse the effects of the measure. Argentina submits that this is so clear that Chile itself recognized it in its reply to question 6 of the Panel, in which it states that a variable levy is a non-tariff measure "insofar as the system operates to exclude low priced goods and preclude price competition."¹⁸⁸ In Argentina's view, this means that Chile upholds Argentina's economic impact analysis criterion.¹⁸⁹ As also upheld by Chile¹⁹⁰, Argentina adds, the PBS is designed to moderate the effects of international price fluctuations. It is implemented through a system which avoids or moderates the effects of the transmission¹⁹¹ 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

¹⁸⁴ See Argentina's Rebuttal, paras. 69 and 70.

¹⁸⁵ See Argentina's Second Oral Statement, para. 21.

¹⁸⁶ Argentina refers to Chile's response to question 6 (ALL) of the Panel.

¹⁸⁷ See Argentina's Rebuttal, paras. 58-59.

¹⁸⁸ See Argentina's Rebuttal, para. 52.

¹⁸⁹ See Argentina's Second Oral Statement, para. 19.

¹⁹⁰ Argentina refers to para. 11 of Chile's First Written Submission.

¹⁹¹ Argentina refers to para. 18 of Chile's First Written Submission.

¹⁹² Argentina refers to para. 17 of Chile's First Written Submission.

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 system¹⁹⁵, 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

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.

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 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, 31.5 per 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 com-

¹⁹⁶ See Argentina's First Oral Statement, paras. 41-51.

¹⁹⁷ See Argentina's Rebuttal, paras. 64-69.

plexity 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 predictability¹⁹⁹ 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 – 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

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.

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

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

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

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.

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

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 Vegetables*, adopted on 18 October 1978, BISD 25S/68.

²⁰⁷ See Chile's response to question 3 (ALL) of the Panel.

Members were permitted to adopt remain highly restrictive and prejudicial to the interests of export nations.²⁰⁸

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 English language dictionary of the word "ordinary", which the dictionary defines as "regular, normal customary or usual." In response to Panel questions, Chile points out that, in Spanish, the terms used instead of ordinary or "ordinario" is "propriadamente dicho". Chile submits that the slightly different translation is indicative of a term of art, though admittedly neither "ordinary" nor "propriadamente dicho" is instructive without considering the other elements of interpretation called for in the Vienna Convention. Chile contests the United States' statement, allegedly without authority, that what should be "regular, normal, customary or usual" is the *form* of the customs duty. Chile considers that Article II:1(b) and the Understanding do not speak of "forms" of customs duties and that the "authority" claimed by the United States for this proposition is a baffling reference to a Uruguay Round negotiating proposal that called for agreement to express

²⁰⁸ See Chile's Rebuttal, paras. 26-27.

²⁰⁹ Chile refers to United States' responses to question 3(b) and 3(c) (ALL) of the Panel.

²¹⁰ See Chile's Rebuttal, para. 8.

²¹¹ See Chile's Rebuttal, para. 10.

tariff equivalents in *ad valorem* or specific terms.²¹² Chile submits that, even if the United States' argument were accepted that ordinary duties are *ad valorem*, specific or a combination, the Chilean duty would still meet the United States' definition of ordinary, since the Chilean duty is a combination of an *ad valorem* and a specific duty. In the Chilean PBS, the PBS duty, while calculated according to the PBS formula, is a specific duty per unit of volume or weight of the product, which is added to (or rebated from) the *ad valorem* duty. Chile concludes that unsupported United States (and Argentine) assertions aside, there is nothing in the Article II:1(b) that limits how a specific or *ad valorem* rate may be set, so long as the bound rate is respected.²¹³ Chile also contests the United States' argument whereby the Chilean PBS is not an ordinary customs duty in the sense of Article II on grounds of an alleged "lack of transparency and definiteness." Chile argues that there is nothing in Article II that supports fabrication of such a test, which is itself rather lacking in transparency and definiteness. Chile further argues that the test is also illogical, since other duties now must be transparent, and definite in the sense of the limitations on level provided in Article II. Chile contends that it would be circular at best to say that by inscribing the nature and level of other charges, those "other" duties then become 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 both Article II and Article 4.2 is expressed in the same way in the Spanish and French texts of those Articles, even though the choice of terms in Spanish and French "*propriadamente dichos*" and "*proprement dit*" does not follow the usual dictionary translation into Spanish or French of the English word "ordinary".²¹⁶ Chile alleges that, in addition to illustrating the hazards of a simple dictionary approach to treaty interpretation, this identical somewhat unusual translation in both Articles is further indication of the intent that the terms have the same meaning. It should be noted, Chile adds, that the term "ordinary

²¹² See Chile's Rebuttal, paras. 11-12.

²¹³ See Chile's Rebuttal, para. 13.

²¹⁴ See Chile's Rebuttal, para. 14.

²¹⁵ See Chile's Second Oral Statement, paras. 16-17.

²¹⁶ Chile refers to Robert Collins French-English, English-French Dictionary 472 (Beverly T. Atkins et al., 2nd ed. 1987). The Oxford Spanish Dictionary 1390 (Beatriz Galimberti Jarman et al., eds., 1994).

customs duties" does not, by itself, carry the connotation in Article II that the duties are already or necessarily bound, but rather is something that can be bound pursuant to Article II. However, in Article 4.2, it appears from context that a measure that was "converted" into an ordinary customs duty was intended to mean made into a bound ordinary customs duty.²¹⁷

(c) Relation between Article II:1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture

4.85 **Chile** points out that all parties to the dispute agree that "ordinary customs duties" has the same meaning in Article 4.2 and its footnote as in Article II:1(b) of the GATT 1994. It further states that Argentina, however, never faces up to the contradiction in the Argentine position under Article II:1(b) and Article 4.2. Chile explains that, under Article II:1(b), Argentina complains that the PBS duties have resulted and could result in a breach of Chile's bindings - the bindings on ordinary customs duties. Under Article 4.2, however, to avoid conceding that the Chilean PBS duties are ordinary customs duties exempt from Article 4.2, Argentina attempts to invent a new definition of what is an ordinary customs duty as opposed to a "variable import levy" or "similar" measure. The Argentine definitions, however, are simply fabricated by Argentina, without foundation in the text of the Agreement, and without logic and coherence as a matter of treaty interpretation.²¹⁸

4.86 **Chile** submits that Argentina's complaint under Article II:1(b) properly treats the PBS duties as "ordinary customs duties", even though Argentina has tried to ignore the implications of its own claim. Chile argues that Argentina's claim under Article II of the GATT is that the PBS duties and the *ad valorem* duties can potentially result in total applied rate of duty above the bound rate. Chile contends that, if Argentina had considered, erroneously, that the price band duties were an "other" duty or charge, then Argentina would have claimed that the price band duties were flatly prohibited, regardless of whether the binding is breached. The reason is that Article II:1(b) unconditionally prohibits "other" duties and charges that have not been scheduled, without regard to whether those "other" duties and charges, when added to ordinary customs duties, would result in a breach of the 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 sim-

²¹⁷ See Chile's response to questions 1 and 2 (ALL) of the Panel.

²¹⁸ See Chile's Second Oral Statement, para. 23.

ply 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 always been so treated.²²¹

4.88 **Argentina**, in reference to the above argument by Chile to the effect that it did not register its PBS because the duties resulting from it were "ordinary customs duties", states that, in fact, Chile is merely recognizing that while the resulting duties could be ordinary customs duties²²², the PBS as such cannot, since it does not have any limit as to the duties it is capable of imposing and varies over a wide range – both above and below the bound level – with a frequency that makes it incomparable to ordinary customs duties.²²³ Argentina explains that what counts under Article 4.2 of the Agreement on Agriculture, which is a *lex specialis vis-à-vis* Article II:1(b) of the GATT 1994, is that the price band system, as its name suggests, is a "system" (a series of elements which interact to produce a result) and not an "ordinary customs duty". Argentina submits that the PBS, by its very nature – "variable levy" or "similar measure" – is one of the "measures of the kind" which have been required to be converted into "ordinary customs duties". It contends that it is the system that was required to be converted (the PBS) that is inconsistent with Article 4.2 of the Agreement on Agriculture, and not the duties resulting from that system. Chile itself has said that "Chile's price band system duties are not variable import levies within the meaning of Article 4.2 of the Agriculture Agreement".²²⁴ Regardless of the status of the duties resulting from the application of the PBS, Argentina submits, the system as such has been shown by Argentina to be "a variable levy" or similar measure within the meaning of Article 4.2 of the Agreement on Agriculture.²²⁵

²¹⁹ See Chile's Second Oral Statement, paras. 13-14.

²²⁰ Chile refers to para. 21 of Argentina's Oral Statement.

²²¹ See Chile's Rebuttal, paras. 18-20.

²²² Argentina refers to para. 20 *in fine* of Chile's Rebuttal.

²²³ See Argentina's Second Oral Statement, para. 14.

²²⁴ Argentina refers to Chile's Rebuttal, title preceding para. 23.

²²⁵ See Argentina's Second Oral Statement, para. 15.

4.89 **Argentina** submits that the obligation contained in the first part of Article II:1(b) of the GATT 1994 is a separate obligation and different from the obligation laid down in Article 4.2 of the Agreement on Agriculture.²²⁶ It further explains that Article 4.2 of the Agreement on Agriculture prohibits certain measures involving restriction of market access independently of any breach of Article II:1(b) of the GATT 1994 (Schedules of Concessions).²²⁷ It will later specify that Article 4.2 of the Agreement on Agriculture is *lex specialis vis-à-vis* Article II:1(b) of the GATT 1994.²²⁸

4.90 **Chile** considers that the prohibitions in Article 4.2 apply without regard to whether the measures breach a tariff binding. In Chile's view, for example, it is obvious on the face of the Agreement that one of the main purposes of Article 4.2 was to prevent a Member who had had the privilege of converting a non-tariff measure into an often prohibitively high tariff from then proceeding to restore that or some other non-tariff barrier at a later date. However, Chile argues, a measure that could violate Article II of the GATT 1994 is not likely to be a non-tariff measure prohibited under Article 4.2, unless the measure has non-tariff components as well.²²⁹

4.91 **Argentina** argues that the only way of evaluating whether a measure which was maintained is inconsistent with Article 4.2 of the Agreement on Agriculture, particularly if it is a measure similar to those listed in footnote 1, is by analysing its economic effects as compared to ordinary customs duties. Consequently, Argentina submits, not having been tariffed and the results of the process not having been included in the corresponding schedule, failing a waiver or renegotiation of the commitments, the price band system is clearly in violation of Article 4.2 of the Agreement on Agriculture, even without exceeding the bound level.²³⁰ Argentina further claims that Chile itself admits that Article 4.2 of the Agreement on Agriculture can be violated without violating Article II:1(b) of the GATT 1994.²³¹

4.92 **Argentina** does not agree with the argument developed by the European Communities whereby a measure that would meet the test set out by the Appellate Body in *Argentina – Footwear, Textiles and Apparel*, and would therefore not be contrary to Article II of GATT 1994, would not be subject to any further obligation in Article 4.2 of the Agreement on Agriculture. The European Communities consider that such a conclusion would stand even if the measure in question resulted in the application of a "duty that varies" – inasmuch as this "variation" is maintained below the ceiling written in the Member's tariff binding. Thus, in the European Communities' view, the decisive element which distinguishes an "ordinary customs duty" from a "variable levy" is the existence of a ceiling in the tariff binding. Argentina considers that the European Communities

²²⁶ See Argentina's Rebuttal, para. 13.

²²⁷ See Argentina's response to question 4 (ALL) of the Panel.

²²⁸ See Argentina's Second Oral Statement, para. 15.

²²⁹ See Chile's response to question 4 (ALL) of the Panel.

²³⁰ See Argentina's Rebuttal, paras. 50-51.

²³¹ Argentina refers to Chile's response to question 4 (ALL) of the Panel.

are trying to link different obligations laid down in different agreements. In Argentina's view, Article II:1(b) of the GATT 1994 lays down the obligation to refrain from levying "ordinary customs duties" in excess of the bound duties set forth in the national schedules. On the other hand, Argentina explains, Article 4.2 of the Agreement on Agriculture lays down the obligation to change all "measures of the kind which have been required to be converted into ordinary customs duties", as well as the obligation to refrain from maintaining, resorting to, or reverting to any measures of the kind set forth in the non-exhaustive list in the footnote. Argentina notes that, at the same time, the difference between the application of specific duties – in the case cited by the European Communities (violation of the bound level, Article II:1(b) of the GATT 1994) – and the Chilean PBS (Article 4.2 of the Agreement on Agriculture) lies in the total predictability and transparency for the purposes of commercial planning in the first case (application of specific duties with a ceiling), and the total absence of predictability and transparency for the purposes of commercial planning in the second case (application of a variable duty or similar measure). Argentina concludes that the European Communities' interpretation of the obligations under Article 4.2 of the Agreement on Agriculture deprives of its effectiveness a provision that was painstakingly negotiated by Members. As stated in Article 21 of the Agreement on Agriculture, Argentina submits, the obligations under the GATT 1994 apply with respect to agricultural trade to the extent that the specific Agreement concluded on agriculture does not provide otherwise.²³² Argentina explains that the Members agreed, in the case of agriculture, that a certain kind of measures would be "required to be converted into ordinary customs duties", i.e. tariffied with a view to eliminating their distortionary effects and lack of transparency and predictability. These effects, Argentina asserts, which distinguish the "measures of the kind" that must be tariffied from "ordinary customs duties", are independent of any ceiling.²³³

4.93 In **Chile's** view, the above argument of the European Communities may be correct, although it would note that Chile has pointed out several bases for concluding that the Chilean PBS is not prohibited by Article 4.2, so it is not necessary to resolve the issue whether the existence of a binding by itself is sufficient to make a duty that varies not a prohibited measure under Article 4.2. While it is obvious that the mere existence of a binding on a product does not permit resorting or reverting to a prohibited non-tariff barrier on such product, Chile contends, the European Communities' distinction is salient for a measure whose only protection is achieved via a duty, where the degree of variation does not add any protection greater than that achieved if the duty were applied at the bound level. Chile believes that the logic behind accepting the European Com-

²³² Argentina refers to Article 21 of the Agreement on Agriculture and quotes para. 353 of the Panel report in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (WT/DS161/R, WT/DS169/R) adopted on 10 January 2001, as modified by the Appellate Body report, as follows: "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 with the same matter."

²³³ See Argentina's response to question 5 (ALL) of the Panel.

munities' argument lies in three points: First, as Argentina has conceded, not every duty that varies is banned, since that would imply a rule that countries cannot change their applied rates, even to reduce them, even if bound rates are respected. Chile's annual reduction of its applied rates would become a prohibited variable levy, by such an absurd test. Argentina arguments notwithstanding, there is nothing in the WTO establishing rules about degree, frequency or predictability of variations. Second, the most important objective characteristic of the "conversion" of the European Communities' variable levies appears to be the binding of duties, and the European Communities' conversion was subject to ample discussion and negotiation by all parties before the WTO agreements went into force. It thus would seem to Chile that the European Communities were entitled to think all parties understood its conversion to be adequate. Indeed, Chile explains, the only complaints about the European Communities' conversion were that the levy did not vary enough. Chile considers that, while the European Communities' system is certainly not at issue in this dispute, it is reasonable to look at the practice of such a major Member, and the attitude of other Members toward that practice in establishing how it would implement the obligations even before the entry into force of the WTO agreement. Third, and most important, varying the applied rate below the bound level is less, not more protective than a perfectly legal system in which the applied rate is simply maintained at the bound level. According to Chile, while Argentina has tried to suggest that the variability of a duty is an additional barrier to trade, Argentina has no evidence for that proposition. Chile submits that it is undeniable that every Member has a right to apply its duties at all times at the level of its bindings. Chile claims that, in theory and in fact, it is impossible to see how it can be less advantageous to trade of other countries if instead of constantly applying duties at the bound rate, a Member maintains a system in which the duties assessed are usually less than the permissible bound rate, at least so long as the ceiling binding is honoured or an appropriate exception invoked. In Chile's view, the variation of the applied rates below the bound rates may mean that Members cannot rely on always having the benefit predictability of the voluntary benefit of lower rates than the tariff binding, but Members have no right to such lower rates in any event. Thus, Chile concludes, it is reasonable to assert that, in the case of measures whose only protective effect is through a duty, there is no basis for complaint about a duty that varies, so long as the ceiling binding and other obligations such as MFN are respected.²³⁴

²³⁴ See Chile's response to question 5 (ALL) of the Panel.

(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 35²³⁶ 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

²³⁵ See Chile's First Written Submission, para. 36.

²³⁶ Chile quotes Article 24 of ECA 35 which reads as follows: "In using the PBS foreseen in its domestic legislation for the import of goods, Chile undertakes, in the framework of this Agreement, not to include new products or to modify the mechanisms or apply them in such a way as may undermine Mercosur's market access conditions."

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 conclusion, Chile asserts, the conduct of Argentina and the other participants in the negotiation of ECA 35 suggests that all of the Mercosur member countries viewed the PBS as a legitimate measure that was permitted under the WTO and required disciplines under ECA 35 so that the member countries of Mercosur could obtain a benefit beyond what they had already obtained as Members of 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

²³⁷ See Chile's response to question 13 (CHL) of the Panel.

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 claimed²⁴¹, in bringing its complaint concerning the inconsistencies of the PBS with Article 4.2 of the Agreement on Agriculture before the WTO, Argentina acted in conformity with the principle of good faith and the principle of *pacta sunt servanda*. However, Argentina submits, Chile's conduct in maintaining provisions under its domestic legal system which violate Article XVI.4 of the Marrakesh Agreement Establishing the WTO after accepting the covered agreements is contrary to the principle of good faith in the fulfilment of agreements and in the actions of States, particularly when Chile has recognized that it has done this "deliberately".²⁴²

4.97 **Chile** clarifies that the ECA 35 did not deal directly with the issue of whether the PBS was or was not, for the purposes of the WTO, an ordinary customs duty or some other kind of duty, charge or tax. However, it is clear that none of the parties considered that the duties under the PBS were "other duties" under the WTO, since Chile did not include them as such in its tariff schedule, and the other Members did not attack them as such under the WTO.²⁴³ It further clarifies that it has never said that Argentina's acceptance of the price band in ECA 35 was an exception to the WTO. Chile explains that what it has said is that Argentina, through WTO, wants to upset the balance of rights and 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] system²⁴⁵ in the framework ECA 35

²³⁸ See Chile's response to question 13(a) (CHL) of the Panel.

²³⁹ Argentina refers to Chile's response to question 13(a) (CHL) of the Panel.

²⁴⁰ See Argentina's Rebuttal, paras. 36-37.

²⁴¹ Argentina refers to Chile's response to question 13(a) (CHL) of the Panel.

²⁴² See Argentina's Rebuttal, paras. 84-85.

²⁴³ See Chile's response to question 13(a) (CHL) of the Panel.

²⁴⁴ See Chile's First Oral Statement, para. 65.

²⁴⁵ Argentina refers to para. 36 of Chile's First Written Submission by Chile.

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 multi-lateral 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 comments²⁴⁹ 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

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.

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 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 directly with the issue', and if there is an opinion to the effect that the PBS does not constitute another duty", and if Chile also failed to include the PBS as such in its tariff schedule and in the Annexes and Additional Notes to ECA 35, it is difficult to see how ECA 35 can serve as a context for the interpretation of obligations under Article 4.2 of the Agreement on Agriculture. Argentina further argues that if the Panel were to consider that the ECA 35 provides a guide, because Chile itself excluded the PBS from its tariff schedule and because it takes the view that no preferences - the very purpose of ECA 35 - are applicable to the price band system, this reinforces the idea that the PBS is not a tariff - in WTO terms, "an ordinary customs duty" - but rather, it is what Argentina has been claiming it to be from the beginning of these proceedings, i.e. a "variable levy" or a "similar border measure" which is inconsistent with Article 4.2 of the Agreement on Agriculture.²⁵³

Prior Knowledge, Negotiating History and Subsequent Practice

4.101 **Chile** submits that the PBS has been in effect since 1983, having been established by law, and that the system is used by some countries of the Andean Community and was used by some Central American countries. It explains that, throughout the late 80s and early 90s, the World Bank encouraged countries, at least in Latin America, to convert their quantitative restrictions to price bands, which are more market oriented schemes. Chile contends that Argentina has a system similar to Chile's price band for imports of sugar that considers an additional duty that is the result of the difference of two prices; one called "Guía de Base" which is the result of the average international prices of the last eight years and the other called "Guía de Comparación" which is the London price.

4.102 **Argentina** considers that Chile's vague and general argument concerning the existence of PBSs in Latin America is irrelevant in justifying the kind of vio-

²⁵¹ Argentina refers to Chile's response to question 13(c) of the Panel.

²⁵² *Ibid.*

²⁵³ See Argentina's Rebuttal, paras. 92-96.

lation resulting from the Chilean PBS. Argentina is of the view that Chile's statement is not based on any concrete evidence of the existence of several PBSs in the region, and even if there were several, their mere existence would not suffice to make the Chilean system consistent with WTO rules - that, after all, is the subject of this proceeding.²⁵⁴ It further argues that the prior existence of the Chilean PBS and its subsequent maintenance following the entry into force of the Agreement on Agriculture does not preclude the fact that the system was contrary to Article 4.2 and its footnote. In Argentina's view, Article 28 of the Vienna Convention clearly states that the "provisions [of a treaty] do not bind a party in relation to any act or fact which took place ... before the date of entry into force of the treaty with respect to that party." In this regard, Argentina considers that there was no possibility of filing a complaint prior to the entry into force of WTO Agreements on 1 January 1995. Argentina therefore concludes that Chile's argument that neither Argentina nor any other Member filed a complaint previously is without foundation. On the other hand, Argentina adds, as from the entry into force of the Agreements - i.e. the date on which the Members assumed the positive obligation to bring their domestic regulations into conformity with the system (pursuant to Article XVI.4 of the WTO Agreement) and to put an end to any measure that is inconsistent with the system - the Chilean measure has been liable to questioning under the DSU, not only as a result of previous rules, but because of what is expressly stipulated in Article 4.2 of the Agreement on Agriculture itself, since Chile has continued to maintain a measure which should have been converted into a regular customs duty. Argentina submits that this 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

4.103 **Chile** agrees that there is no doctrine of estoppel in the WTO nor any other rule or practice in the WTO that provides that a measure cannot be challenged if its removal was not specifically addressed in negotiations or if the challenge is not made within some specific period after entry into force. However, Chile contends that Argentina misunderstands Chile's argument. Chile argues that there is no evidence that PBS were considered measures that had to be converted into ordinary customs duties, while the context of other parts of the WTO agreement, the negotiating history, and subsequent practice all support Chile's

²⁵⁴ See Argentina's First Oral Statement, para. 58.

²⁵⁵ See Argentina's First Oral Statement, paras. 52-57.

view that the PBS duties are not prohibited.²⁵⁶ Chile further indicates that, under Article 32 of the Vienna Convention, the negotiating history is a valid tool for interpretation in case of doubt. Chile insists that Chile's negotiators recall that both the Secretariat and other delegations confirmed orally that the price band system was not a measure requiring conversion to ordinary duties, and claims that neither Argentina nor any interested party has offered any evidence to the contrary. Chile also stresses that subsequent practice supports Chile's view that the price band system is not a measure prohibited by Article 4.2. Chile mentions that Argentina has a sugar import duty system that Chile is confident Argentina would not maintain if it believed the validity of any of the interpretations it asserts against Chile. Chile submits that, while it might be argued that Chile's system or that of other Andean countries, or Argentina's sugar system is too small in its effects to be worth a challenge, the same could hardly be said of the EC's system. In Chile's view, the reason that PBS or the systems of the European Communities or Argentina were not challenged in the WTO has nothing to do with forbearance. Rather, it is because these measures are ordinary customs duties that are subject to the disciplines of Article II:1(b), but are not prohibited by Article 4.2.²⁵⁷

4.104 **Argentina** asserts that following the end of the Uruguay Round, "subsequent practice" (within the meaning of Article 31 of the Vienna Convention) - if any - relevant to define the content of the provisions of the text of Article 4.2 of the Agreement on Agriculture, which are not ambiguous, is the practice of the Members of the WTO. In this sense, Argentina submits, the only existing practice within the WTO, provides precisely the opposite outcome to what Chile has submitted before this Panel. Argentina quotes paragraphs 47 and 48 of document WT/L/77, containing the Report of the Working Party on the Accession of Ecuador to the WTO and indicates that the excerpt clearly shows that the overwhelming majority of WTO Members has agreed, within a formal context (that is, during the discussions leading to the accession of Ecuador to WTO) – reflected in a WTO official instrument – that PBSs are incompatible with WTO rules. Argentina concludes that this is the only relevant WTO practice²⁵⁸ in the sense of Article 31.3(b) of the Vienna Convention, since it reflects the *opinio juris* of all WTO Members and not that of isolated Members.²⁵⁹

4.105 In response to a question by the Panel, **Chile** indicates that it believes that the text and context leave no ambiguity that the Chilean PBS is not a measure prohibited by Article 4.2. However, it adds, if the Panel is in doubt, the negotiating history and state practice are legitimate supplementary interpretive aids, and these all support Chile's position that Article 4.2 does not prohibit the Chilean PBS. Chile contends that there are four elements of this practice: first, the exis-

²⁵⁶ See Chile's Second Oral Statement, para. 30.

²⁵⁷ See Chile's Rebuttal, paras. 30-34.

²⁵⁸ Argentina adds as defined by the Appellate Body on *Japan – Alcoholic Beverages II* (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R) adopted on 1 November 1996 (DSR 1996:I, 97).

²⁵⁹ See Argentina's response to question 41 (ARG) of the Panel.

tence of similar measures to those of Chile in other countries (including Argentina and the European Community); second, the absence of "conversion" except by binding of the duty by any other Member having such a measure; third the absence of any challenge of such measures under Article 4.2, and fourth, the initiation of dispute settlement challenges of the European Community's system in 1995-1997 by Canada, the United States, Thailand and Uruguay under provisions of the GATT 1994 and the Customs Valuation Agreement, but never on grounds of a violation of Article 4.2. Chile submits that this practice, like the negotiating history and the tariff negotiations, does not by itself prove that the negotiators of Article 4.2 did not intend to prohibit duties that vary in the sense of the Chilean, Andean, Argentine or European Communities system. However, it argues, the practice, context and negotiating history all support the logical reading of Article 4.2, i.e. that the Article does not prohibit the Chilean PBS, at least so long as it operates within a system of bound ordinary customs duties.²⁶⁰

4.106 In response to a question by the Panel as regards Argentina's reference to the Working Party Report on Ecuador's accession to the WTO, **Chile** submits that it includes the comment that "some members of the working party" thought that Ecuador's price band system was contrary to WTO rules. However, it argues, the discussion in paragraphs 42 to 48 of the Working Party Report does not reveal any general agreement that Ecuador's system was inconsistent with WTO rules. Chile submits that, even among those who voiced the view that Ecuador's system was inconsistent with the WTO, there does not even appear to have been agreement on what rules might be infringed, and in no case is there a specific reference to Article 4 of the Agreement on Agriculture. Chile contends that it is recorded that one Member thought that Ecuador should tariffy under the Agricultural Agreement. On the other hand, it explains, it is also noted that members of the Working Party who questioned Ecuador's system thought that it should either be eliminated or brought into conformity with WTO rules, which implies that even these Members, or at least some of them, thought that price bands *per se* are not illegal. Chile claims that Ecuador itself ultimately committed to phase out its price band system over time "in order to comply with the provisions of the WTO Agreement on Agriculture." The Working Party took note of that commitment, but taking note of such a commitment, Chile argues, does not constitute acceptance that eliminating the price band system was required by the WTO. Chile submits that it is well known that it is a normal part of the accession process for existing Members to request an acceding Members to undertake changes in policies and practices, even if such changes are not required by the general rules of the WTO.²⁶¹

Secretariat's Advice

4.107 **Chile** claims that it has received advice from the GATT Secretariat according to which the PBS would not be inconsistent with its obligations under

²⁶⁰ See Chile's response to question 42 (CHL) of the Panel.

²⁶¹ *Ibid.*

either the GATT or the draft Agreement on Agriculture then under negotiation. Chile qualifies this statement by explaining that, during the 80s and the beginning of the 90s, i.e. during the Uruguay Round negotiations, the World Bank encouraged various countries, at least in Latin America, to convert their quantitative restrictions into price bands, which are mechanisms that permit competition. Chile claims that, on at least one occasion, during a seminar for Central American countries, in response to the concern that had been expressed over the maintenance of these mechanisms, a letter was presented originating in the GATT Secretariat arguing that it was not necessary to tariffy price bands since they were unrelated to the domestic price - provided the price bands were maintained within the bound levels.²⁶² Chile later clarifies that it was 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

²⁶² See Chile's response to question 14 (CHL) of the Panel.

²⁶³ See Chile's response to question 40 (CHL) of the Panel.

²⁶⁴ See Chile's response to question 14 (CHL) of the Panel.

²⁶⁵ See Argentina's Second Oral Statement, para. 28.

²⁶⁶ Argentina refers to the Trade Policy Review Body, Trade Policy Review of Chile, Report by the Secretariat, WT/TPR/S/28 (7 August 1997), para. 38.

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

4.110 **Chile** notes that Argentina requested consultations with Chile on 5 October 2000 under the WTO's dispute settlement procedure concerning the consistency of the provisional and definitive safeguard measures applicable to imports of wheat, wheat flour and edible vegetable oils. Chile states that the provisional measures ceased to have effect on 22 January 2000, the date on which the definitive measures on the same products entered into force. The Chilean authority decided to extend the safeguard measures as of 26 November 2000²⁶⁹ 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

²⁶⁷ See Argentina's Rebuttal, paras. 76-78.

²⁶⁸ See Chile's First Written Submission, para. 39,. See also para. 41 of Chile's First Oral Statement.

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.

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

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

²⁷² See Chile's First Written Submission, paras. 79-82.

²⁷³ Chile refers to document WT/DS165/AB/R, para. 81.

²⁷⁴ See 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 See Chile's First Written Submission, paras. 89-91.

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

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 certain goods subject to price bands. Chile indicates that the consultations were held on 21 November 2000 but, when requesting the establishment of a panel, as noted in its communication of

²⁷⁸ Argentina refers to Chile's First written submission, para. 25 *in fine*.

²⁷⁹ See Argentina's First Oral Statement, paras. 65-67.

²⁸⁰ See Argentina's First Oral Statement, paras. 82-85.

²⁸¹ See Argentina's First Oral Statement, paras. 67-69 and footnote 19; Argentina's Second Oral Statement, para. 36 and footnote 28.

19 January 2001²⁸², Chile explains that Argentina nonetheless included in its request the provisional measures, the definitive measures and the decision to extend the safeguards. Chile notes that Argentina included in its request Chilean measures (the extension of the safeguards) that were not the subject of prior discussion during a WTO consultation procedure and this was recognized by Argentina itself in its request for the establishment of a panel. Chile considers that such recognition does not constitute sufficient grounds in terms of a WTO Member's obligation to respect the DSU. Chile submits that this is not a minor question nor simply a formality, but concerns respect for a basic guarantee of due process in the defence of the interests of a Member of the WTO.²⁸³

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 anomaly²⁸⁴ 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 2001²⁸⁶, Argentina again requested the establishment of a panel and mentioned the various consultations held by the parties²⁸⁷, 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 DSU²⁸⁸ to examine the matter brought up by Argentina in its communication requesting the establishment of the panel. Chile questions whether these terms of reference could allow examination of another matter that was not included in the consultations. Chile further questions whether the DSB, with its terms of reference, can disregard certain provisions in the DSU that require a panel only to consider a matter that has previously been discussed in valid consultations at the WTO. Chile submits that, like all WTO Members, it is seeking to resolve the dispute with Argentina in good faith and considers that its good faith cannot lead to neglect of important provisions in the DSU that guarantee proper defence.²⁸⁹

4.117 **Argentina** submits that, contrary to what Chile maintains, the then possible extensions of the definitive measures were in fact discussed during the consultations held with Chile. In this regard, Argentina claims that, between 5 October 2000 when Argentina requested consultations, and 21 November 2000 when the consultations were actually held, Argentina learned that the Chilean Ministry of Agriculture had requested the extension of the measures (3 November 2000), after which, on 13 November 2000, Argentina participated in the hearing before

²⁸² Chile refers to WT/DS207/2.

²⁸³ See Chile's First Written Submission, paras. 92-94.

²⁸⁴ Chile refers to WT/DSB/M/98, para. 83.

²⁸⁵ *Ibid.*, para. 84.

²⁸⁶ Chile refers to WT/DSB/M/101.

²⁸⁷ *Ibid.*, para. 52.

²⁸⁸ *Ibid.*, para. 57.

²⁸⁹ See Chile's First Written Submission, paras. 95-97.

the Commission. Subsequently, Argentina explains, on 17 November 2000, the Argentine Mission in Geneva transmitted to the Chilean Mission a written questionnaire in which some of the questions referred to the extension of the definitive measures.²⁹⁰ Argentina argues that, even if the extension of the definitive measures were not considered to have been properly addressed, this would not prevent them from being rightly subject to the jurisdiction of the Panel, as was recently confirmed by the Appellate Body.²⁹¹

4.118 **Chile** argues that the DSU states the following: the dispute settlement system is a central element in providing security and predictability to the multilateral trading system (Article 3.2); no solution to a dispute should nullify or impair benefits accruing to any Member (Article 3.5); any request for consultations (to be valid in the WTO) must be submitted in writing and identify the measures at issue, the reasons and basis for the complaint and, lastly, be notified to the DSB (Article 4, paragraphs 2 and 4); the intervention of a panel may only be requested within a period calculated from the date of receipt of the request for the holding of consultations (Article 4, paragraphs 7 and 8); and the request for establishment of a panel must refer to the consultations (Article 6.2). It further argues that, in the report of the Appellate Body in *Brazil – Export Financing Programme for Aircraft*, it is stated that: "Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."²⁹² Chile explains that it has met with Argentina on a number of occasions in order to find a comprehensive solution to this dispute. 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. Nevertheless, Chile argues, the extension

²⁹⁰ See Argentina's First Oral Statement, paras. 78-80.

²⁹¹ See Argentina's Second Oral Statement, para.37 and footnote 32.

²⁹² Chile refers to WT/DS46/AB/R, adopted on 20 August 1999, para. 131.

²⁹³ See Chile's First Written Submission, paras. 98-100.

²⁹⁴ See Chile's response to question 30(a) (ARG, CHL) of the Panel.

was the result of a new request that gave rise to a new process, with a public hearing, and to subsequent determinations based on the evidence considered on that occasion. Chile contends that, even though the content of the final measure (extension) is identical to that in the previous measure, the new measure only exists because the competent Chilean authority formally had to issue a new administrative act that completed and validated the extension, otherwise the previous measure would have expired, and nothing more. Chile submits that the situation would have been different if the original measure had been automatically extended within a specified period without any interested party contesting it, as this would have lent weight to the Argentine theory of an alleged "legal similarity", but quite clearly this is not the case.²⁹⁵

4.120 **Argentina** argues there are absolutely no legal grounds for accepting, as a possible interpretation of Article 6.2 of the DSU, that the extensions of Chile's definitive measures lack a legal identity with the safeguard measures, nor does such a suggestion make any sense. In Argentina's view, the fact that they were extended through a new decree is the logical result of the fact that the definitive measure had an expiry date. Otherwise, Argentina affirms, it would have violated various paragraphs of Article 7 of the Agreement on Safeguards (7.1, 7.2, 7.3 and 7.6). Argentina contends that the legal identity of the measure is confirmed by the fact that the same authority issued the extension, through the same Commission, because the measure applies to the same products and because the measures apply exactly the same remedy.²⁹⁶

4.121 **Argentina** claims that to agree on the issue raised by Chile would be to negate "due process", to the detriment of Argentina, by restricting access to jurisdiction. It considers that the security and predictability of the multilateral trading system would be seriously undermined since this could lead to a situation in which a safeguard measure which is extended will never be subject to scrutiny by the DSU.²⁹⁷

4.122 **Argentina** argues that, given that under the Safeguards Agreement, "extension" is not an independent notion, it goes without saying that if the definitive measure is inconsistent, that inconsistency does not cease with the extension of the measure. Argentina points out that if the original measure had been repealed, and if Exempt Decree No. 349 adopting the extension had been a new measure, Chile's way of proceeding would still be inconsistent with Article 7.5 of the Agreement 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

²⁹⁵ See Chile's First Written Submission, paras. 101-103.

²⁹⁶ See Argentina's First Oral Statement, paras. 75-76.

²⁹⁷ See Argentina's First Oral Statement, para. 77.

²⁹⁸ See Argentina's First Oral Statement, paras. 88-89.

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-

²⁹⁹ See Chile's Second Oral Statement, paras. 56-60.

³⁰⁰ See Chile's response to question 16 (ARG, CHL) of the Panel.

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 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

³⁰¹ See Argentina's Rebuttal, para. 102.

³⁰² Argentina refers to para. 25 *in fine* of Chile's First Written Submission.

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.

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

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.

2. *Substantive Arguments*

4.130 **Argentina** claims that Chile initiated the safeguards investigation on imports of vegetable oils, wheat and wheat flour in order to provide a legal justification for its PBS. According to Argentina, the safeguards case served to confirm that the PBS violated Chile's obligations under the WTO, since Chile acknowledged that, under that system, it exceeded its bound tariff. Given the true objective behind its investigation, Argentina argues, it comes as no surprise that the Commission (i.e. the competent Chilean authority) was unable to comply with any of the requirements of the Agreement on Safeguards.³⁰⁷ In particular, Argentina submits that the Chilean investigation to impose definitive safeguard measures and the identical extension of those measures on imports of edible vegetable oils, wheat and wheat flour, is inconsistent with Article XIX of the GATT 1994 and with Articles 2, 3, 4, 5, 6 and 12 of the Agreement on Safeguards.

4.131 **Chile** submits that the object and purpose of the investigation initiated by Chile for the application of the provisional safeguard measure, the definitive

³⁰⁶ See Chile's Second Oral Statement, paras. 48-52.

³⁰⁷ See Argentina's First Written Submission, para. 76.

measure and subsequently the extension thereof, as well as the adoption of those measures, was not in any way to provide a legal justification of its price band system. The object and purpose of the measures was to enable Chile to readjust, temporarily, the balance between itself and, without distinction as to origin, other exporting countries, in respect of the level of concessions, in the wake of unexpected and unpredicted developments as a result of which imports of agricultural products under the band genuinely and substantially threatened to cause serious injury to the domestic industry producing like or directly competitive products. These unexpected developments essentially consisted of an unusual and unpredicted persistence of very low international prices which affected agricultural products, including those covered by the price band, and which, in their turn, had such an impact on import trends that Chile was faced with a threat of serious injury to the domestic industry in question.³⁰⁸ Chile submits that it is not correct to state, as Argentina does, that the purpose of the safeguard measures is to justify the PBS as such because the purpose of a safeguard is to give the domestic industry temporary protection and, in Chile's particular case, this is limited to a period that may not exceed one year. Chile submits that it could hardly try to "justify" a longstanding permanent mechanism known to all Chile's trade partners - including Argentina - which had been notified to the WTO and appeared in many free trade agreements - including one signed with Argentina - by means of a temporary safeguard measure for such a limited period.³⁰⁹

(a) Compliance with the Notification and Prior Consultation Requirements

4.132 **Argentina** claims that Chile violated Article XIX.2 of the GATT 1994 and Article 12.1(a) of the Agreement on Safeguards by failing to comply with the notification requirements 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.

4.133 **Argentina** claims that the Appellate Body has already ruled on the criteria for the application of Article 12.1(a) that must be met in order to comply with the text.³¹⁰ In Argentina's view, Chile's conduct does not, however, comply with the provisions of Article 12.1 of the Agreement on 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

³⁰⁸ See Chile's Second Oral Statement, paras. 43-45.

³⁰⁹ See Chile's First Written Submission, paras. 120-122.

³¹⁰ Argentina refers to the Appellate Body report on *US -Wheat Gluten*, (WT/DS166/AB/R) adopted on 19 January 2001, paras. 105 and 106.

³¹¹ Argentina refers to Chile's notification to the Committee on Safeguards, dated 25 October 1999, G/SG/N/6/CHL/2.

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.³¹³³¹⁴ 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 12.4.³¹⁶³¹⁷

4.136 Reading Argentina's claim regarding notifications and consultations³¹⁸, **Chile** submits that Argentina only referred to the following measures by Chile: (a) notice of initiation of the investigation in 1999; (b) the provisional measure; and (c) the definitive measure adopted in January 2000. Chile argues that this clarification is necessary because, if Argentina wishes the Panel to make a concrete ruling, it should have made clear to which Chilean notifications it was referring and in what way it considered that these violated the actual provisions of the WTO Agreements, which Argentina does not specify at all. If the Panel should rule on the conformity of the timing of Chile's notification of initiation of the procedure, (rather than the provisional and definitive measures, which were not yet in effect), Chile recalls that a recommendation by the Panel may only refer to the conformity of the measure as regards Chile's obligations under the WTO Agreements. Consequently, Chile argues, the Panel cannot conclude, as

³¹² See Argentina's First Written Submission, paras. 253-257.

³¹³ Argentina refers to the Appellate Body report on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea – Dairy)*, WT/DS98/AB/R adopted on 12 January 2000, paras. 107, 108 and 109.

³¹⁴ See Argentina's First Written Submission, para. 258.

³¹⁵ See Argentina's Second Oral Statement, para. 40 and footnote 34.

³¹⁶ Argentina refers to its notification to the Committee on Safeguards, dated 28 December 1999, G/SG/20.

³¹⁷ See Argentina's First Written Submission, paras. 259-265.

³¹⁸ Chile refers to paras. 253-265 of Argentina's First Written Submission.

Argentina indicates – that "Chile's conduct does not, however, comply with the provisions of Article 12.1 of the Agreement on Safeguards nor with the Appellate Body's conclusions on application of this Article."³¹⁹ Chile submits that, when the DSB adopts findings by 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 in question are only the provisional and definitive measures. In this context, Chile emphasizes that the extension measure was not the subject of a WTO consultation procedure. Chile submits that Argentina tries to restrict the scope of the Agreement on Safeguards so that measures are only adopted on the basis of definition of a like product³²¹, but not including directly competitive products. In any event, Chile points out that Article 12.2 refers to "all relevant information" on the one hand and, on the other, specifically states "precise description of the product involved". Chile argues that this precise description of the product is the identification of the product (like or directly competitive) to which the safeguard measure applies. According to Chile, all Chile's notifications determine quite clearly which products are the subject of the procedure and, subsequently, the measures.³²²

4.137 **Chile** explains that it notified the WTO Committee on Safeguards of its intention to apply a provisional measure on 2 November 1999.³²³ It further explains that this provisional measure was eventually applied as of 26 November 1999. Chile affirms that it complied with the requirement to notify the intended measure before it was adopted, as called for by Article 12.4 of the Agreement on Safeguards and, at the same time, gave the Members of the WTO the opportunity to examine the measure, as required by Article XIX:2 of the GATT. Chile contends that Argentina's assertion that, on 1 December 1999, Chile notified the provisional measure adopted on 26 November 1999³²⁴ is not relevant because, as already stated, Article 12.4 requires notification of the intention to adopt a provisional measure before it is imposed, which Chile did. Chile further adds that it subsequently notified the decree by which the provisional measure was adopted, something that Article 12.4 does not require. Chile also refers to Argentina's statement that Chile "did not give ... the opportunity to hold consultations, ...

³¹⁹ *Ibid.*, para. 255.

³²⁰ *Ibid.*, para. 263.

³²¹ *Ibid.*, para. 263.

³²² See Chile's First Written Submission, paras. 212-216.

³²³ Chile refers to G/SG/N/7/CHL/2.

³²⁴ Chile refers to para. 265 of Argentina's First Written Submission.

immediately after the imposition of the provisional measure"³²⁵ Chile disagrees with this Argentine reasoning because it goes beyond the actual requirements in Article 12.3 in relation to Article 12.4 of the Agreement on Safeguards. According to Chile, Article 12.4 of the Agreement on Safeguards in fact deals exclusively with the obligations to notify and consult with regard to those provisional safeguard measures referred to in Article 6 of the Agreement on Safeguards. Chile submits that, when Argentina claims that it "had to request the consultations indicated in the last sentence of Article 12.4"³²⁶, this appears to suggest – although it is not expressly stated – that Chile should have indicated in its notification that it would give sufficient opportunity to hold consultations. Chile claims that this assumption is not admissible because it is not a requirement of the Agreement on Safeguards. The last part of Article 12.4 provides that "Consultations shall be initiated immediately after the measure is taken", and here the imperative tone is directed both at the Member imposing the provisional measure and any other WTO Member interested in holding consultations, so responsibility in this respect does not only lie with the notifying Member. Chile submits that it has always been ready to hold consultations with any Member who shows an interest and understands that, in the light of the provisions in the Agreement on Safeguards, notification to the Committee on Safeguards suffices to show its willingness to hold consultations with any party that so 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

³²⁵ Chile refers to para. 264 of Argentina's First Written Submission.

³²⁶ *Ibid.*, para. 265.

³²⁷ See Chile's First Written Submission, paras. 217-221.

³²⁸ See Argentina's First Oral Statement, para. 110.

"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 demonstrated, as a matter of fact, that the safeguard measure in question was applied, *inter alia*, "as a result of unforeseen developments".³³⁴

4.142 **Chile** points out that the reason why the Commission recommended the application of safeguards on products subject to price bands was the continued existence of unusually low prices over a period that could not be considered transitory. Chile contends that the unforeseen developments correspond to this special situation of global prices. Chile submits that the level of the bound tariff had been exceeded on previous occasions, but only for very short periods that did not justify the introduction of changes. On this occasion, Chile argues, the period was much longer and made it necessary to find a solution. Chile submits that keeping the band within the bound tariff would result in the serious injury ex-

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.

³³⁴ See Argentina's First Written Submission, paras. 80-82.

plained in the submission. In Chile's view, the unforeseen development in this case is the continued existence of very low international prices for much longer periods, which greatly exceeded the forecasts by experts. Chile argues that a fall in international prices to such low levels over such a long period is unusual and unpredictable, especially in the case of products whose price fluctuates considerably. Chile submits that the trend in international prices of wheat (hard red winter No. 2, Gulf, and Argentine bread wheat), and soya bean oil (Illinois crude soya bean oil and Buenos Aires crude soya bean oil) show marked and persistent decreases between 1997 and 2000.³³⁵

4.143 **Argentina** submits that the fall of international prices was not an unforeseen development, nor was it unexpected or unusual. In Argentina's view, the creation of the price band system in 1986 clearly shows that Chile knew of, and had even tried to regulate, the alleged negative effects of these economic developments (variations in international commodity prices). Argentina concludes that the developments that led to the application of the safeguards were not unforeseen developments under the terms of Article XIX.1(a) of the GATT 1994.³³⁶

4.144 **Chile** notes that the purpose of the price bands has always been simply to moderate the strong short-term fluctuations in international prices of the products subject to the system, and not to compensate for medium- and long-term trends in those prices, so that the "fall in international prices to such low levels and for such a long period ..." was a development that could not reasonably be foreseen.³³⁷ However, Chile argues, the preliminary question of fact which led Chile to adopt its safeguard measures was not these short-term fluctuations; quite to the contrary, it was the continued persistence of very low international prices over a long period of time. Chile submits that it is these developments that were obviously entirely unforeseen, and that Chile was not reasonably in a position to foresee. In Chile's view, these circumstances therefore fall outside the object and scope of the price band system.³³⁸

4.145 As regards Argentina's claim that there is no mention of unforeseen developments as a preliminary question in the Minutes of the Commission, **Chile** submits that the relevant examination and finding is recorded in the last part of the penultimate paragraph on page 3 of the Minutes of Session No. 193.³³⁹ Argentina affirms that none of the Commission records even mention unforeseen developments.³⁴⁰

(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.

³³⁵ See Chile's First Written Submission, paras. 141-144.

³³⁶ See Argentina's First Oral Statement, para. 95.

³³⁷ See Chile's Rebuttal, para. 67.

³³⁸ See Chile's Second Oral Statement, para. 65.

³³⁹ See Chile's Second Oral Statement, para. 66.

³⁴⁰ See Argentina's Second Oral Statement, para. 42.

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 contain any reference suggesting that the information submitted by the Argentine exporters was analysed.³⁴²

4.148 As regards Argentina's argument that it did not have the opportunity to participate fully in the investigation, **Chile** argues that for it to be relevant, Argentina should have explained to the Panel the reason why it did not have the opportunity to participate in the investigation conducted by the Chilean authorities. Chile issued a Law (and regulations) giving the competent authority powers regarding safeguards. This Law was published in full in the Chilean Official Journal in May 1999 and the relevant regulations were published in the Chilean Official Journal in June 1999. These two notifications, which were public, are acknowledged by Argentina in its first written submission.³⁴³ In addition, Chile argues, all this Chilean legislation was notified to the WTO on 23 July 1999, as can be seen from document G/SG/N/1/CHL/2, as Argentina acknowledges in its first written submission. Chile further submits that the safeguards investigation into goods subject to price bands was initiated in accordance with the notice published by the investigating authority in the Chilean Official Journal on 29 September 1999, which clearly showed that the investigation was initiated on 30 September 1999. This fact is recognized by Argentina in its first written submission.³⁴⁴ On 29 October 1999, the Government of the Argentine Republic became party to the investigation, submitting a document setting out its position and requesting to take part in the public hearing. During the procedure, the Chilean investigating authority held a public hearing on 25 November 1999, as can be seen from the Minutes of Session No. 189. The notice of a public hearing was published in the Official Journal and was contained in Chile's notification to the WTO.³⁴⁵ On 23 November 1999, in a letter from the Technical Secretariat, the Embassy of Argentina was given confirmation of the public hearing and asked to confirm whether it would attend, which Argentina did on 24 November. The Argentine Embassy in Chile took part in the hearing and presented its arguments. Its chargé d'affaires *ad interim*, a Minister and two Counsellors were present. A representative of the Argentine Milling Industry Federation and a representative of the Chamber of the Argentine Oil Industry (CIARA) also participated. Furthermore, Chile states, when the investigating authority decided to examine the request for an extension of the safeguard measures, it announced in the Official Journal³⁴⁶ that a public hearing would be held on Monday, 13 November 2000.³⁴⁷

³⁴¹ See Argentina's First Written Submission, paras. 84-86.

³⁴² See Argentina's Rebuttal, para. 109.

³⁴³ Chile refers to para. 66 of Argentina's First Written Submission.

³⁴⁴ *Ibid.*, para. 68.

³⁴⁵ Chile refers to G/SG/N/6/CHL/2.

³⁴⁶ Chile refers to the Official Journal of 4 November 2000.

Chile submits that the following took part in the public hearing before the investigating authority and put forward their arguments: the Argentine Embassy in Chile, represented by a Minister and a Counsellor; the Attorney for Molinos Río de la Plata (Argentine oil exporter); the Argentine Cereals Exporters Center; and the Executive Director of the Argentine Milling Industry Federation.³⁴⁸ Chile therefore 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 no non-confidential summaries of confidential information because there was no confidential information discussed. Consequently, Chile submits, the situation envisaged in paragraph 1 of Article 3 of the Agreement on Safeguards did not exist, as Argentina claims. Chile adds that the information on these products is fully available to the public through an official body, the Office of Agricultural Studies and Policies (ODEPA), which keeps public statistics for the agricultural sector that are used by the Commission. Chile claims that Argentina also had an opportunity for access to the relevant file, which contained the submissions by other interested parties, and examined and obtained copies of all the information it requested.³⁵¹

(d) Whether Chile Failed to Publish a Report Setting Forth Reasoned Conclusions and Findings

4.150 **Argentina** claims that Chile has infringed Articles 3.1 and 4.2(c) of the Agreement on Safeguards on the grounds that the competent Chilean authorities did not publish a report setting forth their reasoned conclusions and findings reached on issues of fact and law.

4.151 According to **Argentina**, Articles 3.1 and 4.2(c) lay down very specific requirements concerning the content of the determination that the competent authorities must publish. Article 3.1 stipulates that "... the competent authority shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." whilst Article 4.2(c) refers to Article 3.1, and lays down the additional requirement that the "competent au-

³⁴⁷ Chile submits that this was notified to the WTO on 9 November 2000 in document G/SG/N/10/CHL/1/Suppl.2.

³⁴⁸ Session of the Commission on Distortions No. 223 of 13 November 2000.

³⁴⁹ See Chile's First Written Submission, paras. 126-133.

³⁵⁰ See Chile's response to question 17 of the Panel.

³⁵¹ See Chile's First Written Submission, paras. 134-137.

thorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined". Argentina submits that the Appellate Body in *Argentina – Footwear (EC)*³⁵² and *US – Wheat Gluten*³⁵³ has ruled that the national authorities must explain 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.³⁵⁴

4.152 **Argentina** submits that the verb "to publish" implies "to make public" through a report, published in some official medium, setting forth the investigating authority's findings of fact and law in accordance with Article 3.1 of Agreement on Safeguards. The Agreement on Safeguards uses the verb "publish" instead of referring to a "public" document. There may be documents which by their nature are "public", and hence accessible to anyone, but which are not "published" in any medium – an act designed to facilitate consultation of the said document.³⁵⁵

4.153 **Argentina** argues that the Chilean Commission did not publish any report showing that it had examined all of the relevant information and including either a demonstration of the critical circumstances justifying the provisional measure or an examination of the relevant information and of 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 Agriculture's application for the initiation of an investigation, but was apparently never verified by the Commission and there was never the slightest confirmation of its accuracy.

4.154 In fact, **Argentina** claims, the Commission never submitted any review or analysis of the documentation backing its estimates, nor did it seek out any evidence that might shed doubt on its information or seriously consider the arguments of the parties in evaluating the imports or the state of the domestic industry. On these grounds Argentina submits that the Commission of Chile infringed Articles 3.1 and 4.2(c) of the Agreement on Safeguards, and failed to provide a reasoned and adequate explanation of how the facts support their determination. Argentina contends that neither the investigation conducted by the Commission, nor its findings and conclusions of fact and of law can back any safeguard measure, either provisional or definitive - as originally applied - or their identical ex-

³⁵² WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body report.

³⁵³ WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body report.

³⁵⁴ See Argentina's First Written Submission, paras. 87-94 and footnotes 50 and 51.

³⁵⁵ See Argentina's response to question 18 (ARG, CHL) of the Panel.

tension.³⁵⁶ In particular, Argentina stresses that the Minutes of the Commission which according to Chile constitute the public official report do not contain any report demonstrating the existence of critical circumstances justifying the provisional measures, nor do they contain an examination of the relevant information and the conclusions concerning increased imports, the like product, the domestic industry, the analysis of the factors, the threat of serious injury, causality and unforeseen developments, either in the case of the provisional measures or in the case of the definitive measures, as required by Articles 3.1 and 4.2(c) of the Agreement on Safeguards.³⁵⁷

4.155 **Chile** submits that, to make the procedure consistent with the provision of the Agreement on Safeguards, what the Commission does is to make the Minutes public, placing them at the disposal of the interested parties once the decree or the excerpt from the resolution, as appropriate, has been published.³⁵⁸ Chile explains that the examination made by the investigating authority, as a whole, as well as its findings and recommendations, are contained in the respective records, which are public. Chile contests Argentina's claim that the investigating authority did not publish any report containing its findings³⁵⁹ and submits that all the Minutes of its sessions are public and that any interested party may obtain a copy of the records.³⁶⁰ In this regard, Chile indicates that the Commission published prior notice in the Chilean Official Journal of both the initiation of the investigation and the various public hearings conducted throughout the course of the investigation. As a result, Chile continues, Argentina had the opportunity to become an interested party to the investigation and thus was able to fully participate in all public hearings related to the safeguard measures. Chile further states that, although Argentina claims that the Commission violated the Agreement on Safeguards by not publishing a single document, the Commission did in fact make available to the public all Minutes from the case which contained the Commission's complete "findings and reasoned conclusions reached on all pertinent issues of fact and law." Moreover, Chile argues, contrary to Argentina's allegations, the data on which these findings were based were all verified with the official records of the National Customs Service, the Central Bank, Reuters and official publications of ODEPA³⁶¹, thereby ensuring the accuracy of the data. Chile also indicates that the Commission made available all Minutes in this case to the public which include the Commission's findings of both fact and law. 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

³⁵⁶ See Argentina's First Written Submission, paras. 91-94.

³⁵⁷ See Argentina's Rebuttal, para. 106.

³⁵⁸ See Chile's response to question 18 (ARG, CHL) of the Panel.

³⁵⁹ Chile refers to para. 92 of Argentina's First Written Submission.

³⁶⁰ Chile refers to Annex 6 to its First Written Submission.

³⁶¹ See Chile's response to question 17 of the Panel.

³⁶² See Chile's First Oral Statement, para. 72.

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 foundation. Chile argues that Argentina notes the existence of "incomprehensible" differences in data but that these are simply the result of the revision and verification of the information between the time the investigation was initiated and the time the measures were adopted because there were marginal corrections to the information on oil imports on the basis of official information from the National Customs Service.³⁶³

4.157 **Argentina** argues that the law establishes seven members of the Commission, two of whom are members of the Central Bank. Moreover, Law 19.612 stipulates that the approval of three quarters of the members of the Commission is required for decisions on safeguards. Argentina submits that, when the Commission of Chile voted to recommend the application of provisional and definitive safeguard measures, the relevant legal Minutes (Minutes of Session Nos. 185 and 193) reveal that the "majority" of the members of the Commission approved the decision, with the representatives of the Central Bank abstaining. Argentina argues that, if one checks the attendance of these sessions as established in the records, given the abstention of the Central Bank representatives, these measures appeared not to have met the requirement of approval by the competent Chilean authority as provided for in Chile's own legislation.³⁶⁴

4.158 **Chile**³⁶⁵ points out that Law No. 19.383, published in the Official Journal of 5 May 1995, introduces an amendment to Article 11 of Law No. 18.525 to allow the participation of a representative of the Ministry of Agriculture in the Commission. Consequently, there are eight, not seven, members of this Commission; Chile assumes that Argentina based its argument on an old text of the Chilean Law, an issue that is relevant because the current Chilean law was duly notified to the WTO on 23 July 1999.³⁶⁶ Regarding the quorum for attendance and voting at sessions Nos. 185 and 193, Chile notes that on both occasions the eight members were present and that the respective votes were taken with the sole abstention of the two members representing the Central Bank, which means that six out of eight members voted in favour of the measure, representing 75 per cent or three quarters. Chile also notes that this is an essential requirement of Chilean

³⁶³ See Chile's First Written Submission, paras. 145-150.

³⁶⁴ See Argentina's First Written Submission, footnote 54.

³⁶⁵ Chile refers to footnote 54 of Argentina's First Written Submission.

³⁶⁶ Chile submits that the updated text of its Law was notified to the WTO in document G/SG/N/1/CHL/2.

law when a proposed safeguard measure exceeds the bound tariff and that these three quarters also constitute a "majority", as shown by the records. Chile therefore considers that the statements by the complainant have no foundation, and this is confirmed by the lack of conviction with which Argentina claims in this connection, that the Chilean measures "appeared not to have met" the legal requirement.³⁶⁷

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 measures³⁷¹, 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 work-

³⁶⁷ See Chile's First Written Submission, para. 139.

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

ing 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 and relevance of the evidence submitted, gathering additional information, clarifying different elements and supplementing the information provided by the parties with information available from other sources. Consequently, Chile submits, the Commission plays a pro-active role in verifying the information supplied by the parties and supplementing it where necessary.³⁷³

(e) Like Product

4.164 **Argentina** claims that Chile has infringed Article XIX:1(a) of the GATT 1994 and Articles 2.1, 4.1(c) and 4.2(a) of the Agreement on Safeguards on the grounds that the competent Chilean authorities failed to define the like product properly.

4.165 **Argentina** submits that, pursuant to all three above-mentioned Articles, it is the "domestic industry" thus defined that must be examined under Article 4.2(a) to determine whether the increase in imports has caused serious injury or threat thereof. In Argentina's view, the Commission failed to identify the like product and did not conduct an analysis of the like product or products. Argentina therefore concludes that the entire analysis of the increase in imports and the determination of threat of serious injury is based on a mistaken premise which is devoid of legal validity.³⁷⁴ Argentina indicates that the Appellate Body has ruled

³⁷² See Chile's Rebuttal, paras. 60-62.

³⁷³ See Chile's Rebuttal, paras. 63-65.

³⁷⁴ See Argentina's First Written Submission, paras. 95-98.

that the wording of Article 4.1(c) is "clear and express" in stating that the term "domestic industry extends solely to the producers ... of the like or directly competitive products."³⁷⁵ It further indicates that the Appellate Body also observed that "[t]he conditions in Article 2.1, therefore, relate in several important respects to the *specific products*. In particular, Argentina argues, 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."³⁷⁶ Argentina submits that the Chilean Commission did not conduct that analysis. In Argentina's view, it is clear that, in this case, there were important elements to be identified concerning the issue of the like product. Argentina quotes the Appellate Body which maintained that "input products can only be included in defining the 'domestic industry' if they are 'like or directly competitive' with the end products".³⁷⁷ Once again, Argentina claims, this analysis did not take place. Argentina also refers to the Appellate Body statement³⁷⁸ whereby "the data before the competent authorities must be sufficiently representative to give a true picture of the 'domestic industry'". Argentina claims that, in this case, there is no way that the Panel could even consider the matter, since no like product was defined, nor were the producers of the like product identified. Thus, the decision does not meet the most elementary requirements of Articles 2.1, 4.1(c) and 4.2(a) of the Agreement on Safeguards.³⁷⁹ Argentina claims that the Commission did not provide a legal analysis of how it arrived at these categories and how it determined that they constituted the "domestic industry that produces like or directly competitive products" in accordance with Article 2.1 of the Agreement on Safeguards.

4.166 **Argentina** submits that, as regards edible vegetable oils, the Chilean Commission provides no reasonable explanation of why it appears to have grouped together colza (rape) seeds and various types of edible oils to form a single "product" for its investigation. According to Argentina, Chile is applying its price band to 25 different tariff items of the Harmonized System for edible vegetable oils - "products" which range from olive oil to palm oil, at various stages of processing (crude and refined). Argentina claims that, of these 25 items, Chile only records imports 21 different types of oil. 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

³⁷⁵ Argentina refers to the Appellate Body report on *US - Lamb* (WT/DS177/AB/R, WT/DS178/AB/R) adopted on 16 May 2001, para. 84.

³⁷⁶ *Ibid.*, para. 86.

³⁷⁷ *Ibid.*, para. 90.

³⁷⁸ *Ibid.*, para. 132.

³⁷⁹ See Argentina's First Written Submission, paras. 99-101.

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 that it is a fact that the categories of products involved correspond to products in the PBS which, in turn, was established some time ago and grouped categories of products that were directly competitive. In other words, 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. Nevertheless, Chile claims, as can be seen from the records, the

³⁸⁰ See Argentina's First Written Submission, paras. 104-106.

³⁸¹ Argentina quotes document G/SG/N/8/CHL/1, subpara. 1(iv).

³⁸² See Argentina's First Written Submission, para. 107.

³⁸³ See Argentina's First Written Submission, para. 108.

³⁸⁴ Chile refers to para. 99 of Argentina's First Written Submission.

³⁸⁵ Chile refers to para. 98 of Argentina's First Written Submission.

Commission reaffirmed the analysis in that respect. Chile has specified each and every one of the products involved in the investigation and in the subsequent application of measures through its tariff position, its SACH code, Chile's harmonized system, taking into account as well, the explanatory notes to this system.³⁸⁶

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 repeats³⁸⁷ 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 measure corresponded exactly to the categories used for the price band system, thereby assuring that the categories were comprised of only directly competitive products. Moreover, Chile argues, the Commission did an independent analysis

³⁸⁶ See Chile's First Written Submission, paras. 151-156.

³⁸⁷ Argentina refers to para. 153 of Chile's First Written Submission.

³⁸⁸ Argentina refers to para. 155 of Chile's First Written Submission.

³⁸⁹ See Argentina's Rebuttal, paras. 115-118.

of both wheat and wheat flour as well as the category comprising edible vegetable oils.³⁹⁰

4.172 As regards wheat and wheat flour, **Chile** explains that, in view of the inherent nature of the products under investigation, domestic wheat was considered to be a like product to imported wheat since the imports correspond to the same product at the agricultural production level. It indicates that the same conclusion was reached for flour, which would be a like product to imported flour. In this connection, Chile explains, the Commission also took account of the fact that flour constitutes an alternative way of importing wheat if the import of wheat as such proves to be more costly or subject to a higher tariff: imported flour is directly competitive with domestic wheat in view of the fact that the latter is used almost exclusively for producing flour.³⁹¹ Thus, Chile argues, the Commission found that wheat flour has a high rate of substitutability with wheat and thus the two products are directly competitive.³⁹² Chile contests Argentina's statement that the Commission does not provide any analysis to determine which products are like and directly competitive with imports of wheat flour.³⁹³ Chile argues, establishing a safeguard for wheat and failing to do so for flour would be perfectly useless because imports would then tend to be in the form of flour. This was why a price band 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

³⁹⁰ See Chile's First Oral Statement, para. 75.

³⁹¹ See Chile's response to question 27(a) (CHL) of the Panel.

³⁹² See Chile's First Oral Statement, para. 75.

³⁹³ Chile refers to para. 107 of Argentina's First Written Submission.

³⁹⁴ Chile refers to para. 108 of Argentina's First Written Submission.

³⁹⁵ See Chile's First Written Submission, paras. 157-159.

³⁹⁶ Chile refers to para. 105 of Argentina's First Written Submission.

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 as a percentage of domestic production."⁴⁰² Argentina argues that the increase in imports has to have already occurred when the decision is made. In this regard, it refers to the Panel report in *Argentina – Footwear (EC)* which maintained that "... if only a threat of increased imports is present, rather than actual increased imports, this is not sufficient determination of the existence of a threat of serious *injury* due to a threat of increased *imports* would amount to a determination based on allegation of conjecture rather than one supported by facts as required by Article 4.1(b)"⁴⁰³ According to Argentina, the report of the Panel in *US –*

³⁹⁷ See Chile's First Written Submission, paras. 160-162 and Chile's First Oral Statement, para. 75.

³⁹⁸ Argentina refers to para. 75 of Chile's First Oral Statement.

³⁹⁹ See Argentina's Rebuttal, para. 119-120.

⁴⁰⁰ See Argentina's First Written Submission, para. 109.

⁴⁰¹ Argentina refers to the Panel report on *Argentina – Safeguard Measures on Imports of Footwear ("Argentina – Footwear (EC)")*, (WT/DS121/R) adopted on 12 January 2000, as modified by the Appellate Body report, para. 8.138.

⁴⁰² *Ibid.*, para. 8.141.

⁴⁰³ *Ibid.*, para. 8.284.

Wheat Gluten confirmed this general notion, noting that Article XIX:1(a) and Article 2.1 of the Agreement on Safeguards contains "the initial threshold requirement that there be an increase in imports."⁴⁰⁴

4.177 **Argentina** also refers to *Argentina – Footwear (EC)*, where the Appellate Body established that the examination of the increase in imports must include an analysis of the trends over the period of investigation, and that recent imports must also be examined.⁴⁰⁵ Argentina reminds that the Appellate Body maintained that "not just *any* increased quantities of imports will suffice." ... "[T]he increase in imports must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively to cause or threaten to cause 'serious injury'.⁴⁰⁶ Argentina claims that Chile has not demonstrated a real increase in imports. Argentina submits that, in fact, the Commission does not bother with the question of whether imports increased. On the contrary, Argentina argues, it simply reaches an unfounded conclusion: "There were noticeable 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 forecast of a greatly accelerated increase in imports that would occur (or has already occurred) unless the full duties specified in the bands are applied. ..."⁴⁰⁷ Argentina further argues that, even if this analysis had any validity, *quod non*, the Commission did not provide objective evidence of its effect, nor did it specify to what degree imports would have increased. Argentina submits that an analysis of this type does not provide a sufficient basis for concluding that imports were in "increased" quantities, as required by Articles 2.1 and 4.2(b) of the Agreement on Safeguards.⁴⁰⁸ Argentina concludes that what counts in deciding on the application of safeguard measures being a demonstration of the actual increase in imports and affirms that Chile provided no such demonstration either for wheat, or for wheat flour, or for edible vegetable oils.⁴⁰⁹

4.178 **Argentina** considers that the decision of the Commission to recommend the extension of the measures (Minutes of Session No. 224) contains some data in addition to that contained in the related documents. However, Argentina argues, the new data on which the extension is based suffers from the same shortcomings as the original investigation. Argentina submits that the Chilean Commission failed to demonstrate that imports were in such increased quantities as to justify the imposition of a safeguard measure. For all of these reasons Argentina concludes that the Chilean Commission failed to demonstrate that edible vegeta-

⁴⁰⁴ Argentina quotes the Panel report on *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities ("US – Wheat Gluten")*, (WT/DS166/R) adopted on 19 January 2001, as modified by the Appellate Body report, para. 8.31.

⁴⁰⁵ Argentina quotes the Appellate Body report on *Argentina – Footwear (EC)*, (WT/DS121/AB/R) adopted on 12 January 2000, para. 129.

⁴⁰⁶ *Ibid.*, para. 131.

⁴⁰⁷ Argentina quotes the notification on threat of serious injury, G/SG/N/8/CHL/1, item 2 *in fine*.

⁴⁰⁸ See Argentina's First Written Submission, paras. 110-115.

⁴⁰⁹ See Argentina's Second Oral Statement, para. 44.

ble oils, wheat or wheat flour were being imported in increased quantities, absolute or relative.⁴¹⁰

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. 224⁴¹¹ 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 measure requires that the competent authority find for a second time that there is an increase in imports to justify an extension. Chile argues that, taken literally, Article 7.2, refers to Articles 2, 3, 4 and 5, however as indicated earlier it refers only to procedural aspects regulated by those Articles and not to substantive aspects. Chile further argues that, if Argentina were right, there would be an essential contradiction between the requirements laid down in the last part of paragraph 2 and the requirement of a further increase in imports established in Article 2. Chile contends that, if one assumes that prior to the adoption of an extension, there must be a definitive measure whose object, *inter alia*, is to counteract the threat of injury presented by an increase in imports, there would be no reason for requiring evidence of the fact that the domestic industry is adjusting. Chile wonders how would it be possible for there to be any adjustment to a further increase in imports if the definitive measure were still in force.⁴¹³

4.181 In response to the above argumentation, **Argentina** submits that Minute 193 – which provides the outcome of the Commission's investigation for the definitive safeguard measures – is not WTO-consistent since, by not following the procedural requirements established in the Agreement on Safeguards, it does not meet any of the substantive conditions, compliance of which is necessary for any safeguard measure in order for it to be lawful. Therefore, it affords no legal basis for the application of the definitive safeguard measures. As a result, Minute 224, which is legally premised on Minute 193, can not possibly justify the extension of such WTO-inconsistent safeguard measures. Thus, the measures, whether as originally applied or as extended, are WTO-inconsistent. In addition, Argentina also maintains that Minute 224 itself violates various provisions of the Agree-

⁴¹⁰ See Argentina's First Written Submission, paras. 116-118.

⁴¹¹ Chile quotes the Minutes No. 224, II.(i) of 17 November 2000.

⁴¹² See Chile's First Written Submission, para. 170.

⁴¹³ See Chile's Second Oral Statement, paras. 61-63.

ment on Safeguards as previously elaborated in various submissions by Argentina.⁴¹⁴

(i) Edible Vegetable Oils

Initiation of the Investigation

4.182 **Argentina** submits that, with respect to oils, Minutes of Session No. 181 of the Commission states that: "Imports of oils pursued a growth trend, increasing from 82,000 tons in 1990 to 171,000 tons in 1998, reflecting a growth of 110 per cent for the period." Argentina considers that it is easy to understand the irrelevance of the data evaluated. In this regard, Argentina quotes the Appellate Body in *Argentina – Footwear (EC)*:⁴¹⁵ "... the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points)". Argentina submits that in this case, when Chile decided to initiate the safeguards investigation, it did so on the basis of an "end point to end point" analysis only, considering the increase in imports between 1990 and 1998, without analysing the rate and amount of the increase in imports, in absolute terms and as a percentage of domestic production. Consequently, Argentina claims, the analysis carried out by the Chilean authorities is inconsistent with the obligations contained in Article 4.2 (a). Argentina explains that this was the Panel's interpretation in *Argentina – Footwear (EC)*, and it was confirmed by the Appellate Body, which stated with respect to the increase in imports in absolute terms that it is not enough to carry out an analysis from end point to end point, rather it is necessary to consider the intervening trends (up or down and the importance of mixing them to determine an increase in the amount) (rate and amount).⁴¹⁶ According to the interpretation of the requirements made by the Appellate Body in the same case, Argentina submits that "the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'".⁴¹⁷ Argentina further submits that it is incomprehensible that Chile should have presented different data in Minutes of Session No. 181 from the data it provided in Minutes of Session No. 224 for imports of oils between 1990 and 1998 or, at least, there is no explanation of this difference in figures.⁴¹⁸

4.183 **Chile** contests Argentina's statement whereby Chile decided to initiate the safeguards investigation into edible vegetable oils only on the basis of an "end point to end point" analysis (for the years 1990 and 1998).⁴¹⁹ Chile notes that, when determining the measures, the Commission's analysis did not only consider

⁴¹⁴ See Argentina's response to question 50 of the Panel.

⁴¹⁵ Argentina quotes the Appellate Body report on *Argentina – Footwear (EC)*, (WT/DS121/AB/R) adopted on 12 January 2000, para. 129.

⁴¹⁶ *Ibid.*, para. 129.

⁴¹⁷ Argentina quotes the Appellate Body report on *Argentina – Footwear (EC)*, (WT/DS121/AB/R) adopted on 12 January 2000, para. 131.

⁴¹⁸ See Argentina's First Written Submission, paras. 119-125.

⁴¹⁹ Chile refers to Argentina's First Written Submission, para. 121.

the most recent trend but also developments and other factors that had affected the situation of such imports, as can be seen from Minutes of Session No. 193. Chile also contests Argentina's claim regarding "incomprehensible" differences in the data (paragraph 125), which in any event are deemed to be marginal, can be explained as a result of the revision and verification of the information provided by Chile.⁴²⁰

Provisional Safeguards

4.184 **Argentina** submits that, regarding imports, Minutes of Session No. 185 of the Commission merely states that "... the Commission took into account the increase that would have occurred during the agricultural season 1999/2000 on the hypothesis of the bound import tariff of 31.5 per cent instead of the duties applicable under the price band. On the basis of this information provided in the application, the Commission estimated that the increase in imports would correspond, at least, to the volume needed to cover the production deficit resulting from the decrease in production under the related headings". In Argentina's view, the Minutes did not present any information with respect to an increase in imports in absolute terms or relative to domestic production and on whether the imports were under such conditions as to cause or threaten to cause serious injury, so that Chile once again failed to comply with its obligations under Articles 2.1 and 4.2 (a).⁴²¹

4.185 **Chile** disagrees with Argentina's claim and refers to the import statistics before the Commission, updated in the Annex to Minutes of Session No. 224. Chile explains that, under the tariff heading corresponding to mixtures of oils (1517.9000), increasing quantities of edible vegetable oils started to be imported. This situation led to an increase of 45 per cent in imports of this product in 1999 and an increase of 431 per cent in 2000. Consequently, in 2000, 70 per cent of the imports of edible vegetable oils into Chile were classified as "mixtures" of oils. In Chile's view, this is relevant because, for example, between 1990 and 1996, this share did not exceed 0.4 per cent. The dramatic 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

⁴²⁰ See Chile's First Written Submission, paras. 172,-173.

⁴²¹ See Argentina's First Written Submission, paras. 126-127.

⁴²² See Chile's First Written Submission, paras. 167-169.

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 more-

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.

over was clearly downward during the period 1998-1999 (the most recent), both as regards the headings subject to safeguards and the others.⁴²⁶

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 sources⁴²⁷ 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

⁴²⁶ See Argentina's First Written Submission, paras. 131-133.

⁴²⁷ Argentina refers to data provided by the Argentine Embassy in Chile, based on Chilean customs figures, published by the firm "Intelecta".

⁴²⁸ See Argentina's First Written Submission, paras. 134-140.

⁴²⁹ Chile quotes the Minutes No. 224, II.(i) of 17 November 2000.

conclusion is not based on concrete statistical data, as can be 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 statement⁴³¹ 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

⁴³⁰ See Argentina's First Written Submission, paras. 141-142.

⁴³¹ Chile refers to paras. 141-142 of Argentina's First Written Submission.

⁴³² See Chile's First Written Submission, paras. 174-179.

⁴³³ See Argentina's First Written Submission, para. 143.

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 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

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.

⁴³⁷ Argentina refers to the Panel report on *Argentina – Footwear (EC)*, (WT/DS121/R) adopted on 12 January 2000, as modified by the Appellate Body report, para. 8.284.

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 peaking in 1996; the volume of imports of wheat flour fell by 21 per cent in 1998 compared with 1997; imports fell by a further 11 per cent during the first nine months of 2000 compared with the same period in 1999.⁴³⁸

(iii) Wheat

Initiation of the Investigation

4.197 **Argentina** contends that, as far as wheat is concerned, it can be seen that Chile decided to initiate the safeguards investigation by means of Minutes of Session No. 181 on the basis of partial data that do not give an overall view of the trend, particularly since the imports peaked in 1996 and this did not occur subsequently.⁴³⁹

Provisional Safeguards

4.198 **Argentina** submits that, with regard to wheat imports, Minutes of Session No. 185 do not provide any information either to justify the application of provisional safeguard measures to imports of wheat.⁴⁴⁰

Definitive Safeguards

4.199 **Argentina** submits that, as regards imports of wheat, Minutes of Session No. 193 indicate that, although there was an increase in imports from 1993 to 1996, these fell in 1997 and only rose by 6 per cent in 1998 compared with the previous year. They also indicate that, over the first ten months of 1999, imports increased by 281 per cent in comparison with the same period the previous year. Argentina further submits that, in the publication by ODEPA entitled *El Pulso de la Agricultura* of February 1999, No. 27 there are specific references to the seriousness of the drought in 1998/1999. According to this publication, 55 per cent of the agricultural communities were in a state of alert. Argentina claims that, in its report on the first half of 1999, the Chilean Ministry of Agriculture stated that the drought during the 1998/1999 season had led to a decrease in the area under cultivation and a fall in wheat yields and production throughout Chile. Consequently, Argentina submits, it is clear that this factor, which was not taken into account in the relevant Record, had a decisive effect on domestic production of wheat and possibly on other products subject to the safeguard, and, as a result, on imports. Argentina indicates that the section on increased imports in the notifica-

⁴³⁸ See Argentina's First Written Submission, paras. 151-155.

⁴³⁹ See Argentina's First Written Submission, para. 156.

⁴⁴⁰ See Argentina's First Written Submission, para. 157.

tion to the WTO 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. 193⁴⁴² 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 figures given do not suffice for the purpose of deciding whether or not to extend the safeguard measure and, in light of the interpretation given by the panel in *Argentina - Footwear (EC)* concerning the increase in imports in absolute terms to the effect that an end point to end point comparison does not suffice and that intervening trends (up or down and the importance of mixing them in order to determine an increase in the amount), the rate and amount, within a fixed period of investigation, must be analysed, which is not the case in this instance, serious doubts are cast on the consistency and coherence of the figures. Argentina therefore claims that it does not suffice to consider different figures for incomplete periods in some cases or figures that are not viewed as a whole, because this deprives the period of any relevance. Argentina further argues that, bearing in mind that in the same *Argentina - Footwear (EC)* case the Appellate Body considered that the increase in imports must have been recent enough, sudden enough, sharp enough and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury", the decrease of 18 per cent in imports of wheat during the most recent period is decisive for invalidating the application of the measure.⁴⁴⁵

⁴⁴¹ See Argentina's First Written Submission, paras. 158-159.

⁴⁴² Chile quotes the Minutes No. 193 of 7 January 2000.

⁴⁴³ See Chile's First Written Submission, para. 164.

⁴⁴⁴ See Argentina's Rebuttal, para. 122.

⁴⁴⁵ See Argentina's First Written Submission, paras. 160-163.

4.203 **Argentina** explains that, regarding wheat imports, the Minutes include a Table 1 with figures which, on the one hand, do not show a growing trend in imports of wheat and, on the other, indicate that the trend is to say the least erratic. Consequently, Argentina submits as particularly serious, the fact that Minutes of Session No. 224, which extend the safeguard measures for one year, not only fail to record an increase in imports of wheat but acknowledge a fall of 18 per cent in the most recent period. According to Argentina, Minutes of Session No. 224 and the notification of the extension also contain figures on imports of "other wheat", which reached a peak in 1996 and then declined. Argentina argues that, although imports increased in 1999, this increase has been estimated on the basis of historically low levels such as those in 1997 and 1998. Imports fell again in the year 2000. Argentina claims that the section on wheat imports in the notification to the WTO dated 22 December 2000 concerning the extension of the existing measure repeats the wording in Minutes of Session No. 224 of the Commission: "[d]espite the fact that wheat imports (in tons) fell by 18 per cent in the period January to September 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." Argentina questions the relevance this statement has in support of the decision to apply a safeguard measure. Argentina indicates that it has also obtained figures concerning Chilean imports of wheat (tariff heading 1001.9000 - Wheat, other) from other sources⁴⁴⁶ for the last three full years. According to Argentina, these figures clearly show the fall in wheat imports in the year 2000. In any event, Argentina states, as far as this product is concerned, the impact of the drought in 1998/1999 must be taken into account and yet was not considered by the Chilean authorities under "other factors".⁴⁴⁷

(g) Evaluation of all Relevant Factors

4.204 **Argentina** contends that the competent Chilean authorities 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. In particular, Argentina considers that the determination of threat of serious injury made by the Chilean authority applying the measure is not supported by the evidence obtained during the investigation. Argentina maintains that the determination of threat of serious injury by the Commission is inconsistent because of two instances of non-compliance: (i) contrary to their obligations under Article 4.2 of the Agreement on Safeguards, the Chilean authorities did not evaluate all the factors related to the situation of the industry; (ii) the findings and conclusions of the Commission regarding the factors investigated were not substantiated by evidence.⁴⁴⁸

⁴⁴⁶ Argentina refers to data provided by the Argentine Embassy in Chile, based on Chilean customs figures, published by the firm "Intelecta".

⁴⁴⁷ See Argentina's First Written Submission, paras. 164-172.

⁴⁴⁸ See Argentina's First Written Submission, paras. 173-176.

4.205 **Argentina** notes that neither the Minutes of the Commission nor the notifications to the WTO contain any analysis of each of the factors specified in Article 4.2(a) during the investigation period, but only isolated data referring to some of the factors related to the appraisal of an alleged threat of injury. Argentina explains that, for example, neither the Minutes nor the notifications contain any evaluation of the rate and amount of the increase in imports, the share of the domestic market taken by imports, nor any figures regarding sales, productivity, capacity utilization, profits and losses, employment or any other relevant factor concerning the situation of the domestic industry. In Argentina's view, this does not mean that the competent authority must confine itself to examining the factors listed in the Agreement on Safeguards, but it does mean that, at the very least, it should examine these factors, because Article 4.2(a) uses the words "in particular" when referring to them. For example, Argentina adds, in addition to the aforementioned profitability (profits and losses), the competent authority should have examined cash flows in the major firms in this sector. Argentina submits that the investigation carried out by the Commission did not comply with the provisions of the Agreement on Safeguards because it did not evaluate all relevant factors and did not undertake a substantive analysis of each factor. Argentina suggests that the Commission may have simply accepted the information on the industry's indicators submitted by the petitioner, in this particular case the Ministry of Agriculture. Argentina considers that the Final Determination does not really contain data but only some partial statistics for the three products mentioned therein. It further explains that it is only possible to extract some isolated data that are not very clear because there is no sequential information of the type needed to undertake comparisons. In Argentina's opinion, it is not possible either to identify the source of the statistics on which the investigation was based nor the process by which the statistics were verified and re-evaluated in terms of their reliability. Furthermore, Argentina affirms, the data themselves appear to be based on some type of "forecast" because the text is written in the conditional tense. Argentina contends that, it has not proved possible to identify any analytical basis to substantiate the forecast. Argentina also contends that the comparison between the periods 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

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.

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 Chile⁴⁵² 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 does not determine nor specify what is the proper method for deciding on the relevance of the factors, so Argentina's

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.

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

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.

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 domestic market taken by imports, changes in the level of sales, productivity, capacity utilization, profits and losses, *inter alia*.⁴⁶⁶ In Argentina's view, although the extension of the safeguard measure, reported in Minutes of Session No. 224 and in the notification of extension, includes some additional data, the following points should be made: Firstly, the data are not analysed in the aforementioned Record; secondly, the figures contained in the tables attached to the Minutes imposing the measure in fact invalidate any possible determination of threat of injury. For example, Argentina explains, prices appear to have risen significantly between 1996 and 1999 in terms of pesos and then stabilized during the period examined for the year 2000.⁴⁶⁷

4.213 **Argentina** indicates that Table 16 of Minutes of Session No. 224 recommending the extension contains figures relating to colza (rape) and sunflower, in terms of area sown, harvest and yield. In Argentina's opinion, it is not clear why these seeds should be representative of the edible oils industry because no explanation of their relevance is given. Argentina submits that, in any event, it can easily be seen that the total number of hectares sown and harvested increased sharply in the period beginning in 1998, and sowing increased threefold between 1997 and 1999, returning to the 1998 level in the year 2000, although the figure was still higher than that for the previous years, and that harvests reached their maximum level in 1999 following an increase in 1998. In terms of employment, Argentina adds, the figures presented relate solely to the seed sector and there is no information at all on the milling and refining sector, which raises doubts as to their relevance. Nevertheless, Argentina argues, the number of people employed increased in 1998 and 1999.⁴⁶⁸

4.214 **Chile** contests the above statement from Argentina that the data provided "in fact invalidate any possible determination of threat of injury."⁴⁶⁹ In Chile's view, Argentina's assertion regarding rising prices is based on only one of the three columns in Table 12, attached to Minutes of Session No. 224 (for the purpose of determining the price in question), and is precisely the column that does

⁴⁶⁶ Argentina refers to Minutes No. 193, p. 4. See also the notification of threat of serious injury, G/SG/N/8/CHL/1, pp. 1 and 2.

⁴⁶⁷ See Argentina's First Written Submission, paras. 183-187.

⁴⁶⁸ See Argentina's First Written Submission, para. 188.

⁴⁶⁹ Chile refers to para. 187 of Argentina's First Written Submission.

not contain any adjustment for national currency. Chile argues that Argentina does not refer to the other prices shown. In column two of this table, Chile submits, it is clearly indicated that the prices in United States dollar terms decreased over the same period.⁴⁷⁰

4.215 In response to a question by the Panel, **Chile** explains that, in the case of the oil industry, the relevant factors analysed by the Commission were the rate and amount of the increase in imports, the share of the domestic market taken by increased imports, production (in the case of oils, only production information was available, which in any case is similar to the level of sales), capacity utilization, and profits and losses. Domestic prices were also evaluated. Chile also indicates that no information was available concerning productivity and employment in the oils industry.⁴⁷¹

4.216 With respect to Chile's reply to question 21 of the Panel regarding the factors that it investigated, **Argentina** argues that, apart from the fact that it is impossible to find any reference in any of the Records to the share of the market taken by imports or changes in the level of sales, for example, it must be stressed that the findings and conclusions of the Commission were not supported by evidence.⁴⁷²

4.217 In reference to the above argument on lack of information on productivity and employment, **Argentina** claims that Chile is contradicting itself since the Commission, having stated that it did not 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

⁴⁷⁰ See Chile's First Written Submission, para. 189.

⁴⁷¹ See Chile's response to question 21(a) (CHL) of the Panel.

⁴⁷² See Argentina's Rebuttal, para. 130.

⁴⁷³ See Argentina's Rebuttal, para. 133.

⁴⁷⁴ Argentina refers to Minutes No. 193, p. 4.

⁴⁷⁵ Argentina refers to Minutes No. 224, notification of extension, G/SG/N/14/CHL/1, p. 16, Table 10.

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 shows that the sector not only increased production but also productivity. Argentina further submits that, although the aforementioned reduction occurred in 1999, in 2000 the sown area, harvests and yield all increased. Although in historic terms annual variations are quite normal and decreases in one year are followed by increases, Argentina argues, the years 1997 and 1998 appear to have been years of strong growth 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

⁴⁷⁶ See Argentina's First Written Submission, paras. 191-193.

⁴⁷⁷ See Argentina's First Written Submission, paras. 194-197.

⁴⁷⁸ See Argentina's First Written Submission, paras. 198-200.

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 given by Chile to question 21, Argentina highlights its inconsistency with the answer given by Chile to question 35, since, according to Argentina, in the first one Chile states that the Commission on Distortions analysed the rate and amount of the increase in imports in absolute and relative terms, while in the second one Chile points out that the Commission focused its analysis of imports on their evolution in absolute terms, without mentioning where that analysis could be found in the Minutes of the Commission.⁴⁸¹

(h) Threat of Injury

4.223 **Argentina** claims that the Chilean authorities did not prove 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.

4.224 **Argentina** elaborates on the existing case law of the Appellate Body. In this regard, it indicates that the Appellate Body stated that, in making a determination of threat of injury, the concept of "serious injury" was essential and panels must be mindful of the very high standard of injury implied by these terms⁴⁸² and that "... there must be a high degree of likelihood that the anticipated serious

⁴⁷⁹ See Chile's response to question 21(a) (CHL) of the Panel.

⁴⁸⁰ See Argentina's Rebuttal, paras. 131-132.

⁴⁸¹ See Argentina's Rebuttal, para. 134.

⁴⁸² Argentina refers to the Appellate Body report on *US - Lamb*, (WT/DS177/AB/R, WT/DS178/AB/R) adopted on 16 May 2001, para. 126.

injury will materialize in the very near future".⁴⁸³ In Argentina's view, the information submitted by the Commission does not, however, define the extraordinary circumstances that would justify imposition of a safeguard measure. Argentina indicates that, as regards the period of review for the evaluation of the relevant factors when determining threat of injury, the Appellate Body has ruled that it must be determined "... whether there is an appropriate temporal focus for the competent 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 imminent", according to Article 4.1(b) of the Agreement on Safeguards. It further submits that Article 2.1 of the Agreement on Safeguards, when referring to an increase in imports (in absolute or relative terms), also indicates that such imports must be "under such conditions as to cause or threaten to cause serious injury to the domestic industry ...". Chile argues that the Chilean authorities followed an analytical forward-looking approach based on the facts when

⁴⁸³ *Ibid.*, para. 125.

⁴⁸⁴ *Ibid.*, para. 127.

⁴⁸⁵ *Ibid.*, para. 137.

⁴⁸⁶ See Argentina's First Written Submission, paras. 202-207.

⁴⁸⁷ See Argentina's First Written Submission, paras. 208-213.

determining the threat of serious injury. In this regard, Chile refers to the analysis of the "threat of injury" done by the Appellate Body in the United States – Lamb Meat where it said that "this term is concerned with 'serious injury' which has not yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty"⁴⁸⁸ and emphasized that "in order to constitute a 'threat', the serious injury must be 'clearly imminent'. The word 'imminent' relates to the moment in time when the 'threat' is likely to materialize".⁴⁸⁹ Chile further submits that the Appellate Body later states that "as facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts. There is, therefore, a tension between a future-oriented 'threat' analysis, which, ultimately, calls for a degree of 'conjecture' about the likelihood of a future event, and the need for a fact-based determination ... Thus, a fact-based evaluation, under Article 4.2(a) of the Agreement on Safeguards must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future."⁴⁹⁰ 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.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

⁴⁸⁸ Chile quotes the Appellate Body report on *US – Lamb*, (WT/DS177/AB/R, WT/DS178/AB/R) adopted on 16 May 2001, para. 125.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*, para. 136.

⁴⁹¹ See Chile's First Written Submission, paras. 190-195.

⁴⁹² See also Chile's First Oral Statement, para. 79.

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 record⁴⁹⁴ 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 Chile⁴⁹⁶, 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 statement⁴⁹⁷ 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 before the Panel, as a justification of its violation of Article II:1(b) of the GATT 1994, the application of safeguard measures, while on the other hand, it is trying to justify the non existence of imports in such quantities and the absence of evidence of threat of injury by pointing to the existence of the price band system which it maintained in violation of Article 4.2 of the Agreement on Agriculture.⁴⁹⁸

(i) Causal Link

4.229 **Argentina** maintains 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

⁴⁹³ See Chile's First Written Submission, paras. 196-199.

⁴⁹⁴ See Chile's First Oral Statement, para. 79.

⁴⁹⁵ See Chile's response to question 22(a) (CHL) of the Panel.

⁴⁹⁶ Argentina refers to para. 79 of Chile's First Oral Statement.

⁴⁹⁷ Argentina refers to Chile's response to question 22(a) (CHL) of the Panel.

⁴⁹⁸ See Argentina's Rebuttal, paras. 137-142.

threat of injury to the domestic industry. Argentina also considers that Chile 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 inasmuch as it did not establish any causal link between the existence of factors other than the increase in imports which at the same time were causing injury to the domestic industry.⁴⁹⁹

4.230 **Argentina** contends that, in this case, contrary to what is required in the above-mentioned Articles, there was no evidence of an increase in imports or threat of serious injury. Argentina indicates that the Appellate Body Report in *Argentina – Footwear (EC)* stated that a causal link cannot exist if there is no increase in imports or serious injury.⁵⁰⁰ However, in order to conclude its examination of the inconsistencies in the findings of the Commission, Argentina also considers that there is no evidence of the existence of a causal link.⁵⁰¹

4.231 As far as the determination of a causal link is concerned, **Argentina** notes first and foremost that the alleged threat of serious injury to the domestic industry evaluated by Chile is not based on a threat caused by increased imports but is related to Chile's obligation in the WTO to apply the bound tariff of 31.5 per cent. Argentina indicates that this is specifically stated in Minutes of Session No. 181 of the Commission, which reads: "[t]he quantification of 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". Likewise, Argentina contends, Minutes of Session No. 185 state that: "[r]egarding imports, the Commission took into account the increase that would have occurred during the 1999/2000 agricultural season on the hypothesis of application of the bound import tariff of 31.5 per cent instead of the duties applicable under the price band." Argentina also refers to Minutes of Session No. 224 in order to claim that this reconfirms that "[i]n examining imports, the Commission took into account the fact that, for each of the products investigated, the normal operation of the price bands had been decisive in curbing an increase in imports and, consequently, the trend in imports cannot be analysed without taking this factor into account ...". In Argentina's view, this clearly shows that it was not increased imports that led to the application and extension of the safeguard measures but the hypothesis of application of the bound tariff.⁵⁰²

4.232 **Argentina** fails to understand how a simple statement such as "given the recent and future situation of international prices ..."⁵⁰³, without any analytical support, can constitute the basis for determining the existence of a causal link. Argentina affirms that Chile failed to comply with its obligations under Articles 4.2(b) and 2.1 of the Agreement on Safeguards by not establishing a causal link

⁴⁹⁹ See Argentina's First Written Submission, paras. 238-239.

⁵⁰⁰ Argentina quotes the Appellate Body report on *Argentina – Footwear (EC)*, (WT/DS121/AB/R) adopted on 12 January 2000, para. 145.

⁵⁰¹ See Argentina's First Written Submission, para. 217.

⁵⁰² See Argentina's First Written Submission, paras. 218-222.

⁵⁰³ Argentina refers to Minutes No. 224, p. 5, para. 3.

between the alleged increase in imports and the alleged injury to the domestic industry. In Argentina's opinion, as the Appellate Body stated in the *US – Wheat Gluten* case: "We begin our reasoning with the first sentence of Article 4.2(b). That sentence provides that a determination 'shall not be made unless [the] investigation demonstrates ... the existence of *the causal link* between increased imports ... and serious injury or threat thereof.' (emphasis added). Thus, the requirement for a determination under Article 4.2(a), is that 'the causal link' exists. The word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn, denotes a relationship between at least two elements, whereby the first element has, in some way, 'brought about' 'produced' or 'induced' the existence of the second element. The word 'link' indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection' or 'nexus' between these two elements. Taking these words together, the term 'the causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury."⁵⁰⁴ Argentina refers now to *Argentina – Footwear (EC)*, where the Panel determined a three-stage sequence to justify the causal link (the Appellate Body supported this method and approach).⁵⁰⁵ Argentina adds that, regarding the last stage of the causal link in *US – Wheat Gluten* and *US – Lamb*, the Appellate Body supported a "logical process" for the competent authorities' determination of "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", in accordance with the obligations under Article 4.2(b).⁵⁰⁶ This process means separating the injurious effect of increased imports from the injury caused by other factors. Argentina claims that the Appellate Body considers that Article 4.2(b) presupposes that the injurious effects caused to the domestic industry by the increased imports must be distinguished from the injurious effects caused by other factors.⁵⁰⁷ In this regard, Argentina mentions that the Appellate Body noted that "[w]hat is important in this process is separating or distinguishing the effects caused by the different factors in bringing about the 'injury'."^{508 509}

4.233 **Argentina** examines the application of the three-stages methodology designed by the Appellate Body to this case: (i) Simultaneity of the trends: Argentina indicates that the determinations do not contain sufficient bases to conclude that the trends are simultaneous. Indeed, Argentina states, the import trends have

⁵⁰⁴ Argentina quotes the Appellate Body report on *US – Wheat Gluten*, (WT/DS166/AB/R) adopted on 19 January 2001, para. 67.

⁵⁰⁵ Argentina quotes the Panel report on *Argentina – Footwear (EC)*, (WT/DS121/R) adopted on 12 January 2000, as modified by the Appellate Body report, para. 8.229, and Appellate Body report on *Argentina – Footwear (EC)*, (WT/DS121/AB/R), adopted on 12 January 2000, paras. 144 and 145. See Argentina's First Written Submission, footnote 117.

⁵⁰⁶ Argentina quotes the Appellate Body report on *US – Lamb*, (WT/DS177/AB/R, WT/DS178/AB/R) adopted on 16 May 2001, para. 177.

⁵⁰⁷ Argentina quotes the Appellate Body report on *US – Wheat Gluten*, (WT/DS166/AB/R), adopted on 19 January 2001, para. 69.

⁵⁰⁸ *Ibid.*, para. 68.

⁵⁰⁹ See Argentina's First Written Submission, paras. 223-226.

not been analysed in relation to the changes in the industry's economic and financial indicators. In fact, this could not have been done because the Minutes do not contain any analysis nor sufficient data for this purpose. What is even worse is that the period examined for the 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 analysis of the conditions of competition between the imported product and the like product. Consequently, Chile could hardly try to establish the existence of a causal link under specified conditions of competition. (iii) Other factors caused injury to Chile's domestic industry producing wheat, wheat flour and edible vegetable oils, but not increased imports: Argentina indicates that the third element of a causation analysis is the consideration of whether factors other than increased 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** claims that the Commission did not undertake an analysis to evaluate the injury or threat of injury to the domestic wheat, wheat flour and edible vegetable oils industry caused by "other factors". As an example, Argentina indicates that, although the Commission showed that international prices were falling, this was not properly evaluated and, bearing in mind that these are agricultural and agro-industrial products, climatic conditions within Chile – which are extremely relevant to the local supply situation – were not evaluated.⁵¹¹ Argentina asserts that the request for extension of the measure by the Chilean Ministry of Agriculture⁵¹², clearly shows that the low level of international prices was one of the Chilean Ministry of Agriculture's main concerns. Argentina argues that the Commission did not evaluate this additional factor – namely, international prices – in terms of their impact on the domestic industry, distinguishing this effect from the effect of imports.⁵¹³ Argentina further states that the ODEPA Publication "*El Pulso de la Agricultura*" of February 1999, No. 27, contains specific references to the seriousness of the drought in 1998/1999. According to this publication, Argentina claims, 55 per cent of agricultural communities were in a state of alert. In its report on the first half of 1999, the Chilean Ministry of Agriculture stated that the drought during the 1998/1999 season had led to a decrease in the area under cultivation and a fall in the yield and production of wheat throughout Chile.⁵¹⁴ Argentina submits that the Commission did not analyse this factor, even though it had a decisive effect on domestic wheat production of wheat and possibly on other products subject to the safeguard.⁵¹⁵

⁵¹⁰ See Argentina's First Written Submission, paras. 228-231.

⁵¹¹ See Argentina's First Written Submission, paras. 232-234.

⁵¹² Argentina refers to the request for extension of the safeguard measure for price-band-related products, Ministry of Agriculture, Order No. 792, 10 October 2000. (See Annex ARG-22).

⁵¹³ See Argentina's First Written Submission, paras. 235-236.

⁵¹⁴ Argentina refers to the *Temporada Agrícola*, No. 13, first half of 1999, ISSN 0717-0386, Government of Chile, ODEPA (Ministry of Agriculture), pp. 21 and 22, attached as Annex ARG-30.

⁵¹⁵ See Argentina's First Written Submission, para. 237.

4.235 As regards Argentina's statement that the Chilean authorities did not make any determination of a causal link in any Minutes or notification⁵¹⁶, **Chile** points out that, as shown in Minutes of Session No. 193, the Commission took into account the fact that average c.i.f. prices of Chilean imports were closely related to world prices (trend in commodities). In fact, Chile argues, the correlation coefficient calculated between the average c.i.f. price and the international price over two periods, for wheat and oil, was 91 per cent and 92 per cent respectively. Chile explains that these variables are therefore closely related, so it can be stated that the trend in domestic prices is strongly affected by the trend in import costs.⁵¹⁷

4.236 As regards the above argumentation, **Argentina** considers that Chile's claim whereby the relationship between prices of Chilean imports and world prices proved that there was a causal link is worthless since the causal link must be between the increase in imports and the threat of injury.⁵¹⁸ Argentina further argues that the correlation of prices is not, in itself, sufficient for the purposes of determining the existence of a threat of injury. Argentina further argues that if one delves deeper into Chile's analysis, and checks this statement in Minutes of Session No. 193 against the graph showing the evolution of the international price of soya bean oil (US\$/ton),⁵¹⁹ one would find that there are inconsistencies in this reasoning. Argentina points out that this graph shows a sharp fall in international prices between November 1998 and September 2000, whereas according to Minutes of Session No. 193, "imports [of oils] fell by 24 per cent..." during the first ten months of 1999. In Argentina's view, the alleged inverse correlation between international prices – their fall – and the evolution of imports – their increase – is not valid. To illustrate this, Argentina has provided, as Annex ARG-35, two graphs that show a direct correlation between the fall in international prices and the decrease in imports, based on the graph which Chile itself provided in its submission and on import data for soya bean oil provided in Table 7 of Minutes of Session No. 224. Argentina claims that there could hardly have been a threat of injury when the trends presented by Chile itself point to the contrary.⁵²⁰

4.237 **Chile** stresses that it had already stated that the Commission, in explaining the threat of injury situation, took account of the following information: the evolution of imports – bearing in mind that the operation of the price band had been decisive in containing their increase; the correlation between international prices, import prices and domestic prices; and the low level of international prices. This was the basis for the prediction that a rapidly accelerating increase in imports would occur if the total duties under the price band were not applied, and led the Commission to the conviction that there was an imminent threat of injury. In Chile's view, this is particularly true for commodity type products, such as

⁵¹⁶ Chile refers to para. 218 of Argentina's First Written Submission.

⁵¹⁷ See Chile's First Written Submission, paras. 200-203.

⁵¹⁸ See Argentina's First Oral Statement, para. 105.

⁵¹⁹ Argentina refers to para. 201 of Chile's First Written Submission.

⁵²⁰ See Argentina's First Oral Statement, paras. 101-103.

those at issue. Regarding Argentina's claim that the inverse correlation between the fall in international prices and the increase in imports was not valid in the case of oils, Chile submits that two factors must be borne in mind: (i) that the operation of the price bands was decisive in containing imports; and (ii) that since 1999 there has been an abnormal situation in the pattern of imports - explaining their decrease - owing to the disputes concerning the tariff headings under which oils should be imported. Chile further submits that, with respect to the impact of these disputes, Minutes of Session No. 224 point out that a close look at these headings reveals an increase in imports of vegetable oils, and not a decrease.⁵²¹

4.238 Specifically with respect to oils, **Argentina** submits that the Commission failed to take into account in its causation analysis a number of other factors which had been raised by the Oil Industry Association of the Argentine Republic (CIARA) in the proceedings. In particular, Argentina submits that the Commission failed to analyse the shift of the industry to more profitable sectors; the increase in local demand for seed; the elasticity of oil-seed supply in relation to the real tariff on oils; whether the threat of injury to the industry would be eliminated by the transfer of the input price increase resulting from the increased tariff to consumers, or whether on the contrary, the threat of injury to the industry was attributable to the tariff increase that caused the increase in the sales price of oils generating a fall in demand; imports as a commercial strategy of the Chilean oils industry deriving from the shortage of local sources of supply; the sustained growth of the economy, the increase in domestic demand, the increase or variations in private consumption and the increase in GDP in relation to imports of oils over the past decade; the population growth and increase in per capita consumption; the fact that international prices causing the variation in tariffs under the price band do not affect oil-seed production; the structural problems of oil-seed production; the shift of the industry to more profitable sectors; the analysis of other factors affecting agricultural production must take account of meteorological circumstances that could have affected productivity and profitability of the crop.⁵²²

(j) Whether Chile's Safeguard Measure was not Limited to the Extent Necessary to Remedy Injury and to Facilitate Adjustment

4.239 **Argentina** submits that Chile's safeguard measure violates Articles XIX.1(a) of the GATT 1994 and Articles 3.1 and 5.1 of the Agreement on Safeguards because it was not limited to the extent necessary to remedy injury and to facilitate adjustment.

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"). Ar-

⁵²¹ See Chile's Rebuttal, paras. 68-69.

⁵²² See Argentina's response to question 24 (ARG) of the Panel.

gentina 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

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.

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 system⁵²⁹, 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 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 the short-term fluctuation in prices, but the sharp and sustained fall in those prices over a long period. Contrary to Argentina's assertion, Chile adds, if the fall in prices were to persist, the measures would not be permanent, but would be applied for the time necessary to facilitate adjustment and adaptation to the new price conditions, and in any case, for not more than two years. Chile considers that, in this scenario, as in the case of an increase in

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

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

⁵³⁰ See Argentina's Rebuttal, para. 99.

⁵³¹ See Chile's Second Oral Statement, paras. 46.47.

⁵³² See Argentina's First Oral Statement, para. 107.

prices, the measures would continue to be applied in full conformity with Article 5.1 of the Agreement on Safeguards, since the purpose of their adoption and the amount involved was limited to what was necessary to prevent serious injury and facilitate adjustment.⁵³³

4.248 **Chile** submits that the short period during which the measures were applied together with the safeguard formula adopted was based on considerations of proportionality which maintained domestic competition without neutralizing or equalizing domestic prices and international prices. Chile also notes that based on the facts of this case the purpose of the safeguards must be to prevent a threat of serious injury from materializing and not to repair serious injury that has already taken place. According to Chile, it is perfectly logical that the extension measures should have adopted the same formula as the definitive measures, because in spite of the recovery shown by the domestic industry, the measures, as established, continued to be necessary to prevent serious injury.⁵³⁴

(k) Provisional Measures

4.249 **Argentina** claims that the competent Chilean authorities did not comply with Article XIX:2 of the GATT 1994 and Article 6 of the Agreement on Safeguards, which lay down the requirements for the application of provisional measures.

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

⁵³³ See Chile's Rebuttal, paras. 72-73.

⁵³⁴ See Chile's Second Oral Statement, paras. 72-73.

⁵³⁵ Argentina refers to Minutes No. 185.

⁵³⁶ See Argentina's First Written Submission, paras. 246-248.

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 concludes that imports would increase if duties were limited to the bound tariff.⁵³⁸ There is no evidence, however, that imports did in fact increase. The sole reference to increased imports is on page 2 of the Resolution where the authorities indicate that they based their recommendation on "available evidence" which shows the "possibility" of an increase in imports of the products in question "if the tariff falls to 31.5 per cent" - in other words, Argentina claims, the level bound by Chile. However, not even in this case is the relevant information provided. Argentina also indicates that the analysis of the indicators of threat of injury are incomplete because not all the factors have been evaluated, as required by Article 4.2(a) of the Agreement on Safeguards.⁵³⁹ Argentina contends that, even for those factors that have been evaluated, the analysis has no meaning because there is no investigation period and no reference to any other period that might give an overall view of the relevance of the "decreases" inferred.⁵⁴⁰ According to Argentina, it appears that the figures are simply forecasts because the findings are set out in the conditional tense. Argentina argues that the basis for such forecasts and their source are not identified.⁵⁴¹ For the foregoing reasons, Argentina claims that the provisional resolution does not comply with Article 4.2(a).⁵⁴²

4.252 **Argentina** contends that there is no analysis of causality.⁵⁴³ In other words, Argentina explains, there is no attempt to relate the trends in imports (which are not provided) with the trends in indicators for the industry (in the few cases where these are provided the data are not specified). Consequently, Argentina claims that the resolution does not comply with Article 4.2(b) of the Agreement on Safeguards.⁵⁴⁴

4.253 **Chile** submits that Minutes of Session No. 185, of 22 October 1999, sets out the critical circumstances and assessments required in order to determine the need for the recommended 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. There-

⁵³⁷ Argentina refers to Minutes No. 185.

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

⁵⁴² See Argentina's First Written Submission, paras. 249-251.

⁵⁴³ Argentina refers to Minutes No. 185.

⁵⁴⁴ See Argentina's First Written Submission, para. 252.

⁵⁴⁵ See Chile's First Written Submission, para. 210.

fore, 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

⁵⁴⁶ See Chile's First Oral Statement, para. 83.

⁵⁴⁷ See Argentina's Rebuttal, paras.150-151.

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 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, which are not "customs duties" in nature; the text in Article II:1(b) establishes a parallel between "customs duties" and "duties or charges" which are not properly characterized as "customs duties". These are, it explains, simply "imposed on or in connection with the importation". Brazil considers that this distinction is also apparent in the structure of the Schedule of

Concessions, since these "other" duties must be recorded in the appropriate column of the Schedule. Finally, Brazil points out that the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 creates legal obligations concerning "other duties and charges" that are different from those regarding "ordinary" customs duties.

5.6 Brazil submits that the objective of Article 4.2 of the Agreement on Agriculture is to guarantee tariffication, or, to follow the line of inquiry of the Panel, to guarantee that Members would simplify matters by resorting solely to "ordinary customs duties" and, therefore, in order to comply with that Article, "similar border measures other than ordinary customs duties" should have been, converted into "ordinary customs duties". In Brazil's view, the measures listed in the footnote of Article 4.2 of the Agreement on Agriculture are the ones which "have been required to be converted into ordinary customs duties". "Other duties and charges" were not required to be converted into "ordinary customs duties" in the Uruguay Round since they could have been consolidated into the appropriate column of the Schedule. Therefore, Brazil submits, "similar border measures" as referred to in the footnote of Article 4.2 of the Agreement on Agriculture is distinct from "other duties or charges of any kind" mentioned in Article II:1(b) of the GATT 1994. Since the end of the Uruguay Round, however, they fall within the prohibition of Article II:1(b), last sentence. Brazil submits that a violation would exist if these "other duties or charges of any kind" had not been recorded in the Schedule of Concessions or had been raised or changed in such a way as to violate commitments recorded in the column reserved for "Other Duties and Charges".

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 clear violation of the procedures contained in the Agreement on Safeguards. Brazil contends that it would certainly be very convenient if every time a Member decided to violate its bound tariffs it could simply apply safeguards a posteriori as a means of obtaining legal justification. Brazil argues that this kind of procedure, though, was certainly not in the minds of the drafters of the Agreement on Safeguards, who were trying to avoid the proliferation of the so-called grey area measures that existed before the conclusion of the Uruguay Round. Brazil further submits that the Agreement on Safeguards calls for very special situations and for the respect of clearly stipulated procedures and that this is even more applicable if one considers measures to protect agricultural products, which were some of the favourite targets of grey area measures.

5.10 As regards price stabilization, Brazil stresses that Articles 2 and 4 of the Agreement on Safeguards make no direct reference to such issues. It submits that safeguards were not devised to deal with the objective of guaranteeing the stabilization of prices of certain agricultural products. As regards Chile's reference to the lack of justification for questioning a measure no longer in place, Brazil submits that, although it respects the importance of the principle contained in Article 3.7 of the DSU, it is concerned with the possibility that if the measures applied by Chile are left unexamined, they could lead to similar measures against the same products or other goods. Brazil submits that if the safeguards were applied incorrectly and unjustifiably, this should be known; otherwise, Members could have an incentive for maintaining an illegal measure up to the moment when a panel was convened.

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 question, namely the imposition of the safeguard and the application of the price band system. In its opinion, the consistency of the measures applied by Chile should be analysed using a combined approach that establishes a close relationship between the two, given that Chile

has used the PBS as a mechanism for applying the safeguard measure which is also an issue in this dispute.

5.12 Colombia submits that, in examining the consistency of the measures applied by Chile with the latter's commitments in the WTO, the Panel must make an interpretation that links Articles 4 and 21 of the Agreement on Agriculture, Articles II and XIX of the General Agreement, and the Agreement on Safeguards. In Colombia's view, *such an analysis would enable the Panel to distinguish between two different scenarios for the PBS, namely its application in normal circumstances and its use as a safeguard measure. In normal circumstances, and as mentioned above, price bands are consistent with Article 4 of the Agreement on Agriculture.* From a systemic perspective, Colombia argues, it is crucial to take account of each and every one of the elements set forth in Article XIX of the GATT when analysing the consistency of the safeguard measure applied by Chile. In addition to the points mentioned by Argentina in its written submission, another factor needs to be considered, namely the "effect" of the obligations incurred by a contracting party under the General Agreement. In Colombia's view, the term "effect" specified in Article XIX implies that a Member making use of a safeguard measure must be able to demonstrate that, within the period defined by it for analysing the other requisite variables, imports to its territory complied with the obligations under the GATT, which obviously also include tariff concessions. Colombia considers that this requirement must be fulfilled in addition to the provision of evidence regarding unforeseen developments and factors relating to trends in imports, serious injury and the causal link. Colombia submits that the fact that Chile has exceeded the bound level implies that the safeguard measure applied fails to meet one of the essential requirements of Article XIX of the General Agreement, which is that the trend in imports, the injury and the causal link should result precisely from a scenario under which tariffs are lower than or at least equivalent to the bound level. Colombia submits that the safeguard measures applied by Chile are inconsistent inasmuch as they establish the use of a PBS, a mechanism that does not guarantee that the safeguard is applied exclusively to the extent necessary to remedy the injury.

5.13 According to Colombia, the process of determining whether the Chilean PBS is consistent with Article 4 of the Agreement on Agriculture would certainly require prior demonstration that, as a result of the Uruguay Round, these systems were tariffied because they were classified as variable levies or as border measures other than customs duties. Colombia disagrees with Argentina's interchangeable use of the terms "variable levies" and "variable tariffs" since it believes them to mean different things. Colombia explains that considering that the PBS does not correspond to the definition of variable levies, (a special term used in the Agreement on Agriculture that is not equivalent to variable tariffs) but on the contrary fall within the definition of customs duties, they are consistent with Article 4 of the Agreement on Agriculture. Colombia is of the opinion that a ruling on the inconsistency of the Chilean PBS with Article 4 of the Agreement on Agriculture would imply that this type of mechanism has been classified as a

variable levy and that therefore any tariff undergoing change within a specified period of time would fall within this category.

5.14 Colombia considers that to be able to answer the question of whether the Chilean PBS is consistent with Article II of the GATT, the Panel first needs to examine the normal operation of the price band system and determine whether its structure includes factors that would make it possible to exceed the bound tariff. As a second step, Colombia explains, the Chilean measure might be found to be consistent if it could be regarded as a safeguard that meets the requirements of Article XIX of the GATT - in which case it would be possible to exceed the bound level. Should the Panel find that the 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. Ecuador

5.15 Ecuador emphasizes that both the Argentine and Chilean assessments of the issue should be understood in the light of the close interrelationship between the application of the Chilean price band system and the application of safeguards. In Ecuador's view, only the question of the consistency of the Chilean measure as a whole has been brought before this Panel and, therefore, the Panel should only rule on the consistency or inconsistency of the Chilean measure in question with the WTO rather than conduct a conceptual analysis of the PBS.

5.16 Ecuador considers that PBSs can be operated differently from the one implemented in Chile and remain consistent with WTO rules, that is to say, respecting bound tariff levels and other commitments under Article II of the GATT 1994 as well as the market access commitments referred to in the Agreement on Agriculture, specifically under Article 4. According to Ecuador, PBSs do not necessarily constitute variable tariffs as described in the footnote to Article 4 of the Agreement on Agriculture, especially if such systems are applied in a transparent and predictable manner with the simple aim of counteracting major swings in the international prices of a limited number of agricultural products, thereby guaranteeing acceptable domestic production conditions. If PBSs are used as tariff measures, Ecuador argues, they do not require tariffication in order to be consistent with Uruguay Round provisions. Moreover, Ecuador argues, GATT-WTO regulations allow the tariff levels applicable to imports to be altered provided that they do not exceed the maximum levels and that the market access conditions bound in Members' schedules are guaranteed. Ecuador further submits that the implementation of PBSs also treats all Members to which the MFN tariff applies without distinction, and applies equally to all goods classified under the same tariff subheading which reach port within a period of time determined sufficiently in advance and with sufficient predictability, independently of the country of origin, the import or export agent and the customs value of the product. Ecuador concludes that this is clearly a tariff system and it will not therefore have had to be tariffied since it complies with the letter and spirit of Article 4 of the Agreement on Agriculture. In Ecuador's view, any PBS based on

the relevant international agricultural product prices is as predictable as regards the applicable tariffs as any other tariff-setting system, in that the tariff payable depends on the customs value of the goods. It is Ecuador's opinion that a tariff-setting system which clearly establishes the mechanism for modifying tariffs and furnishes adequate and timely information on such changes should be considered predictable as regards the application of such tariffs. Moreover, Ecuador adds, if such a mechanism for modifying tariffs is disassociated from the domestic market conditions of the importing country and precludes discretionary intervention by the competent authorities, the system is also highly transparent.

D. European Communities

5.17 In the European Communities' view, the most important question that the Panel should address first, is whether the extension of Chile's definitive safeguard measure is properly before it. The European Communities consider that the Chilean safeguard measure which is in force (the definitive measure, as extended) is not a separate measure from the one on which consultations were held, and in any event is properly before the Panel in accordance with the relevant provisions of the DSU. The European Communities fully agree with Chile that no DSB action can to any extent modify the provisions of the DSU, including those concerning consultations prior to dispute settlement. It is the view of the European Communities that abidance by those provisions has however to be reviewed also in the light of the other WTO provisions relevant in each particular case. The European Communities contend that the issue of whether the extension of a definitive safeguard measure under the Agreement on Safeguards constitutes the continuation of the original measure, or rather a different 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 Body pronouncements which, in their view, do not support Chile's contention. As to the DSU, the European Communities agree with Chile when it points out that pursuant to Article 3.4 DSB recommendations and rulings aim at a satisfactory solution of a dispute, and that pursuant to Article 3.3 a dispute arises when a Member's rights are nullified or impaired by a measure taken by another. In the European Communities' view, there appears however to be little doubt that all Chilean measures referred to by Argentina in its request for Panel establishment were "taken". Likewise, the European Communities argue, it is correct that under Article 3.7 of the DSU the main aim of the dispute settlement mechanism is to secure a positive solution to a dispute, preferably through the removal of a measure found to be inconsistent with the WTO. Chile does not dispute, however, that the extension of the definitive safeguard measure is in force – so that, if required by WTO rules, it could be removed. As regards the Appellate Body pronouncements referred to by Chile, the European Communities submit that they also do not support Chile's objection. Chile first refers to *Brazil – Aircraft* in support of essentially a "due process rights" defence and, in this case, does not support Chile's claim that review of the extension by the Panel would violate such rights. The European Communities submit that, as in that case, the extension of the definitive safeguard measure at issue in the present dispute concerns the same "matter" and, as Chile expressly admits, corresponds exactly to the original definitive measure, apart from the duration. 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 In the European Communities' view, this broad obligation of the domestic authorities is paralleled by a broad review that panels are called to exercise on safeguard measures. The European Communities submit that the Panel is not limited in its review by the "record of investigation".

5.21 The European Communities submit that all the basic requirements for the adoption of safeguard measures must be met and demonstrated *before* a safeguard measure is taken, and all must be accounted for in the report of the competent authorities. The general issue raised by Chile's measure, as extended, is that in a number of respects Chile's competent authorities failed to properly examine and evaluate, or to examine and evaluate at all, whether the requirements for the adoption of a safeguard measure were met. The European Communities submit that this consideration applies in the first place to the decisions (Exempt Decrees) of the Ministry of Finance, which Chile identified as its "measures" in its notifications to the WTO. In its view, those measures themselves simply establish the type and duration of the safeguard relief accorded, and contain no reference or analysis whatsoever of the underlying justifications. The same consideration largely applies to the Recommendations of the Commission. The European Communities add that the decrees establishing the provisional measure, the definitive measure and the extension, include no reference to either of those Recommendations or to the Minutes of the Commission's investigation. Rather, each of those decisions refers to a different document (*oficio reservado*) of the Com-

⁵⁴⁸ The European Communities refer to the Appellate Body report on *United States - Import Measures on Certain Products from the European Communities* ("US - Certain EC Products"), (WT/DS165/AB/R) adopted on 10 January 2001, Chile's First Written Submission, para. 87.

⁵⁴⁹ The European Communities refer to the Panel report on *Korea - Dairy*, (WT/DS98/AB/R) adopted on 12 January 2000, as modified by the Appellate Body report, paras. 7.30-31, 7.54.

mission's President. The European Communities submit that it has not had the benefit of examining such *oficios reservados* and it is not clear to the Community whether the Recommendations reprinted in the Minutes of the meetings of the Commission of Distortions actually correspond to the "official communications" referred to in the Decrees or not. If they do not, the European Communities cannot see how those Recommendations may be examined as relevant basis for the decrees.

5.22 The European Communities submit that the safeguard measure taken and identified by Chile does not include any "demonstration as a matter of fact" that certain circumstances constituted "unforeseen developments". The same applies to the Recommendations of the Commission reprinted in the Minutes of its meetings. The fact that Chile submits before the Panel that the time extension of the downwards price trends on the international markets constitutes such "unforeseen development" is 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. Moreover, this does not address the issue of whether other "relevant factors" may have existed and possibly be brought to the attention of the domestic authorities. There are even fewer indications as concerns the causal relation between the increased imports and the serious injury or threat thereof.

5.24 As regards the PBS, the European Communities take the view that assessing the violation of Article II:1(b) of GATT 1994 is sufficient for the Panel to conclude that, by adopting and maintaining its price band system, Chile has violated its WTO obligations. By its structure and design, that system takes away the predictability as to the maximum amount of Chile's tariff protection, which the other WTO Members thought they had achieved by negotiating tariffs with Chile. What is more, it alters the balance of concessions carefully achieved through the Uruguay Round.

5.25 The European Communities submit that Article 4.2 prohibits the maintenance, after the entry into force of the WTO Agreement, of pre-Uruguay Round measures "which have been required to be converted into ordinary customs duties" (i.e. to be "tariffed"). It also prohibits the introduction *ex novo* of the same types of measures, as well as their re-introduction. In the European Communities' view, given that the obligations in Article 4.2 concern measures that had to be converted into ordinary customs duties, it necessarily follows that measures which already fall within the definition of "ordinary customs duties" do not need "conversion". As a result, the European Communities argue, measures that are "ordinary customs duties" in the sense of Article II:1(b), as interpreted by the Appellate Body, are not caught by the obligations of Article 4.2 of the Agreement on Agriculture. The European Communities contend that a measure that would meet the test set out by the Appellate Body in *Argentina – Textiles and Apparel*, and would therefore not be contrary to Article II:1(b) of GATT 1994, would not be subject to any further obligation in Article 4.2 of the Agreement on Agriculture. This conclusion stands even if the measure in question resulted in the application of a "duty that varies" - inasmuch as this "variation" is maintained below the ceiling written in the Member's tariff binding. Thus, the European Communities submit, the decisive element which distinguishes an "ordinary customs duty" from a "variable levy" is the existence of a ceiling in the tariff binding. The European Communities consider that the term "variable import levies" does not include all "duties which vary" or all duties which vary according to certain parameters.

5.26 In response to a question from the Panel concerning the concept of ordinary customs duties, the European Communities explain that, under GATT 1947, there seems to have been no agreement among the contracting parties that the clause "ordinary customs duties" would be limited to particular types of duties. The only indication in connection with that clause in the Analytical Index to the GATT turns on a formal distinction, namely on whether a certain duty is or is not inscribed in the columns of a contracting party's Schedules. The European Communities refer to *Argentina – Textiles 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 under GATT 1947, it had been noted, in respect of variable duties: "[i]t is obvious that, if any such duty or levy is imposed on a 'bound' item, the rate must not be raised in excess of what is permitted by Article II of the Agreement."⁵⁵⁰

⁵⁵⁰ The European Communities refer to the Contracting Parties to the General Agreement on Tariffs and Trade, *Questions Relating to Bilateral Agreements, Discrimination and Variable Taxes*, Note by the Executive Secretary, L/1636, 21 November 1961, p. 3, para. 7 (also excerpted in *Analytical Index to the GATT*, 1995, Vol. I, p. 72).

In the European Communities' view, it is clear that this position can only be correct if it is first assumed that variable levies may fall within the scope of Article II of GATT 1994.

5.27 In practice, the European Communities explain, the types of duties inscribed by the contracting parties to GATT 1947 in the column "ordinary customs duties" of their Schedules have greatly varied, including, *inter alia*, forms of duties commonly designed as "specific duties", "*ad valorem* duties", "mixed" duties, and also tariff quotas. The European Communities submit that it should however be clear that categories like "specific duties", or "*ad valorem*" duties are not given legal relevance in Article II:1(b) of the GATT 1994, and are not in any way mandatory under such provision. Accordingly, they do not in any way limit the liberty of WTO Members as to the device, the mention of which, in the column "ordinary customs duties" of their Schedule, indicates how those Members ensure that they will not *exceed* their bindings. The European Communities in particular disagree that certain basic, if not simplified, definitions set out for the purposes of economic theory may be of great assistance in identifying the content of legal obligations agreed upon by sovereign WTO Members, if those Members did not incorporate such definitions in the legal texts which they agreed.

5.28 In the European Communities' view, the Chilean PBS is a measure that falls and can be reviewed under Article II:1(b) of GATT 1994 as an ordinary customs duty. The European Communities submit that the Chilean PBS does not always result in the application of an additional, or "supplementary" duty to the one recorded in the "ordinary customs duty" column in Chile's Schedule. Quite to the contrary, it argues, there are cases in which, depending on the import prices, the "ordinary" duty is returned in full or in part. Therefore, the European Communities argue, the PBS seems more a mechanism for the application of Chile's "ordinary customs duty" rather than a separate and supplementary duty.

5.29 As regards the difference between "ordinary customs duties" and "other duties and charges", the European Communities explain that Article II:1(b) also provides with respect to "other duties and charges" that they cannot exceed a given amount, but gives no indication as to whether certain "types" of duties would or would not be considered as "other duties and charges". The European Communities submit that the similarity of language compared to that used for the "ordinary customs duties" suggest that the second sentence of Article II:1(b) has to be read similarly to the first sentence, that is, as only embodying an obligation *not to exceed* the amounts of "other duties and charges" provided for in their domestic legislation. The European Communities contend that, in practice, the expression "other duties or charges" in Article II:1(b) has been deemed to cover measures such as stamp duties, statistical fees, revenue fees.⁵⁵¹ As for the Understanding on Article II:1(b) of GATT 1994, while obliging Members to record their "other duties and charges" in their Schedule, on penalty of losing their right

⁵⁵¹ The European Communities refer to the *Analytical Index to the GATT*, 1995, Vol. I, p. 78.

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 II:1(b) is to refrain from imposing "other duties and charges" *in excess of* those provided for in domestic legislation (and, after the entry into force of the Understanding on Article II:1(b) of GATT 1994, in excess of those recorded in a Member's Schedule), these measures are also characterized by a ceiling. It concludes that, as such, they cannot be assimilated to the measures referred to in footnote 1 to Article 4.2 of the Agreement on Agriculture, including the measures "similar" to those expressly listed in the first part of the footnote. The European Communities further explain that, given that a separate obligation not to exceed the level of "other duties and charges" is laid down in Article II:1(b) compared to that laid down for "ordinary customs duties", there is a separate ceiling for such "other duties and charges". In the European Communities' view, the basic obligation not to exceed the ceiling has not been changed by the Understanding on Article II:1(b) of GATT 1994, which simply adds, for reasons of transparency, that the ceiling must be recorded in the Schedules.

5.31 The European Communities consider that the obligation in Article 4.2 of the Agreement on Agriculture is not "independent" of the one in Article II:1(b) of GATT 1994 insofar as the interpretation of Article 4.2 is concerned. In fact the latter provision employs the same language "ordinary customs duty", which also appears in Article II:1(b), without any specific definition of such term being provided either in the Agreement on Agriculture or elsewhere in the WTO Agreement. The European Communities submit that the term "ordinary customs duty" is only found in one provision of GATT 1994, namely Article II and concludes that it is therefore to that provision and to its interpretation given over time that one must turn to understand the content of the main obligation in Article 4.2. The European Communities admit that it is nonetheless correct that there is a distinct and additional obligation in Article 4.2 of the Agreement on Agriculture, thus an added value compared to Article II:1(b) of GATT 1994. The European Communities explain that that obligation is the obligation to "tariffy" and not to revert, maintain or resort to measures that were required to be "tariffied". In fact, Article II of GATT 1994 does not provide an obligation to eliminate certain forms of import protection other than tariff protection, nor to limit tariff protection by binding maximum amounts for agricultural products. The European Communities explain that it merely imposes, *if and when* a Member has decided

⁵⁵² The European Communities refer to the *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*, paras. 3, 7.

to place a maximum limit on its right to tariff protection by inscribing a binding in its Schedule, that such a Member cannot come back on its decision (except of course by fulfilling the requirements in Article XXVIII of GATT 1994). According to the European Communities, if a Member had not "tariffied" and then applied a variable import levy, it will in certain cases violate Article 4.2 of the Agreement on Agriculture without, however, simultaneously violating Article II:1(b) of GATT 1994.

5.32 As regards footnote 1 to Article 4.2 of the Agreement on Agriculture ("similar border measures other than ordinary customs duties"), the European Communities contend that this residual list is important because it indicates that the list of measures which had to be "tariffied" (and which cannot be reintroduced, maintained or introduced) is not exhaustive and because it implies that the measures expressly listed in footnote 1 share some common feature (which in turn also has to be shared by non-listed measures in order for these measures to fall under the residual clause), and that the obligation to "tariffy" all those measures has a single rationale. The European Communities submit that, setting aside "variable import levies", all measures listed in the first part of footnote 1 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 domestic producers of products that were "like" or "directly competitive" with that imported product. Moreover, in this particular case, the investigating authority should have carried out such an analysis for each of the products subject to the safeguard measure, namely, wheat, wheat flour and edible vegetable oils. In Guatemala's opinion, even if the price band system operating in Chile took into account each agricultural product and its corresponding like or directly competitive products, this does not absolve the Chilean authority from carrying out its own analysis in order to comply with Article XIX.1(a) of the GATT 1994 and Articles 2.1, 4.1(c) and 4.2 of the Agreement on Safeguards. Guatemala contends that it could not find in any part of Chile's submission "references" that would allow it to find in the Minutes the analysis carried out by the Commission. Furthermore, Guatemala submits, it is a matter for concern that none of the Minutes in the file (Minutes of Session No. 181 of 9 September 1999, Minutes of Session No. 185 of 22 October, Minutes of Session No. 193 of 7 January 2000, and Minutes of Session No. 224 of 17 November 2000) contain this analysis. Accordingly, Guatemala supports Argentina's claim that the Government of Chile acted inconsistently with Article XIX.1(a) of the GATT 1994 and Articles 2.1, 4.1(c) and 4.2 of the Agreement on Safeguards. In Guatemala's view, the Minutes do not mention any analysis of the like or directly competitive product that should have been carried out by the competent authority pursuant to the aforementioned Articles. Likewise, and as a result of the foregoing, Guatemala considers that the Chilean authority could not have determined which products constituted the domestic industry because the entire evaluation which the Chilean authority made in relation to this concept is inevitably wrong and cannot be remedied.

5.38 As regards the increased imports requirement, Guatemala considers that the periods examined by Chile do not allow any proper conclusions to be drawn regarding the trend in imports. In this regard, Guatemala explains that the Chilean authority sometimes evaluated short-term trends and in other instances evaluated data corresponding to long-term trends. In Guatemala's view, evaluating 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 Gua-

temala'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.

5.42 Furthermore, Japan notes that the Agreement on Safeguards does not allow a Member to adopt safeguard measures before the investigation. In any event, Japan submits, careful consideration is called for in order to ensure that the measures inconsistent with Article II:1(b) of the GATT 1994 are not justified as measures taken under the Agreement on Safeguards.

5.43 Japan is of the view that Article 4.2 of the Agreement on Agriculture does not regulate the tariff level but prohibits certain forms of border measures other than ordinary customs duties, except as otherwise provided for in Article 5 and Annex 5 of this Agreement. Thus, Japan considers, insofar as a measure does not fall into such measures so regulated by Article 4.2, the measure does not give rise to violation under Article 4.2 of Agreement on Agriculture.

5.44 According to Japan, since Chile made tariff concessions for wheat, wheat flour and edible vegetable oils in the Uruguay Round, Article II:1(b) of the GATT 1994 does not allow Chile to levy ordinary customs duties in excess of those set forth and provided for in Chile's Schedule of Concessions. While Article II:1(b) of the GATT 1994 also provides for "other duties or charges", if the "specific duty" based on the Chilean PBS is not set forth as "other duties or charges" in the Schedule, Japan is of the view that it is inconsistent with Article II:1(b) of the GATT 1994 to the extent that the applied rate inclusive of the added "specific duty" exceeds the bound rate of concessions.

G. Paraguay

5.45 Paraguay considers that when a bound tariff has been recorded in a Member's Schedule, this tariff constitutes the maximum limit of duties that can legally be applied to the products bound. Paraguay agrees with the Appellate Body's statement in *Argentina – Textiles and Apparel*⁵⁵³ regarding the structure and form of the measure inasmuch as it considers that, although in certain cases the implementation of Chile's price band system does not violate its obligations under the Agreements, on other occasions the system jeopardizes the rights of other Members, and so automatically becomes inconsistent with the Agreements. Paraguay refers to Chile's statement to the effect that the sharp and sustained fall in international prices of the agricultural products made it no longer possible to maintain the system without exceeding the level of bound duties and declares that this appears to suggest that Chile had failed to comply with its obligations under Article II of the GATT 1994.

5.46 Paraguay also claims that Chile has not provided any solid legal grounds for its statement that the PBS is not a variable import levy nor a similar border measure within the meaning of footnote 1 and that it does not come under the scope of Article 4.2 but is rather a specific tariff that fluctuates according to external factors. Paraguay is of the opinion that, even though it is not specifically mentioned in the text, Chile's price band system is one of the measures which the drafters of Article 4.2 of the Agreement on Agriculture, and in particular of footnote 1, were seeking to prevent.

5.47 As regards Chile's safeguard measures, Paraguay finds that, if the PBS was fully applied in Chile in order to maintain a stable domestic price, away from the fluctuation of products in global markets, the argument that the rapid fall in global prices had caused or threatened to cause serious injury to Chilean producers is inconsistent. Paraguay declares that, by recognizing that the measures in force in Chile are being analysed by this Panel, it is tacitly concluding that they are merely an extension of the original measure, and that Chile's argument that the extension is a different measure is out of place because neither the nature nor the characteristics of the original measure have altered - there has merely been an extension of the implementation period. Paraguay further submits that Chile adopted the safeguard measures after it had infringed its bound tariffs by applying the price band system. In Paraguay's view, this means that it used the safeguard measures as a mechanism for 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

⁵⁵³ Appellate Body report on *Argentina – Textiles and Apparel* (WT/DS56/AB/R) adopted 22 April 1998, DSR 1998:III, 1003, para. 62.

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.

5.50 As regards Chile's second argument, the United States submits that Chile's price band regime clearly falls within the ordinary meaning of the term "variable import levies" as used in footnote 1 to Article 4.2 when interpreted in light of its context, object and purpose. The price band mechanism varies the import levy assessed depending on the relationship between historical and current world prices. Chile has not offered any interpretation of the ordinary meaning of "variable import levy" that demonstrates that its price band regime is not encompassed by this term. However, the United States does not fully subscribe to Argentina's definition of a variable import levy as an import surcharge that "ensures" that the domestic market price "remains unchanged regardless of price fluctuations in exporting countries." In the US' view, variable import levies may be effected through a number of possible mechanisms, which may or may not "ensure" a specific domestic price. It further adds that a variable levy, however it is designed, prevents or ameliorates price variability in the domestic market caused by movements in import prices. The United States argues that Chile's price band regime does exactly that by calculating the import levy as the difference between a present "target" price and a current world price.

5.51 The United States defines a variable levy as an "assessment, duty, or tax" that has "different values in different instances or at different times" as determined by an administrative, formulaic mechanism. This mechanism, it explains, defines parameters based on any number of exogenous factors, such as a target price (e.g., historical world prices) and a current price (e.g., a reference price), to set the levy. The levy at any particular point in time is determined on the basis of those exogenous factors so as to prevent or ameliorate price variability in the domestic market caused by movements in import prices. The United States also defines a minimum import price as a similar mechanism whereby the price of each import shipment is compared to an officially established "minimum import price," often based on an internal domestic support price. The United States explains that where the declared value (i.e., transaction value) of the specific shipment is lower than the minimum import price, a penalty, additional charge, or duty is often then assessed, which may be equal to the difference between the minimum import price and the declared value.

5.52 The United States claims that Chile's argument to the effect that its price band mechanism cannot be a variable levy because it is not *identical* to the EC's

pre-Uruguay Round variable levy regime actually serves to highlight the price band system's operation as a variable import levy. The United States explains that the main distinctions that Chile points to are that its system uses a moving five-year average "band" of past world prices to establish a minimum (and maximum) target price, whereas the EC's prior variable levy system used an internal European Communities price to set the target price, and that the price band system uses a current international reference price, whereas the European Communities system used a shipment-specific invoice price. The United States submits that these are distinctions without a difference since how Chile sets its target price and current price does not fundamentally distinguish its regime. Rather, the United States argues, it is the fact that the levy varies based on exogenous factors, such as world prices, not the particular factors used to determine the levy amount, that defines the price band mechanism as a variable levy. The United States adds that another distinction Chile draws is that, unlike the prior European Communities variable levy regime, the price band system permits low-cost foreign producers to compete on the basis of price. The United States contends that, while it is technically true that the system does not completely eliminate price competition, this does not fully capture the economic impact of Chile's price band regime. The United States explains that, when international prices decline, the variable levy assessed under Chile's price band regime exacts a higher duty, on an *ad valorem* basis, on low-cost goods than it does from high-cost goods. Thus, the United States argues, the prohibition on variable import levies in Article 4.2 serves to eliminate the disproportionate impact of these measures on low-cost producers. The United States contends that Chile's definition of "ordinary customs duty" would also capture the EC's prior variable import levy, which was a specific duty that fluctuated, in part, on the basis of external world price factors. Thus, Chile's definition cannot be accepted as it does not distinguish the very European Communities measure that Chile has conceded is a prohibited "variable import levy." The United States submits that the term "ordinary customs duties" is generally recognized to refer to specific duties that are based on a physical quantity or measure of imported product or *ad valorem* duties that are based on a fixed percentage of the value of the imported product. It concludes that such ordinary customs duties do not vary based on world and/or domestic prices.

5.53 The United States submits that, even if the Panel were to conclude that Chile's price band mechanism is not a "variable import levy," the price band regime is a "similar border measure" that is prohibited under footnote 1 to Article 4.2. The United States contends that, due to the similarities in both structure and effect between Chile's price band system and measures recognized by Chile as being variable import levies, the Chilean regime must at least be a prohibited "similar border measure."

5.54 In response to a question from the Panel, the United States submits that, pursuant to the customary rules of interpretation of international law, which are reflected in Article 31(1) of the Vienna Convention, the duty of a treaty interpreter is to determine the meaning of a term in accordance with the ordinary

meaning to be given to the term in its context and in light of the object and purpose of the treaty. Accordingly, the term "ordinary" should be defined in accordance with its ordinary meaning in its context in Article II:1(b). The United States explains that the dictionary definition of "ordinary" is "belonging to the regular or usual order or course; . . . occurring in the course of regular custom or practice; regular, normal, customary, usual."⁵⁵⁴ The United States indicates that, in its context as an adjective of "customs duty," the term can be understood to refer to those types of customs duties that have been the customary, usual types of customs duties used by Members. The United States submits that the regular, normal forms of customs duties used in international trade (both now and at the time of the Uruguay Round) are the *ad valorem* duty and the specific duty (or compound rates based on combinations of the two). It contends that a review of Members' domestic tariff schedules (including Chile's) would reveal that the "regular, normal, customary, usual" forms of customs duties expressed therein are *ad valorem* or specific duties. The United States notes that this understanding of "ordinary customs duties" was apparently expressed during the process of tariffication in the Uruguay Round in which border measures other than ordinary customs duties were converted into tariff equivalents.⁵⁵⁵ Thus, "ordinary customs duties" are *ad valorem* and/or specific customs duties inscribed in a country's domestic tariff schedule with a rate expressed for each individual tariff heading.⁵⁵⁶

5.55 Finally, the United States notes that Chile's domestic tariff schedule confirms that the levy imposed through Chile's price band mechanism is not an "ordinary customs duty." It explains that for all Chilean products, even those on which it imposes price bands, under the column labelled "duties," the Chilean tariff schedule shows *only* an *ad valorem* rate. For products subject to price bands, however, the product description following the tariff number indicates a footnote. The United States points out that the footnote text discloses that an additional "specific duty" is imposed (no rate is specified) and refers to the decree then in effect. However, it adds, such decrees only establish the price band mechanism, that is, a list of international reference prices with the corresponding additional duty to be charged. The United States submits that an importer seeking to ascertain what duty would be imposed on imports would also have to know the Chilean customs authority's weekly determination of the current international reference price. Thus, it concludes, the rate of customs duty imposed through the price band mechanism is neither disclosed by Chile's national tariff schedule nor disclosed by the decree establishing the price band mechanism. The United States indicates that this complicated levy mechanism differs importantly from "ordinary customs duties" in its lack of transparency and definiteness.

⁵⁵⁴ The United States refers to *The Oxford English Dictionary*, p. 912 (2d edition).

⁵⁵⁵ The United States refers to the *Framework Agreement on Agriculture Reform Programme, Draft Text By the Chairman*, Multilateral Trade Negotiations, The Uruguay Round, Group of Negotiations on Goods, Negotiating Group on Agriculture, MTN.GNG/NG5/W/170, 11 July 1990, p. 8.

⁵⁵⁶ The United States refers to the *GATT Analytical Index*, § II.A.2(3), p. 78 (1995 ed.).

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 1994, 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 Arti-

⁵⁵⁷ The United States refers to *The Oxford English Dictionary*, p. 490 (2d edition).

cle 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, measures that are not "similar" to the specifically listed measures could still be prohibited by Article 4.2.

5.58 The United States agrees with Argentina's claim that Chile's price band system, as implemented through laws, regulations, and "complimentary provisions and/or amendments," is inconsistent with Article II:1(b) of the GATT 1994. The United States argues that Chile concedes in its First Submission that the price band system will result in a breach of its tariff bindings if international prices are sufficiently low but seeks to excuse the breach on the basis that its 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 as-

sess 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

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."

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 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

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

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 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.

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 tariffify 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 "tariffify" 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".

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 obliga-

tion 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, Chile appears⁵⁶³ 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

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.

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.

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 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 de-

scription 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 quoted the full text of Article 12 of Law 18.525 in the descriptive part of the interim report, paragraph 2.2.

6.27 We agree with Chile that the text of the interim report required clarification in this respect, and have changed the fifth and sixth sentences of paragraph 7.44.

6.28 With respect to paragraph 7.46, Chile argued that it would appear that the Panel wishes its conclusion on similarity to be a question of fact, which, in Chile's view, is quite clearly wrong. What is a question of fact is the operation of the PBS. The degree of similarity and how such similarity is assessed or determined is obviously a question of law. Argentina noted that in the Panel's consideration of the fact of whether the PBS constitutes a measure similar to those listed in footnote 1 to Article 4.2 of the Agreement on Agriculture, the Panel defined – as a factual matter – the PBS as a hybrid instrument sharing the characteristics of both a variable levy and a minimum import price.

6.29 In consideration of Chile's comment, we consider that the interpretation of what constitutes a "variable import levy", "minimum import price" and "similar" border measure is, of course, a matter of law. Whether or not an existing border measure, however, is, in fact, similar to a variable import levy or minimum import price, requires an assessment of the factual evidence submitted. Such an assessment is simply an application of the law, as interpreted by us, to the facts of this case. Our determination of whether or not a particular measure is "similar to" any of the measures listed in footnote 1 is roughly analogous to a determination of whether two products are "like" or "directly 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 solu-

tion" 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 citing extracts from the text of Article 7 to support its position that an extension is not a measure distinct from the definitive safeguard measure, but merely an extension of the duration of that measure. According to Chile, nowhere does the Panel give consideration to the textual and substantive arguments put forward by Chile in support of the opposite view. Chile requested the Panel to explain why it only cited certain paragraphs of Article 7 to substantiate its conclusion, and why it did not undertake a more in-depth analysis of Article 7 for this purpose, as Chile argued in its submissions. Argentina responded that the Panel starts paragraph 7.116 by mentioning and 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 to make a general comment with no specific detail about the arguments that in its view are missing.

6.37 We take note of Chile's comments, but consider that our report sets out in sufficient detail why we consider that Chile's arguments in this respect cannot be endorsed. We therefore decline to change these paragraphs.

6.38 With respect to paragraphs 7.131 and 7.179, Chile claimed that the Panel did make use of the Minutes of Session No. 224 to reject previous records and to make comments that go beyond a finding of inconsistency with the WTO rules.

According to Chile, paragraph 7.179 is "one example". According to Chile, the Panel specifically uses the minutes of session No. 224 to link the drop in production in the period mentioned in this paragraph to drought and thus reject the minutes of session No.193, because they do not contain any analysis of injury caused by other factors. Argentina considered that the Panel can use the Minutes of Session No. 224 as factual evidence, as suggested by Chile itself, and that the Panel has done so in order to clarify and complement the minutes of session No. 193, taking into account its complete lack of data.

6.39 In commenting on Chile's arguments, we first note that Chile refers to paragraph 7.179 as only "one example", but does not provide any other such "examples". The one concrete example given by Chile to support its allegation that the Panel does not adhere to the rule it sets out in paragraph 7.131 concerns a subsidiary finding by the Panel on causation, where the Panel has already found on other grounds that the CDC failed to establish a proper causal link (see paragraphs 7.176 and 7.177). In paragraph 7.179, the Panel, addressing a particular argument by Argentina, finds that the CDC should have examined the other factor, i.e. drought, to which Argentine exporters had drawn its attention during the investigation. Argentina had raised the argument and adduced evidence showing that the competent authorities must have been aware of the possible impact of the drought factor. It was the failure by the CDC to investigate or evaluate this factor which we find fault with.⁵⁶⁴ The minutes of session No. 224 are therefore merely used as an *observation* on our earlier finding, consistently with paragraph 7.131, not as a basis for our finding. To avoid any misunderstanding in this respect, we have changed paragraph 7.179.

6.40 With respect to paragraph 7.128, Chile claimed that the Panel does not conform to the usual meaning of the word "publish" and, by analogy, refers to the publication requirement in the Anti-Dumping and Subsidies Agreements of the WTO. According to Chile, in no part of its arguments does the Panel explain the reasons why this usual meaning does not reflect the real scope and meaning of the obligation to publish required by Article 3.1, nor why, referring to context in determining such a meaning, the WTO Anti-Dumping and Subsidies Agreements apply. Argentina considered that the Panel made use of the methods of interpretation in compliance with the DSU in order to make findings regarding the obligations contained in Article 3.1 of the Safeguards Agreement.

6.41 In our view, the explanation in paragraph 7.128 is sufficient. We refer both to the dictionary meaning of the term and, in accordance of Article 31 of the Vienna Convention, the context provided by the WTO Agreement and its annexes. We therefore take note of Chile's comments, but consider that they do not warrant any change to paragraph 7.128.

⁵⁶⁴ It should be recalled that, according to the Appellate Body in *US – Wheat Gluten*, "the competent authorities – and not the interested parties – [are required] to evaluate fully the relevance, if any, of 'other factors'", and "where the competent authorities do not have sufficient information before them to evaluate the possible relevance of [...] an 'other factor', they must fully investigate that 'other factor' [...]" Appellate Body report, *US – Wheat Gluten*, para. 55.

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 occur 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 inconsistent with the Agreement on Safeguards, cannot be "remedied" through an extension. In Chile's view, if the Panel, despite the fact that it has no mandate on this issue, also puts forwards arguments and makes an indirect finding of inconsistency of the extension of the Chilean safeguard measures with Article 7 of the Agreement on Safeguards, it must legally substantiate its arguments and findings. Chile therefore requested the Panel to revise this section on the basis of the arguments put forward. Regarding Chile's three comments on this issue, Argentina agreed with the Panel that the inconsistency of a definitive measure cannot be "cured" with the extension of the same measure. In Argentina's view, the Panel has analyzed *in extenso* and concluded that the extensions of safeguard measures are not new measures different to the definitive measure. Therefore, and in agreement with the finding of inconsistency of the definitive measures with different provisions of the Safeguards 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 Price Band System*

1. *Requested Findings*

7.1 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. Argentina argues that the Chilean PBS violates Article II:1(b) of the GATT 1994 since its application can result and has repeatedly resulted in the collection of duties in excess of the rates bound in Chile's National Schedule No. VII, i.e. 31.5 per cent. Argentina also considers that the PBS, in addition to violating the obligations contained in Article II:1(b) of the GATT 1994, is inconsistent with Article 4.2 of the Agreement on Agriculture, because Chile maintains a measure of the kind which has been required to be converted into ordinary customs duties pursuant to Article 4.2 of the Agreement on Agriculture.

7.2 Chile requests that the Panel conclude that the PBS is consistent with both Article II:1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

2. *Amendment to Article 12 of Law 18.525 in the Course of the Panel Proceedings*

7.3 At the second meeting with the parties, the Panel was informed by Chile that a new law 19.722 had entered into force on 19 November 2001 which inserts the following paragraph after the last paragraph of Article 12 of Law 18.525:

"The specific duties resulting from the application of this Article, added to the *ad valorem* duty, shall not exceed the base tariff rate bound by Chile under the World Trade Organization for the goods referred to in this Article, each import transaction being considered individually and using the c.i.f. value of the goods concerned in the transaction in question as a basis for calculation. To that end, the National Customs Service shall adopt the necessary measures to ensure that the said limit is maintained."

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 will not be breached in the future."⁵⁶⁵

7.5 Our understanding from Chile's explanation is that this amendment to Article 12 of Law 18.525 puts in place a cap on the Chilean PBS duties to avoid that those duties, in conjunction with the 8 per cent applied rate, exceed the 31.5 per cent bound rate. Argentina has informed us in this respect that it:

"(...) is not in position to confirm the precise content of the Chilean Exhibit given that Argentina does not have adequate information to express a definitive view on this issue. As far as Argentina knows, Chile has not yet even issued the regulations necessary to implement the new measure."⁵⁶⁶

7.6 We note in this respect that the Panel in *Indonesia – Autos* stated that:

"(...) [i]n previous GATT/WTO cases, where a measure included in the terms of reference was otherwise terminated or amended after the commencement of the panel proceedings, panels have nevertheless made findings in respect of such a measure."⁵⁶⁷

7.7 We see no reason to deviate from this practice of other panels. Furthermore, we note that we would be prejudging our examination of Argentina's claims regarding the Chilean PBS if we were to accept without further analysis that the change introduced by Chile is relevant to the consistency of the Chilean PBS with its obligations under the WTO Agreement. We 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 would be acting in a manner inconsistent with our duties under Article 11 of the DSU if we were to refrain from mak-

⁵⁶⁵ Chile's Oral Statement at the second meeting with the parties, para. 6.

⁵⁶⁶ Argentina's response to question 45 of the Panel.

⁵⁶⁷ Panel report on *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, 4, adopted 23 July 1998. The panel referred to: the panel report on *United States - Measures Affecting Imports of Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/R, adopted on 23 May 1997; the US restriction was withdrawn shortly before the issuance of the panel report; panel report on *EEC - Restrictions on Imports of Dessert Apples, Complaint by Chile*, adopted on 22 June 1989, BISD 36S/93; panel report on *EEC-Restrictions on Imports of Apples, Complaint by the United States*, adopted on 22 June 1989, BISD 36S/135; panel report on *United States - Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91; panel report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98; and panel report on *EEC - Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49. The panel noted that in the panel report on *United States - Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted on 7 November 1989, the challenged measure was amended during the panel process but the panel refused to take into account such amendment. The panel on *Indonesia – Autos* noted that this was also the line taken by the Appellate Body in *Argentina - Textiles and Apparel*, WT/DS56/AB/R, adopted on 22 April 1998, para. 64.

ing findings for the sole reason that Chile amended the challenged measure at a late stage of the proceedings.

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 duties¹, 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.

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

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.

7.14 The general aim of the Uruguay Round negotiations on agriculture was to "achieve greater liberalisation of trade in agriculture and bring all measures affecting import access and export competition under strengthened and more operationally effective GATT rules and disciplines".⁵⁷¹ As explained by the Panel in *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, the object and purpose of the resulting Agreement on Agriculture is:

"to 'establish a basis for initiating a process of reform of trade in agriculture'⁵⁷² in line with, *inter alia*, the long-term objective of establishing 'a fair and market-oriented agricultural trading system'.⁵⁷³ This objective is pursued in order 'to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets'.^{574 575}

7.15 We consider that Article 4.2 is central to the establishment and protection of a fair and market-oriented agricultural trading system in the area of market access. Members "committed to achieving specific binding commitments [on, *inter alia*,] market access".⁵⁷⁶ In particular, following Ministerial Mid-term review of the Uruguay Round negotiations and the December 1991 Draft Final Act, the negotiations on agricultural market access were undertaken on the premise that trade in agriculture was to be conducted on the basis of bound ordinary customs duties and that border measures other than ordinary customs duties would be prohibited.⁵⁷⁷ This involved the conversion of a wide range of border

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.

⁵⁷¹ Punta del Este Declaration, Ministerial Declaration on the Uruguay Round, MIN.DEC, 20 September 1986, p. 6.

⁵⁷² (original footnote) Preambular para. 1.

⁵⁷³ (original footnote) Preambular para. 2.

⁵⁷⁴ (original footnote) Preambular para. 3.

⁵⁷⁵ Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products ("Canada – Dairy")*, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by the Appellate Body report, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, paras. 7.25-7-26.

⁵⁷⁶ Preambular para. 4.

⁵⁷⁷ MTN.TNC/W/FA, para. 1 of Part B, Annex 3, Section A, at L.25:

measures into ordinary customs duties, a process which has commonly been referred to as "tariffication". In general terms, the purpose of this exercise was to enhance transparency and predictability in agricultural trade, establish or strengthen the link between domestic and world markets, and allow for a progressive negotiated reduction of protection in agricultural trade. Article 4.2 of the Agreement on Agriculture, by prohibiting Members from maintaining, resorting to, or reverting to any measures of the kind which have been required to be converted into ordinary customs duties, accordingly provides the legal underpinning for what, in ordinary parlance, is referred to as a "tariff-only" regime for trade in agriculture.

7.16 We note that Article 4.2 of the Agreement on Agriculture and Article II:1(b) of GATT 1994 both use the phrase "ordinary customs duties". Provided this phrase has the same meaning in both provisions,⁵⁷⁸ neither provision can therefore be interpreted independently from the other. However, having regard to the above, we believe that Article 4.2 of the Agreement on Agriculture deals more specifically and in detail with measures affecting market access of agricultural products.⁵⁷⁹ We will 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

The policy coverage of tariffication shall include all border measures other than ordinary customs duties [...]

⁵⁷⁸ See para. 7.48 below.

⁵⁷⁹ We also note in this respect that Article 21.1 of the Agreement on Agriculture provides that "[t]he provisions of GATT 1994 [...] shall apply subject to the provisions of this Agreement." The Appellate Body, in its report on *EC – Bananas III* has commented on this provision,

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.

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. 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 examples 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 We note that the illustrative list of footnote 1 contains, on the one hand, specific measures (i.e. "quantitative import restrictions", "variable import levies", etc.), and, on the other hand, a residual category of measures ("similar border measures other than ordinary customs duties"). Consequently, if the Chilean PBS is a border measure other than an ordinary customs duty which is similar to any of the preceding examples, it would be a measure of the kind which has been required to be converted for the purposes of Article 4.2, 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.

7.24 We recall that, subject to the proviso that 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, a measure explicitly listed in footnote 1 will *ipso facto* be of the kind which has been required to be converted into ordinary customs duties. Consequently, such measure is necessarily not, at the same time, an ordinary customs duty. For the same reason, we consider that a measure which is "similar to" any of the measures listed in footnote 1 will also be "other than ordinary customs duties". Our findings regarding one of those two aspects can therefore be expected to reinforce our findings regarding the other. For the sake of clarity and comprehensive analysis, however, we will address each of those two aspects in separate sections.

"Border measure"

7.25 The Chilean PBS applies exclusively to imported goods and is enforced at the border by Chilean customs authorities. It is therefore clear that the Chilean PBS is a border measure.

"Similar to" a "variable import levy" or a "minimum import price"

Determination of the Meaning of "similar to a variable import levy or a minimum import price"

7.26 First, as regards the term "similar", dictionaries define this term as "having a resemblance or likeness"⁵⁸⁰, "of the same nature or kind"⁵⁸¹, and "having

⁵⁸⁰ The New Shorter Oxford English Dictionary (L. Brown, Ed.), at 2865.

⁵⁸¹ *Ibid.*

characteristics in common".⁵⁸² Two measures are in our view "similar" if they share some, but not all, of their fundamental characteristics. If two measures share all of their fundamental characteristics, they are identical rather than similar. A border measure should therefore have *some* fundamental characteristics in common with one or more of the measures explicitly listed in footnote 1. It is then a matter of weighing the evidence to determine whether the characteristics are sufficiently close to be considered "similar".

7.27 Second, as regards the measures in footnote 1 referenced by Argentina, it has been pointed out by Chile that the exact features of terms of art such as "variable import levy" and "minimum import price" may be difficult to establish on the basis of the text of the Agreement. We note in that respect that "variable import levy" and "minimum import price" are terms which may often be understood by the drafters of trade agreements in reference to one or more particular schemes used by one or more Members. In that sense, they could indeed be referred to as "terms of art". Nonetheless, we recall that these terms are subject to the rules of treaty interpretation laid down in Articles 31, 32 and 33 of the Vienna Convention. According to Article 31 of the Vienna Convention, we should first determine the ordinary meaning of the terms, in their context, and in light of the Agreement's object and purpose. Pursuant to that same provision, we should also take into account certain other international agreements and relevant rules of international law, as well as subsequent practice. Only if necessary to resolve ambiguity or to confirm the ordinary meaning determined using the tools offered by Article 31, Article 32 instructs us to take recourse to supplementary means, including the preparatory work and the circumstances of the treaty's conclusion. Accordingly, below we will proceed by first examining the ordinary meaning of these terms. In addition, we will draw, as appropriate, on other means of interpretation, including those categorized by the Vienna Convention as supplementary means.

7.28 As a preliminary matter, we note Chile's statement that "the obligations in Article 4.2 only relate to *non-tariff* barriers"⁵⁸³ whereas "the PBS only covers the payment of *customs duties*".⁵⁸⁴ 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*".⁵⁸⁵ This would seem to imply 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.⁵⁸⁶⁵⁸⁷ Along

⁵⁸² Webster's Encyclopaedic English Dictionary, at 957.

⁵⁸³ Chile's First Written Submission, para. 34. Chile's response to question 6 of the Panel. Emphasis added.

⁵⁸⁴ *Ibid.* Emphasis added.

⁵⁸⁵ Chile's response to question 8 of the Panel. Emphasis added.

⁵⁸⁶ We note that 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.

those lines, "similar border measures" would need to have the effect of a quantitative restriction.

7.29 We cannot agree with the proposition that only measures with the effect of a quantitative restriction are measures of the kind which have been required to be converted into ordinary customs duties. Such a proposition rests on the assumption that the generic term "tariffs" can be equated with the specific phrase "ordinary customs duties". This assumption is in our view flawed: Article II:1(b) of GATT 1994 makes clear that the universe of "tariffs" is not made up of "ordinary customs duties" alone, but also includes "other duties". By deliberately limiting the mandatory result of the conversion required by Article 4.2 to "ordinary customs duties", the drafters of the Agreement on Agriculture did not exclude the possibility that certain other types of "tariffs" would need to be converted as well. If the drafters of the Agreement on Agriculture would have wanted to require conversion of only measures "other than tariffs", they would have said so, and they would not have used the specific phrase "ordinary customs duties". If they only wanted to require conversion of quantitative restrictions, they could have drawn on the language of Article XI:1 of GATT 1994, for instance, which prohibits "prohibitions or *restrictions other than duties, taxes or other charges*", without distinguishing between "ordinary customs duties" and other types of duties or charges.⁵⁸⁸

7.30 Certainly, there may be some degree of co-extensiveness between the scope of "restrictions other than duties, taxes or other charges" with the scope of "similar border measures other than ordinary customs duties".⁵⁸⁹ We consider that "restrictions other than duties, taxes or other charges" 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,

⁵⁸⁷ 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.

⁵⁸⁸ This does not mean that that Members cannot schedule other duties or charges with respect to goods covered by the Agreement on Agriculture in the corresponding column of their Schedules. We are only saying that, *if* a measure is "of the kind which has been required to be converted into ordinary customs duties", it cannot take another form than an ordinary customs duty. Article 4.2 of the Agreement on Agriculture does not, of course, prevent Members from maintaining as other duties or charges measures which are not of that kind.

⁵⁸⁹ As we will indicate below, under GATT 1947, a panel considered a minimum import scheme, for instance, a restriction within the meaning of Art XI:1. Pursuant to footnote 1 of the Agreement on Agriculture, "minimum import prices" are now measures of the kind which have been required to be converted into ordinary customs duties. Similarly, with respect to state trading operations, the panel in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* found that:

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.

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 meas-

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 Certain Processed Fruits and Vegetables*, adopted 18 October 1978, BISD 25S/68).

ures".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 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 charge; an import levy is a duty assessed upon importation; a levy is variable when it is "liable to vary"⁵⁹². These features can of course not be conclusive as to what constitutes a "variable import levy", since any "ordinary customs duty" could also fit this description: Members may periodically change the level or type⁵⁹³ of their applied rates, provided they remain below the bound rate. Thus, *mere* variability does not distinguish ordinary customs duties from "variable import levies". As regards the literal meaning of "minimum import price", on the other hand, this phrase would logically refer to a certain price level below which imported products may not enter a Member's market.⁵⁹⁴ As regards the context of those terms in footnote 1, we note that all the measures listed there are instruments which are characterized either by a lack of transparency and predictability, or impede transmission of world prices to the domestic market, or both.

7.35 We consider, however, that the text and context of "variable import levy" and "minimum import price" alone do not enable us to determine the meaning of those terms without ambiguity. The determination of their meaning should therefore include an analysis which "go[es] beyond a purely grammatical or linguistic interpretation".⁵⁹⁵ Pursuant to Article 32 of the Vienna Convention, we will take recourse to supplementary means of interpretation. In this case, we consider that certain documents, which predate the entry into force of the Agreement on Agriculture but are strictly speaking not part of the preparatory work⁵⁹⁶, can shed

Nonetheless, it was a price-based measure other than a traditional quantitative restriction such as a quota.

⁵⁹¹ BISD, 33S/19, at 24; 31S/10, at 11.

⁵⁹² The New Shorter Oxford English Dictionary (L. Brown, Ed.), at 3547.

⁵⁹³ Appellate Body report, *Argentina – Textiles and Apparel*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, para. 46.

⁵⁹⁴ We consider that, as a practical matter, this could result from a prohibition on imports priced below the minimum, or because such imports are subject to an additional charge in order to raise their entry price above the specified minimum.

⁵⁹⁵ Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed., 1984), p. 121.

⁵⁹⁶ We believe that Article 32 of the Vienna Convention allows us to use such documents, to which all GATT Contracting Parties had access before and during the negotiations of the Uruguay Round, as a supplementary means of interpretation. First, in our view, they are part of "the circumstances of the conclusion" of the WTO Agreement, including the Agreement on Agriculture. Second, it should be recalled that a treaty interpreter is not restricted to the supplementary means explicitly listed in

light on what the WTO Members meant to express by using those "terms of art".⁵⁹⁷

7.36 Both variable levies and minimum import price arrangements, along with other border restrictions, were the subject of extensive examination in bodies established by the GATT Contracting Parties. These included Committee II (1958-1962); the post-Kennedy Round Agriculture Committee (1967-1973); and the Committee on Trade in Agriculture (1982-1986) which developed the parameters for negotiations in the Uruguay Round on improved and more operationally effective GATT rules and disciplines for trade in agriculture. The work of these Committees was undertaken on the basis, *inter alia*, of notifications by Members covering all instruments of support and protection. Thus, in the case of the 1982-1986 Committee on Trade in Agriculture, reference was made in the information provided by the Contracting Parties to the GATT 1947 provisions under which individual border measures were being maintained.⁵⁹⁸ On the basis of the notifications submitted on variable levies and minimum import prices, as

Article 32 of the Vienna Convention. The use of the term "including" clearly indicates that the supplementary means explicitly mentioned by article 32 are not the only ones a treaty interpreter can have recourse to (Yasseen, *L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités*, Rec., 1976-III, at 79 and 98; Sinclair, *The Vienna Convention on the Law of Treaties*, *supra*, at 153). As stated by Mr. Ago at the 872nd meeting of the ILC,

[...] the word "including" made it clear that recourse could be had to means other than preparatory work or the circumstances of the conclusion of the treaty, though it probably would be wiser not to mention them expressly.
(Yb.ILC, 1966, Vol. I, Part II, 202, at para.50.)

We see no reason why we could not draw on the referenced GATT 1947 documents pursuant to Article 32 of the Vienna Convention. As stated by Mr. Yasseen, then Chairman of the ILC, at its 873rd meeting:

[T]he very nature of a convention as an act of will made it essential to take into account all the work which had led to the formation of that will - *all material which the parties had had before them when drafting the final text*.
(Yb.ILC, 1966, Vol. I, Part. II, 204, at para. 25. Emphasis added.)

⁵⁹⁷ We note that GATT 1947 jurisprudence provides only limited guidance in this respect.

As regards variable import levies, the Panel in *The Uruguayan Recourse to Article XXIII* (adopted 16 November 1962, BISD 11S/95, 100) examined a number of measures described as "import charges" (varying according to divergences between domestic prices and imported prices but not exceeding the bound rate); "variable surtaxes" (charged over and above the normal duties and varying from time to time to take account of differences between domestic and imported prices); "variable import levies" (raising the price of the imported product approximately to the levels maintained for the domestic product); "variable charges" (price supplements levied in order to maintain the price of imported products at the level of the like domestic products) (*Ibid.*, at 104, 107, 134, and 143). The Panel did not consider it "appropriate to examine the consistency or otherwise of these measures under the [GATT 1947]", although it considered that there were "a priori grounds for assuming that those measures could have an adverse effects on Uruguayan exports." (*Ibid.*, at 135)

As regards minimum import prices, we note that the Panel in *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* (adopted 18 October 1978, BISD 25S/68) ruled that a particular minimum import price scheme maintained by the EC was inconsistent with Article XI of GATT 1947 (*Ibid.*, para. 4.14.). The Panel in that case considered that the minimum import price system, as enforced by the additional security, was a restriction other than duties, taxes, or other charges within the meaning of Article XI:1, although one member of the Panel considered that the minimum import price system was not being enforced in a manner which would qualify it as a restriction within the meaning of Article XI:1 (*Ibid.*, para. 4.9).

⁵⁹⁸ AG/W/2 and "Information on Measures Affecting Trade" in the series AG/FOR/...

well as the related examinations undertaken by Contracting Parties, it appears to us that such measures can be analysed as generally having the following fundamental characteristics:⁵⁹⁹

- (a) Variable levies generally operate on the basis of two prices: a threshold, or minimum import entry price and a border or c.i.f. price for imports. The threshold price may be derived from and linked to the internal market price as such, or it may correspond to a governmentally determined (guide or threshold) price which is above the domestic market price. The import border or price reference may correspond to individual shipment prices but is more often an administratively determined lowest world market offer price.
- (b) A variable levy generally represents the difference between the threshold or minimum import entry price and the lowest world market offer price for the product concerned. In other words, the variable levy changes systematically in response to movements in either or both of these price parameters.
- (c) Variable levies generally operate so as to prevent the entry of imports priced below the threshold or minimum entry price. In this respect, 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

⁵⁹⁹ Reports of Committee II - Programme for expansion of international trade - Agricultural protection: Second Report, BISD 9S/110, 116 (para. 13(b)); Third Report, BISD 10S/135, 137 (Committee's "General Findings", at para. 6); Report of Committee II on the consultation with the European Economic Community - L/1910 ("Technical Discussion" of variable levy and import reference prices at pp.5 to 33 - report adopted 16 November 1962: SR.20/12). Agriculture Committee (1967-1973): COM.AG/W/68/Add.3 and COM.AG/W/84 and Addenda thereto ("Import Measures - Variable Levies and Other Special Charges"). Committee on Trade in Agriculture (1983-1986): AG/W/2 and AG/FOR/REV - country by country series - "Information on Measures Affecting Trade"; AG/W/12, paras. 22 to 31.

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 months⁶⁰⁰, 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

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).

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 Indeed, for all practical purposes, and subject to the exceptional instance

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 to the Panel's last question to Argentina (see Argentina's response to question 53 of the Panel). We have no means of knowing, though, as of when this information would have been made available through the internet.

⁶⁰⁵ Article 12 of Law 18.525.

⁶⁰⁶ Chile's response to question 9(f) of the Panel. Emphasis added.

⁶⁰⁷ In its response to the Panel's question regarding this matter, Chile has indicated that the import price *can* nevertheless go below the lower threshold in two instances. First, when international freight costs decrease sharply. Second, when the import price is lower than the Reference Price. This reply by Chile, however, does not invalidate our view that the lower threshold operates generally as a minimum import price. First, we had asked Chile whether "goods [have] entered the Chilean market at prices below the lower end of price band", and, if so, "to identify as many instances as possible,

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 Chile" for the purpose of setting a particular week's Reference Price, unless he exports his product at such a low price below the lower threshold of the PBS that the total applied duties would exceed Chile's bound rate in the absence of an effective cap, he will generally not be able to export his product at a duty-paid price below the lower PBS threshold, because even if he can export at a lower price than exporters from other markets of concern, a PBS duty will still be applied for an amount equal to the difference between the weekly Reference Price, set on the basis of the fob price in his market (which is the lowest among the markets of concern to Chile), and the lower threshold of the PBS. Imports from other markets will, by operation of the system, normally come in at higher f.o.b. prices. Thus, the Chilean PBS operates to insulate the Chilean market from world market prices.⁶⁰⁹

7.42 This insulation of the Chilean market from world market prices is accentuated by the fact that the PBS thresholds are determined, *inter alia*, after discarding 25 per cent of "atypical observations" at the bottom and at the top. By

and provide supporting documentation" (Question 46). Chile, however, has not provided us with any such evidence. Second, Chile's reply to Question 46 refers to two hypothetical instances which merely confirm that the purpose of the measure is to function as a type of minimum import price and that this measure, if implemented "correctly", in fact operates that way. The first scenario results only from the requirement of Article 12 of Law 18.525 that freight costs be estimated. If Chilean authorities make a wrong estimation, it appears possible that the actual c.i.f. price might be a little lower than the lower PBS threshold. This scenario, however, is contingent upon the Chilean authorities themselves not adequately making the estimation required by law. The second scenario would only arise either if Chilean authorities fail to identify the lowest f.o.b. price on the markets of concern, or in the equally marginal hypothesis that an exporter from a market other than those of concern to Chile would export to Chile at a price below the Reference Price. Exporters from markets of concern to Chile cannot, by definition, undercut the lowest price set by themselves.

⁶⁰⁸ Chile has stated that the total applied duties exceeded the bound rate only "on occasion", and that the circumstances leading to this exceeding of its bound rate were of "an extraordinary nature". See para. 4.9 of our report. In such exceptional instances, it is possible that the imported product comes in at a total import cost below the lower threshold of the PBS. However, even then, a cap at any level, whether it be 80, 50 or 31.5 per cent may ameliorate the inhibition of the transfer of world market prices into the Chilean market which results from the PBS, but it cannot eliminate it.

⁶⁰⁹ This can be expressed mathematically in the following way:

Where Imp = Import price; CIF = c.i.f. price; PB = lower threshold of the Price Band; RP = Reference Price; r = applied *ad valorem* rate; (PB - RP) = Price Band duties:

- (a) $\text{Imp} = \text{CIF} + (\text{PB} - \text{RP}) + (\text{CIF} \times r)$
- (b) $\text{Imp} + \text{RP} = \text{CIF} + \text{PB} + (\text{CIF} \times r)$
- (c) $\text{CIF} \geq \text{RP}$
- (d) Therefore, after removing CIF and RP from the equation: $\text{Imp} \geq \text{PB} + (\text{CIF} \times r)$

eliminating the lowest quarter of prices observed, Chile substantially 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 Argentinean wheat exporter becomes more efficient and can export at lower f.o.b. prices to Chile, the Reference Price will fall accordingly. The lower the Reference Price, the larger the gap between the lower threshold and the Reference Price, and the greater the PBS duty. If Argentinean wheat exporters happen to export at the Reference Price level, their wheat will normally enter Chile at a total import cost equal to the lower threshold of the PBS. If Argentinean wheat exporters can only export at an f.o.b. price above the applicable Reference Price – because exporters from other relevant markets produce more efficiently – their wheat will come in at a total import cost which normally exceeds the lower threshold of the PBS.

7.44 Moreover, we observe that several crucial stages of the operation of the Chilean PBS are characterized by a considerable lack of transparency and predictability. For instance, exporters can be expected to have difficulties knowing how the applicable Reference Price is arrived at. No legislation or regulation in Chile specifies which international markets are used for the calculation of the Reference Price. Chile's replies to the Panel's questions indicate that these are "markets of concern to Chile". Chile has informed the Panel that it uses the *lowest* f.o.b. price on these markets of concern to determine the Reference Price. None of these practices appear to be provided for in Chilean legislation or regulation. Article 12 of Law 18.525 only provides that the relevant date is the date of the bill of lading. When asked whether the Reference Prices, determined on a weekly basis, are published, Chile informed the Panel that they are "available to the public at the National Customs Service". In its comments on the descriptive part of our report, however, Chile has added that they are also available now

⁶¹⁰ Chile's response to question 10(d) of the Panel.

⁶¹¹ For example, if prices on the international market were stable or rose during the first four years of the 60 month period, and have steadily declined during the last year of the 60 month period, to a price level below the lowest price in any of the first four years, the values corresponding to that last year would all be discarded in application of the 25 per cent rule. As a result, if the trend of decreasing prices continues or even simply halts without rebounding during the period immediately following the 60 month period, all imports during that period will nevertheless be subject to PBS duties equalling the difference between current international prices and much higher international prices of more than a year earlier.

through a Chilean governmental website.⁶¹² Moreover, as regards the application of the Chilean PBS to the edible vegetable oils identified by reference to 25 tariff lines, Chile has stated that "[i]n general, the Reference Price has coincided with the price of crude soya bean oil, but in some cases it has corresponded to that of crude sunflowerseed oil".⁶¹³ Apparently, there is no means of knowing when one or the other Reference Price will be used. Furthermore, although the PBS values themselves are published each year, exporters have no means of knowing how the PBS values are actually arrived at: no published legislation or regulation in Chile sets out which international markets are used for the determination of the PBS values, or how the "usual import costs" which are added to the f.o.b. prices are calculated. It appears to us that exporters can be expected to encounter serious difficulties in their commercial planning efforts in a system where weekly variations in duties are based on factors unknown, i.e. the future evolution of prices in "markets of concern to Chile". Such lack of predictability must affect the competitive conditions of imports *vis-à-vis* domestic production.

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 top⁶¹⁴, 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 be-

⁶¹² See footnote 604.

⁶¹³ Chile's response to question 43(a) of the Panel.

⁶¹⁴ We consider that the fact that the PBS operates symmetrically by rebating import duties when world prices are relatively high is not a relevant consideration for the purposes of our examination of whether the PBS is a measure of the kind prohibited under Article 4.2.

fore us, however, we consider as a factual matter that the Chilean PBS shares *sufficient fundamental* characteristics with those schemes for it to be considered similar to them, and that the observed differences between the Chilean PBS and either of those schemes are not of such a nature as to detract from this similarity.

7.47 We therefore find that the Chilean PBS is a border measure "similar to" both a "variable import levy" and a "minimum import price".

"Other than ordinary customs duties"

Determination of the Meaning of "ordinary customs duties"

7.48 We have already noted above that our findings regarding "similar to variable import levy and minimum import price" and "other than ordinary customs duties" are mutually reinforcing.⁶¹⁵ We also note that, in Chile's view, the Chilean PBS duties constitute "ordinary" customs duties.

7.49 We recall that the use of the phrase "ordinary customs duties" is common to Article II:1(b) of GATT 1994 and Article 4.2 of the Agreement on Agriculture. Given the central place of this phrase in both provisions, it would appear that the scope of the obligations resulting from these provisions is, in part, determined by the interpretation of that phrase. We note in this respect that the parties⁶¹⁶ and third parties to this dispute all agree that the phrase must have the same meaning in both provisions. We see no reason to disagree with this proposition. Nothing in the text of either GATT 1994 or the Agreement on Agriculture suggests that this identical phrase should be given a different meaning in each of those two provisions. On the contrary, it appears from the drafting history of Article 4.2 of the Agreement on Agriculture that the drafters of that Agreement actually drew on Article II:1(b) of GATT 1947 with 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

⁶¹⁵ See para. 7.24 above.

⁶¹⁶ Responses by Argentina and Chile to question 2 of the Panel.

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.

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 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

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.

⁶²⁰ Collins Spanish-English Dictionary, 14th edition, at 201.

⁶²¹ Le Petit Robert Dictionnaire de la Langue Française (J. Rey-Debove and A. Rey, Eds.), 2nd edition, at 2022.

⁶²² We note that the panel in *Canada – Patent Protection of Pharmaceutical Products ("Canada – Pharmaceutical Patents")* was confronted with an analogous situation when examining the various dictionary meanings of the term "normal":

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 thereof).⁶²⁴ As a *normative* matter, we observe that those scheduled duties always relate to either the value of the imported goods, in the case of *ad valorem* duties, or the volume of the imported goods, in the case of specific duties. Such ordinary customs duties, however, do not appear to involve the consideration of any other, exogenous, factors, such as, for instance, fluctuating world market prices. We therefore consider that, for the purpose of Article II:1(b), first sentence, of GATT 1994 and Article 4.2 of the Agreement on Agriculture, an "ordinary" customs duty, that is, a customs duty *sensu strictu*, is to be understood as referring to a customs duty which is not applied on the basis of factors of an exogenous nature.

7.53 The above determination of the ordinary meaning of "ordinary customs duties" confirms that there is a *normative* dimension to the term "ordinary", and that a "tariff" must have certain fundamental characteristics for such a "tariff" to be considered an "ordinary" customs duty. For this reason, we disagree with an argument presented by the European Communities, apparently endorsed by Chile.⁶²⁵ According to this position:

"(...) the decisive element which distinguishes an 'ordinary customs duty' from a 'variable import levy' is the existence of a ceiling in the tariff binding."⁶²⁶

7.54 This position appears to be based on the proposition that the phrase "ordinary customs duties" in the first sentence of Article II:1(b) would have been interpreted by the Appellate Body in its report on *Argentina – Textiles and Apparel* as including *any kind of* duties on imports, and that, according to that report, the

As so defined, the term can be understood to refer either to an empirical conclusion about what is common within a relevant community, or to a normative standard of entitlement. The Panel concluded that the word "normal" was being used in Article 30 in a sense that combined the two meanings.

Panel report, *Canada – Pharmaceutical Patents*, WT/DS114/R, adopted 7 April 2000, para. 7.54 *in fine*.

⁶²³ We also note that the Attachment to Annex 5 to the Agreement on Agriculture ("Guidelines for the Calculation of Tariff Equivalents for the Specific Purpose Specified in paragraphs 6 and 10 of this Annex") provides, in its paragraph 1, that "[t]he calculation of the tariff equivalents, whether expressed as *ad valorem* or specific rates, shall be made using"

⁶²⁴ We do not believe, however, that, conversely, the fact that a duty ultimately is labelled as an *ad valorem* or specific duty necessarily qualifies that duty as an ordinary customs duty. As a matter of fact, quite some "other duties or charges", registered as such in the "other duties and charges" column of Members' Schedules, appear to be expressed in specific or *ad valorem* terms. Put another way, a duty or charge can be expressed either in *ad valorem* or specific terms, but nevertheless not constitute an "ordinary" customs duty.

⁶²⁵ Chile has stated that the position expressed by the European Communities "may be correct". Chile's response to question 5 of the Panel.

⁶²⁶ Oral Statement by the European Communities, para. 38 *in fine*.

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

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.

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 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 to make agricultural market access conditions more transparent and predictable, and establish or strengthen the link between national and international agricultural markets. As stated in the Punta del Este Ministerial Declaration on the Uruguay Round:

"Contracting Parties agree that there is an urgent need to bring more discipline and *predictability* to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses *so as to reduce the uncertainty, imbalances and instability* in world agricultural markets."⁶³⁵

7.59 As explained by the Panel in *Turkey – Textiles*, this object and purpose is based on the premise that ordinary customs duties "are GATT's border protection

⁶³⁰ (original footnote) Preambular para. 1.

⁶³¹ (original footnote) Preambular para. 2.

⁶³² (original footnote) Preambular para. 3. Emphasis added.

⁶³³ (original footnote) Punta del Este Declaration, Ministerial Declaration on the Uruguay Round, MIN.DEC, 20 September 1986, p. 6.

⁶³⁴ Panel report on *Canada – Dairy*, paras. 7.25-7-26.

⁶³⁵ Punta del Este Declaration, Ministerial Declaration on the Uruguay Round, MIN.DEC, 20 September 1986, p. 6. (Emphasis added). We recall that the objectives of the Punta del Este Declaration are explicitly referenced in the first tiret of the Preamble to the Agreement on Agriculture.

'of choice'" because they "permit the most efficient competitor to supply imports", and are "*more transparent price-based*" measures.⁶³⁶

7.60 In our view, customs duties of the ordinary kind scheduled by the GATT Contracting Parties since 1947 and thereafter the WTO Members, which are exclusively based on either the value or the volume of the goods or a combination thereof (i.e. not based on exogenous factors), were considered by the Uruguay Round negotiators to be most amenable to achieving the objectives of progressively reducing protection in agricultural markets through tariff reductions and ensuring predictability and more transparent, price-based competition. By no longer allowing for instruments of protection which, through the use of exogenous factors⁶³⁷, result in highly uncertain and unstable levels of protection often isolating the domestic market from international price competition, the drafters of the Agreement on Agriculture decided to bring such instruments under "strengthened and more operationally effective GATT rules and disciplines", in pursuit of the long-term objective of establishing a fair and market-oriented agricultural trading system.

Application of the Panel's Interpretation of "other than ordinary customs duties" to the Chilean PBS

7.61 In our analysis of whether the Chilean PBS is a border measure similar to a variable import levy and a minimum import price, we have already highlighted the features of the Chilean PBS which reveal its intrinsically unstable, intransparent and unpredictable nature, as well as the insulation of the domestic market from international price competition which it achieves. Nonetheless, in furtherance 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.

7.62 Most importantly, we note that the Chilean PBS duties are neither in the nature of *ad valorem* duties, nor specific duties, nor a combination thereof⁶³⁸, in the sense that they are not just assessed on the transaction value of individual shipments, nor just on the volume of the goods. The amount of the applicable duty is a function of a price which is disconnected from the actual transaction

⁶³⁶ Panel report, *Turkey – Restrictions on Imports of Textile and Clothing Products* ("Turkey – Textiles"), WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body report, WT/DS34/AB/R, paras. 9.63-9.65. Emphasis added.

⁶³⁷ This can include both quantitative restrictions and certain price-based border measures. See our discussion at para. 7.32 above.

⁶³⁸ In addition, in light of the object and purpose of the Agreement on Agriculture, we consider that a measure such as the Chilean PBS *may* be considerably less amenable to negotiated reduction than an ordinary customs duty, in particular in the absence of an effective "cap". In the case before us, Chile has at an advanced stage in the proceedings argued that a recent legislative amendment constitutes such a "cap" on the Chilean PBS. We do not need to decide, however, whether or not the Chilean PBS would therefore become more amenable to progressive reduction, as we consider that several aspects of the structure and operation of the Chilean PBS quite clearly distinguish this measure from an ordinary customs duty.

value of the imported good. In fact, the applicable duty is determined on the basis of exogenous price factors, i.e. the lower threshold of the PBS and the Reference Price.⁶³⁹

7.63 We also note that several features of the Chilean PBS are bound to artificially inflate this margin between the lower threshold of the PBS and the Reference Price, and, consequently, the level of the applicable PBS duty. Most strikingly, the level of the lower threshold of the PBS is considerably raised over that of the Reference Price by discarding the lowest 25 per cent of all observed international market prices over the preceding 60 months. The prices observed on "markets of concern" used for the calculation of the Reference Price do not undergo the same operation. Second, as confirmed by Chile, the f.o.b. prices used for the PBS values are adjusted, *inter alia*, for "usual import costs", whereas the f.o.b. prices used for the Reference Prices are not.⁶⁴⁰ These differences can in our view only result in increasing the margin between the lower threshold of the PBS and the Reference Price, and thus the applicable PBS duty.⁶⁴¹ We find that those aspects of the structure and operation of the Chilean PBS do not reflect the structure and operation of an "ordinary" customs duty.

7.64 Finally, we note that under the Chilean PBS, the Reference Price, and therefore the applicable duty or rebate, is determined in reference to the date of the bill of lading. Consequently, when two shipments from two different exporting Members leave their respective port of origin on two different dates, but arrive at the Chilean port of entry at the same time, they can be assessed a different duty, to the extent that the Reference Price may very well vary as regards those two shipments. We are fully aware that Argentina did not present any claim under Article I of GATT 1994, and that no such claim is therefore within our Terms of Reference. Whereas we cannot and do not make any finding of law regarding the consistency of the Chilean PBS with Article I of GATT 1994, we do find, as a matter of fact, that the Chilean PBS *inherently* carries the risk of resulting in higher duties on one shipment than on another, despite the fact that those shipments arrive at the same time at the Chilean border, which is not consistent with the characteristics of an "ordinary" customs duty.

⁶³⁹ It is not a combined duty either, which is a straightforward *ad valorem* duty plus a specific duty levied simultaneously. We also note that, although Chile calls the PBS duty a "specific" duty when the Reference Price falls below the lower PBS threshold, the applicable PBS rebate is expressed *ad valorem* when the Reference Price is higher than the upper PBS threshold.

⁶⁴⁰ Chile's response to question 9(e) of the Panel.

⁶⁴¹ We also note that Chile uses different markets to determine the PBS values, on the one hand, and the Reference Price, on the other. Normally, fluctuations of international prices can be most adequately measured by making inter-temporal comparisons of prices on one and the same international market. Although the products to the Chilean PBS are commodities, it cannot be entirely excluded that the prices observed on the Kansas or Chicago Exchanges (used for the calculation of the PBS values) are different from those observed on the "markets of concern to Chile" (used for the calculation of the Reference Price). Indeed, the evidence before us is that Argentina is often the most important designated "market of concern to Chile", not the United States. Consequently, it cannot be entirely excluded that a low Reference Price today may not be fully reflected in the PBS values 60 months later, faulting the inter-temporal comparison of international prices.

Conclusion

7.65 In light of our findings above, we conclude that the Chilean PBS is a border measure similar to a variable import levy and a minimum import price, other than ordinary customs duties, within the meaning of footnote 1 to the Agreement on Agriculture.

- (i) Is the Chilean PBS "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"?

7.66 Chile has not asserted a defence of the Chilean PBS under Article 4.2 of the Agreement on Agriculture in reference to the balance-of-payment provisions of GATT 1994 or other general, non-agriculture specific provisions of the Multilateral Trade Agreements in Annex 1A other than GATT 1994. Regarding the relationship between Article 4.2 of the Agreement on Agriculture and Article II:1(b) of GATT 1994, Chile has stated that "[t]he prohibitions in Article 4.2 of the Agreement on Agriculture apply without regard to whether the measures breach a tariff binding".⁶⁴² At the same time, however, Chile has also stated that the following position, expressed by the European Communities in the course of these proceedings, "may be correct":⁶⁴³

"(...) a measure that would meet the test set out by the Appellate Body in *Argentina – Footwear, Textiles and Apparel*, and would therefore not be contrary to Article II of GATT 1994, would not be subject to any further obligation in Article 4.2 of the Agreement on Agriculture. This conclusion stands even if the measure in question resulted in the application of a 'duty that varies' – inasmuch as this 'variation' is maintained below the ceiling written in the Member's tariff binding. Thus, the decisive element which distinguishes an "ordinary customs duty" from a "variable levy" is the existence of a ceiling in the tariff binding."⁶⁴⁴

7.67 In light of Chile's position, we consider that we should address the argument advanced by the European Communities.

7.68 According to the European Communities, Article II:1(b) of GATT 1994 is a "non-agriculture-specific" provision of GATT 1994 under which a measure such as the Chilean PBS could be maintained, provided it does not exceed the "ordinary customs duties" binding. Consequently, if the measure is consistent with Article II:1(b) of GATT 1994, it would not be subject to the obligation laid down in Article 4.2 of the Agreement on Agriculture. We cannot agree. First, the

⁶⁴² Chile's response to question 4 of the Panel.

⁶⁴³ Chile's response to question 5 of the Panel.

⁶⁴⁴ European Communities' Oral Statement, para. 38.

text of footnote 1 makes clear that the drafters of the Agreement on Agriculture did not mean to exempt from the obligation of Article 4.2 all measures maintained under *any* "general, non-agriculture-specific" provision of GATT 1994. Footnote 1 only excludes from the scope of Article 4.2 measures maintained under balance-of-payment provisions or under *other* general, non-agriculture specific provisions of GATT 1994. The use of the term "other" before "general, non-agriculture specific provisions" makes clear that balance-of-payment provisions are one example of what is meant by the category of "general, non-agriculture-specific" provisions of GATT 1994 and the other Annex 1A Agreements. Balance-of-payment measures can be adopted in accordance with Article XII of GATT 1994. Article XII is clearly in the nature of an *exception* to the general obligations of GATT 1994. In our view, therefore, footnote 1 was meant to exclude from the scope of Article 4.2 only those 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 measures⁶⁴⁵ 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

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.

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 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.

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.

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 Agreement⁶⁴⁹, 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 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 practice⁶⁵²; it is a se-

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.

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; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités" (1976-III) 151 Recueil des Cours p. 1 at 48.

⁶⁵² (original footnote) Sinclair, footnote 24, p. 137.

quence 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.

(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

⁶⁵³ (original footnote) (1966) Yearbook of the International Law Commission, Vol. II, p. 222; Sinclair, *supra*, footnote 24, p. 138.

⁶⁵⁴ We note in this respect that Chile is not arguing *estoppel*. See Chile's response to question 13(a) of the Panel.

⁶⁵⁵ We note in this respect that Argentina has drawn our attention to the July 1995 Report of the Working Party on the Accession of Ecuador, which was adopted by consensus and which shows that several Members considered an Ecuadorian PBS inconsistent with various covered agreements, including the Agreement on Agriculture:

Some members noted that the use of minimum import prices and variable charges appeared to be in conflict with Ecuador's obligations under Articles II, VI and VII of the General Agreement 1994, the WTO Customs Valuation Agreement and the WTO Agreement on Agriculture. In their view, Ecuador should either phase out this mechanism or bring it into conformity with the aforesaid obligations. (WT/L/77, para. 42)

In response, the Ecuadorian delegate has been recorded to state that, in order to comply with the provisions of the WTO Agreement on Agriculture, Ecuador would gradually eliminate the price band system within a seven year period in accordance with the time table annexed to Ecuador's Protocol of Accession. During the period for the phase-out of this mechanism, Ecuador would not enlarge the coverage of the system nor reintroduce products back into the system. The Working Party took note of these commitments. (WT/L/77, para. 48)

In our view, however, in the absence of more specific information regarding the structure and operation of the measure at issue in this report, we cannot determine to what extent this measure is comparable to the Chilean PBS, and, consequently, assess its relevance for our analysis. We are therefore not in a position to take this into account.

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 35⁶⁵⁷, 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 the possibility that different commitments regarding the

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.

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

7.87 Chile is of the view that the text and context of Article 4.2 leave no ambiguity that its PBS is not a prohibited measure. However, according to Chile, should the Panel consider that there is any ambiguity, the negotiating history of the Article 4.2 will demonstrate that the negotiators did not intend to prohibit the maintenance of the PBS.

7.88 We note that Chile links its arguments regarding the negotiating history with elements of subsequent practice and maintains that under the general rubric of "state practice" it becomes clear that Members did not consider the PBS inconsistent with Article 4.2. We have already dealt with the issue of subsequent practice above; here we will turn to the issue of the negotiating history.

7.89 Article 32 of the Vienna Convention provides that:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable."

7.90 Chile has argued that the PBS was in place before the start of the Uruguay Round and, therefore, all Uruguay Round negotiators were fully aware of its existence when preparing the text of Article 4.2. According to Chile, none of the negotiators required that it be converted.

7.91 We cannot agree with Chile's position that it results from the negotiating history of Article 4.2 that the Chilean PBS is not a measure of the kind which has been required to be converted. As we have discussed extensively above, the text and context of Article 4.2 make it clear that Article 4.2 and footnote 1 both are provisions of general application. Article 4.2 refers to measures *of the kind* that were to be converted. Footnote 1 provides an illustrative list of such measures, but generalizes to include other *similar* border measures. Thus, neither the text of the Article nor the footnote contemplate the need for negotiators to conclusively agree on what measures should be converted. Quite the contrary; there was a textual requirement that measures of this kind were not to be maintained. Thus,

the lack of an explicit agreement that the PBS was required to be converted does not help Chile's argument.⁶⁵⁹

7.92 We can find no evidence in the negotiating history that it was intended by the negotiators to exclude the Chilean PBS from coverage of Article 4.2. We note, for example, that the Draft Final Act version of Article 4.2 provided that:

"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 – provided the price bands were maintained within the bound levels."⁶⁶¹ Chile was unable to produce the said letter. However, even if we had been able to verify the exact contents of said letter, we consider that such a letter could not have changed our interpretation of Article 4.2 of the Agreement on Agriculture. The mere fact that an individual in the GATT Secretariat might have made a statement – orally or in writing – along the lines described by Chile is not determinative. The WTO Agreement gives the Ministerial Conference and the General Council the exclusive right to adopt interpretations of the WTO Agreement.⁶⁶² While the Secretariat has in the past, and will in the future be requested to provide advice to Members of the WTO, we believe the general rule of reserving the legal right to adopt interpretations to the Members to be the appropriate standard in this context, while, of course, recognizing that the WTO rules were not in force at the time in question.⁶⁶³

7.95 The Secretariat's advice might prove a part of a more comprehensive compilation of preparatory work if there were evidence that negotiators specifi-

⁶⁵⁹ See para. 7.18 above.

⁶⁶⁰ MTN.GNG/W/FA, p. L.3.

⁶⁶¹ Chile's response to question 14 of the Panel.

⁶⁶² Article IX:2 of the Marrakesh Agreement establishing the WTO.

⁶⁶³ In any event, we note that, on the one hand, Chile tabled its negotiating offer on the basis of the Draft Final Act modalities and draft rules on agriculture on 5 March 1992, and, on the other hand, has stated that "[t]he date of the seminar is [...] unclear but it could have taken place in 1993." (Chile's response to question 40 of the Panel).

cally adopted an approach recommended by the Secretariat, but that is not the case here. Even at face value, the advice referenced by Chile would appear to have been isolated advice offered at a regional seminar held in Central America. There is a complete lack of comprehensive evidence in this case that would correspond with any such advice. Indeed, Chile's argument seems to turn more on the silence of the negotiators regarding its PBS rather than positive evidence that it was intended to be excluded from the application of Article 4.2.⁶⁶⁴

7.96 Chile's general argument regarding "state practice" is in many ways like a non-violation argument.⁶⁶⁵ In effect, Chile argues that it had a reasonable expectation that it was not required to convert. The nature of Chile's argument can be seen in light of Chile's affirmation that it is not arguing that Argentina is legally *estopped* from pursuing the claim against the PBS system. Rather, Chile argues all of this constitutes the broader interpretative context. In other words, Chile should not now be required to convert a system that it had a reasonable basis for concluding was not prohibited by article 4.2. Of course, non-violation is not at all applicable here given the fact that Chile as a respondent could not raise a non-violation claim.

7.97 Chile's "negotiating history" argument might have served as a valid defence by Chile had Argentina argued that it had a non-violation claim under Article 26 of the DSU. In such a case, the existence of the PBS since 1983 would

⁶⁶⁴ In this context, we also note that Argentina has referred to the WTO Secretariat's 1997 Trade Policy Review Report on Chile, which reads that "[t]he price stabilization mechanism works as a variable levy" (WT/TPR/S/28, para. 38). We consider that such a Report should not be taken into account in the context of dispute settlement proceedings. Paragraph A(i) unequivocally states, [The Trade Policy Review Mechanism] is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures [...].

Consequently, we will disregard the information contained in the report referred to by Argentina

⁶⁶⁵ See Article 26.1 of the DSU ("*Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994*") and Article XXIII:1(b) of GATT 1994. The Appellate Body has stated with respect to Article XXIII:1(b) of GATT 1994,

Article XXIII:1(b) sets forth a separate cause of action for a claim that, through the application of a measure, a Member has "nullified or impaired" "benefits" accruing to another Member, "whether or not that measure conflicts with the provisions" of the GATT 1994. Thus, it is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994. Cases under Article XXIII:1(b) are, for this reason, sometimes described as "non-violation" cases; we note, though, that the word "non-violation" does not appear in this provision. (Appellate Body report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos"), WT/DS135/AB/R, adopted 5 April 2001, para. 185)

According to the Panel in *Japan – Measures Affecting Consumer Photographic Film and Paper*:

"[t]he text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure."^[footnote omitted] (Panel report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, para. 10.41)

be an issue, *inter alia*, which Argentina would have to explain if it were to establish all the elements of a non-violation claim.

7.98 There is another aspect of the contrast between violation and non-violation claims which is useful to note here. As the Appellate Body pointed out in *EC – Computer Equipment*, non-violation rests on reasonable expectations in a primarily bilateral context whereas violation claims rest ultimately in a multilateral context. In order to serve as a useful tool in a violation context, there must be positive evidence in the negotiating history of a common understanding of the various parties to the negotiation.⁶⁶⁶ Hence the need for some *comprehensive* evidence of negotiators' intentions to sustain a defence⁶⁶⁷ based on preparatory work.⁶⁶⁸

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 inaction". 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.

⁶⁶⁶ Appellate Body report, *European Communities – Customs Classification of Certain Computer Equipment* ("EC – Computer Equipment"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, at para. 93.

⁶⁶⁷ We note in this regard that this issue of examining preparatory work in accordance with Article 32 of the Vienna Convention has been raised by Chile as a defence. Argentina has made its arguments based upon a textual analysis.

⁶⁶⁸ For example, even if we had considered the evidence of GATT Secretariat advice probative, it would have needed to be seen as part of a comprehensive multilateral pattern of advice combined with negotiators' actions.

⁶⁶⁹ See paras. 7.78-7.79 above.

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 above⁶⁷⁰, 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 exceed⁶⁷¹ and, at several instances in the past, have effectively exceeded⁶⁷², 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

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 impor-

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.

tation, 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 specific duty determined by the mechanism set out in Article 12 of Law 18.525 – and its relevant annual implementing decrees – and

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.

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

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.

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.

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* found that the Panel should not have made a recommendation regarding a measure that no longer existed, it nowhere suggested that the Panel erred in making findings regarding that measure. To the contrary, the Appellate Body stated that the Panel "should have limited its reasoning to issues that were relevant and pertinent" to the expired measure.⁶⁸⁰ And, while we note that the Panel in *Argentina – Textiles and Apparel*⁶⁸¹ decided not to address a measure which had been terminated before commencement of the Panel proceedings, we do not understand that Panel to have found that it lacked *jurisdiction* to make findings on an expired measure. To the contrary, the Panel considered US arguments that it should rule on the expired measure because of the threat of recurrence, but found no evidence to that effect.⁶⁸² This suggests that the Panel merely exercised its discretion not to rule on the expired measures in that case.

7.114 Further, to argue, as Chile does, that the provisional measures lie necessarily outside the scope of the Panel's jurisdiction, because those measures have elapsed, is not tenable, because this would imply that the Panel could examine all aspects of the investigation, except those relating to the provisional measures. We are concerned that if the conformity of such measures cannot, as a matter of principle, be addressed by panels solely because they are no longer in effect at the time of the request for establishment, then provisional safeguard measures generally will escape panel scrutiny, since they are generally terminated before the matter reaches the panel stage.⁶⁸³ Members could then adopt provisional safeguard measures, the WTO-consistency of which, could never be examined by panels. In our view, the drafters of the DSU cannot have meant to exclude, in such a manner, provisional safeguard measures from its scope.

⁶⁸⁰ Appellate Body report, *US – Certain EC Products*, para. 96.

⁶⁸¹ Panel report, *Argentina – Textiles and Apparel*, para. 6.15.

⁶⁸² Panel report, *Argentina – Textiles and Apparel*, para. 6.14.

⁶⁸³ According to Article 6 of the Agreement on Safeguards, the duration of a provisional safeguard measure shall not exceed 200 days. Furthermore, it is unclear under the line of reasoning proposed by Chile why it is of such significance that a measure has been terminated just before or just after establishment of a panel. In both cases the panel would be requested to reach findings and conclusions with respect to a measure that had been terminated. This seems to us a distinction without a difference.

7.115 Although we do not consider that the termination of a measure before the commencement of panel proceedings deprives a panel of the authority to make findings in respect of that measure, we would only make findings regarding the provisional safeguard measures in this case if we were to consider this necessary in order to "secure a positive solution" to the dispute. As explained below⁶⁸⁴, this is not the case.

(b) The Definitive Safeguard Measures and the Extension of their Period of Application

7.116 Chile raises two different objections regarding the Panel's jurisdiction with respect to the definitive safeguard measures and the extension of their duration: first, the definitive safeguard measures had "expired" before the request for establishment was made; second, the "extension measures" were not formally included in the request for consultations. We cannot accept either of those objections, for one and the same reason. Both of Chile's objections are based on the proposition that the extension of the period of application results in a measure distinct from the definitive safeguard measure. We disagree with this proposition. In our view, Article 7 of the Agreement on Safeguards makes it clear that what is at issue is not an extension "of the safeguard measure", but, rather, an extension "of the period of application of the safeguard measure" or of "the duration of the safeguard measure". Article 7 is entitled "*Duration and Review of Safeguard Measures*". Article 7.1 provides:

"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 added)

7.117 Article 7.2 reads:

"The *period* mentioned in paragraph 1 *may be extended* provided that the competent authorities [...] have determined [...] that the safeguard measure *continues* to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting [...]." (emphasis added)

7.118 Article 7.3 reads:

"The total period of application of a safeguard measure including the period of application of any provisional measure, the *period of initial application and any extension thereof*, shall not exceed eight years." (emphasis added)

7.119 This language is sufficiently clear for us as to conclude that the "extensions" are not distinct measures, but merely continuations in time of the definitive safeguard measures. As a result, we consider that the definitive safeguard measures were not terminated before the request for establishment, but, rather, that their duration was simply extended at that time. Thus, we need not further

⁶⁸⁴ See para. 7.195.

consider Chile's argument that we lack the authority to make findings in respect of the definitive measures on the grounds that they have expired.⁶⁸⁵ For the same reason, we also consider the fact that the extension was not mentioned in the request for consultations irrelevant for the determination of our jurisdiction: pursuant to Article 4.4 of the DSU, Argentina had to, and did, identify the definitive safeguard measures in its request for consultations. The fact that the duration of the identified measures was extended by Chile after the request for consultations cannot affect Argentina's compliance with Article 4.4 of the DSU.⁶⁸⁶

7.120 We note, moreover, that the "extension" did not in any way amend the content of the safeguard measures and that there were, in fact, exchanges between Argentina and Chile during the period of consultations regarding the "extension". Chile must therefore have been fully informed about Argentina's intention to challenge the safeguard measures, *as extended in time*. Thus, even if the "extension" were to be considered a separate measure, *quod non*, Chile's due process rights would not have been impinged upon.⁶⁸⁷

(c) Withdrawal of Safeguard Measures while the Panel Proceedings were Ongoing

7.121 On 14 August 2001, the Panel received a communication from Chile stating that the safeguard measures on wheat and wheat flour had been terminated as of 27 July 2001. At the second meeting with the parties, the Panel was informed by Chile that the safeguard measure on vegetable oils would be terminated as of 26 November 2001.

7.122 Argentina has nevertheless explicitly requested the Panel to make findings regarding those measures. Argentina posits that the safeguard measures, even though they may have been repealed 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

⁶⁸⁵ We note, in any event, our view that panels do not lack the legal authority to make findings in respect of expired measures. *See paras. 7.112-7.113, supra.*

⁶⁸⁶ Accordingly, we need not decide whether the failure to identify a measure in a request for consultations would deprive a panel of the legal authority to make findings in respect of a measure otherwise within its terms of reference.

⁶⁸⁷ We note, however, that we are not examining the consistency of the extension decision with the requirements of Article 7.2 of the Agreement on Safeguards, as that is not within our Terms of Reference.

⁶⁸⁸ Argentina refers to Chile's First Written Submission, para. 25 *in fine*.

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. Formally, however, the portion of the PBS duty exceeding the 31.5 per cent bound rate would then presumably no longer be motivated by the objective of safeguard protection.

7.124 We also recall that, in our view, Article 19.1 DSU does 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.

7.125 In determining then whether or not to make findings regarding the "withdrawn" safeguard measures, we note that the challenged measures are indeed within our Terms of Reference. Argentina has in effect argued that it has suffered nullification or impairment as a result of the withdrawn measures and that it is entitled to a ruling on the matter which has been referred to us by the DSB. Considering our findings and conclusions regarding the Chilean PBS, on the one hand, and the particular nature of the safeguard measures by which a portion of the PBS duties were justified, on the other, we believe that it would be in the interest of a prompt settlement of the overall dispute to make findings regarding the safeguard measures at issue, even though they have been withdrawn in the course of the proceedings. By making findings on the "withdrawn" safeguard measures, we thus wish to make it clear that the partial identity between the Chilean PBS and the safeguard measures is bound to affect the question of consistency of such safeguard measures with the substantive requirements of Article XIX of GATT 1994 and the Agreement on Safeguards.

7.126 In accordance with past practice of GATT and WTO panels⁶⁸⁹, we will therefore examine the "withdrawn" safeguard measures challenged by Argentina in these proceedings, and make findings accordingly.

3. *Published Report (Article 3.1 of the Agreement on Safeguards)*

7.127 Article 3.1 of the Agreement on Safeguards provides *in fine* that "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law". Chile has confirmed that the Minutes of Sessions Nos. 181, 185, 193 and 224 of the CDC constitute the "published report" within the meaning of Article 3.1 of the Agreement on Safeguards.⁶⁹⁰ Argentina argues that Chile has acted inconsistently with its obligation to "publish" the report of the investigating authorities.

7.128 In this regard, we note that the Minutes of the relevant CDC sessions have not been "published" through any official medium. Rather, they were transmitted to the interested parties and placed at the disposal of "whoever wishes to consult

⁶⁸⁹ See the panel and Appellate Body reports referenced in footnote 567.

⁶⁹⁰ Letter by Chile dated 10 July 2001.

them at the library of the Central Bank of 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 In addition, we also note that various "transparency" provisions in the covered agreements, such as Article III of the GATS, Article 63.1 of the TRIPS Agreement, and Article 2.11 of the TBT Agreement all distinguish between "to publish" and "to make publicly available". In the light of these considerations, we find that the verb "to publish" in Article 3.1 of the Agreement on Safeguards must be interpreted as meaning "to make generally available through an appropriate medium", rather than simply "making publicly available". As regards the minutes of the relevant CDC sessions, we therefore find that they have not been generally made available through an appropriate medium so as to constitute a "published" report within the meaning of Article 3.1 of the Agreement on Safeguards.

4. *Documents Examined by the Panel to Assess Chile's Compliance with its Obligations under Article XIX of GATT 1994 and the Agreement on Safeguards*

7.129 In the previous section, we have found that the Minutes of the CDC meetings that Chile considers to represent the basis for its decision to impose the definitive safeguard measures at issue in this dispute do not constitute a "published" report within the meaning of Article 3.1. Given that the CDC did however seek to explain the bases for its imposition of the definitive safeguards measures, that these bases may be found in the publicly available Minutes referred to above, and that Argentina has not disputed that Chile may seek to motivate its decision to impose a safeguard measure on the basis of unpublished but public minutes, we will proceed to examine Argentina's substantive claims on that basis.

7.130 There is however an issue regarding *which* of those Minutes we may refer to in our review. Chile has designated minutes of CDC sessions Nos. 181, 185, 193 and 224 as jointly constituting the "report" referred to in Article 3.1 of the

⁶⁹¹ Chile's response to question 18 of the Panel.

⁶⁹² The New Shorter Oxford English Dictionary (L. Brown, Ed.), at 2405.

⁶⁹³ Paragraphs 2, 3, 4, 5 and 6 of Article 22 of the SCM Agreement. Paragraphs 1.1, 2.1, 2.2, 2.3 of Article 12 of the AD Agreement.

⁶⁹⁴ Footnote 53 to the SCM Agreement. Footnote 23 to the AD Agreement.

Agreement on Safeguards. We note, however, that the Minutes of Session No. 224 only concern the *extension*, and that it contains statistical data not included in the Minutes of Sessions Nos. 181, 185 and 193. According to Chile, "the information in Record No. 224 and its annexed statistical tables" are "useful in clarifying the analyses made in the investigation for the recommendation of the definitive measures in Record No. 193", because "much of the information contained in the later of these two records (Record No. 224) is updated data from the investigation concerning the measures initially recommended".⁶⁹⁵

7.131 For the purpose of our analysis of the consistency of the *definitive* safeguard measure, and the investigation preceding its recommendation by the CDC, with the requirements of Article XIX of GATT 1994 and the Agreement on Safeguards, we shall only consider findings and reasoning by the CDC reflected in the Minutes of Sessions Nos. 181, 185 and 193, respectively recommending the initiation of the investigation, the adoption of provisional measures and the adoption of definitive safeguard measures. We consider that our duty under Article 11 of the DSU to make an objective 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. *Unforeseen Developments (Article XIX:1(a) of GATT 1994 and Article 3.1 of the Agreement on Safeguards)*

7.132 Argentina claims that Chile has infringed Article XIX:1(a) of 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. Chile points out that the reason why the CDC recommended the application of safeguard measures on products subject to the PBS was the continued existence of unusually low prices over a period that could not be considered transitory. Chile contends that the unforeseen developments correspond to this special situation of global prices.

7.133 Article XIX:1(a) reads:

⁶⁹⁵ Chile's response to question 50 of the Panel.

⁶⁹⁶ We note that the Appellate Body in its report on *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("US – Cotton Yarn"), WT/DS192/AB/R, adopted 5 November 2001, para. 78, stated in the context of a determination in accordance with Article 6 of the ATC:

"In our view, a *panel* reviewing the due diligence exercised by a Member in making its determination under Article 6 of the ATC has to put itself in the place of that Member at the time it makes its determination. Consequently, a panel must not consider evidence which did not exist *at that point in time*."

"If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

7.134 We recall that the Appellate Body in *US – Lamb* stated that "unforeseen developments" is a circumstance whose existence must be demonstrated as a matter of fact for a safeguard measure to be applied consistently with Article XIX.⁶⁹⁷ According to the Appellate Body, the demonstration of the existence of this circumstance must feature in the published report of the investigating authorities.⁶⁹⁸ If the published report does not discuss or offers any explanation as to why certain factors mentioned in it can be regarded as "unforeseen developments", that report does not demonstrate that the safeguard measure concerned has been applied as a result of "unforeseen developments".⁶⁹⁹

7.135 According to Chile, the CDC made its findings and reasoned conclusions relating to the requirement of "unforeseen developments" in the Minutes of Session No. 193, where it states that:

" (...) [t]he 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*."⁷⁰⁰

7.136 We note that the CDC did not discuss or offer any explanation in its report as to why the reported "sizeable and rapid decrease in international prices" could be regarded as an unforeseen development. In fact, nothing in the CDC's report suggests that this reference was intended to relate to the issue of unforeseen developments. Consequently, we consider that the CDC did not demonstrate that the safeguard measures at issue have been applied "as a result of unforeseen developments", as required by Article XIX:1(a) of GATT 1994.

7.137 Argentina has claimed that Chile failed to set forth reasoned findings and conclusions regarding unforeseen developments in its report, as required by Article 3.1 of the Agreement on Safeguards. We recall in this respect the statement by the Appellate Body in *US – Lamb*:

⁶⁹⁷ Appellate Body report, *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, adopted 16 May 2001, para. 71.

⁶⁹⁸ *Ibid.*, para. 72.

⁶⁹⁹ *Ibid.*, para. 73.

⁷⁰⁰ Emphasis added.

"(...) we observe that Article 3.1 requires competent authorities to set forth findings and reasoned conclusions on 'all pertinent issues of fact and law' in their published report. As Article XIX:1(a) of the GATT 1994 requires that 'unforeseen developments' must be demonstrated, as a matter of fact, for a safeguard measure to be applied, the existence of 'unforeseen developments' is, in our view, a 'pertinent issue[] of fact and law', under Article 3.1, for the application of a safeguard measure, and it follows that the published report of the competent authorities, under that Article, must contain a 'finding' or 'reasoned conclusion' on 'unforeseen developments'."⁷⁰¹

7.138 In light of our finding that the CDC did not discuss or offer any explanation in its report as to why the reported "sizeable and rapid decrease in international prices" could be regarded as an unforeseen development, we find that Chile has failed to set forth reasoned findings and conclusions in its report regarding unforeseen developments, as required by Article 3.1 of the Agreement on Safeguards.

7.139 According to Chile, the statement by the CDC regarding declining international prices reflects the fact that a fall in international prices to such low levels and for such a long period is unusual and unpredictable, especially with respect to products whose prices tend to undergo strong fluctuations.⁷⁰² We wish to point out that, although this *ex post facto* explanation provided by Chile cannot, in any event, cure the CDC's failure to make findings and reasoned conclusions in its report, this explanation would not meet the requirement to demonstrate the existence of "unforeseen developments" either. First, Chile in its explanation and the CDC in its determination seem to refer to different events. Whereas the CDC spoke of "sizeable and rapid" decreases in international prices, Chile now argues that it was the "sustained" fall in international prices which could not have been foreseen. Second, it should be recalled that the safeguard measures do not impose any duty which was not already being applied under the Chilean PBS. The duty applied pursuant to the safeguard measures is merely a different label for the portion of the Chilean PBS duties exceeding the 31.5 per cent bound rate. The Chilean PBS has the stated objective of providing additional protection to offset declining international prices. The very fact that Chile established its PBS with such an objective constitutes, in our view, evidence that declining international prices cannot have been unforeseen. If the safeguard measures are not adding any protection to what already resulted from the Chilean PBS, in force since 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

⁷⁰¹ Appellate Body report, *US – Lamb*, para. 76.

⁷⁰² Chile's response to question 20 of the Panel.

⁷⁰³ Appellate Body report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea – Dairy"), WT/DS98/AB/R, adopted 12 January 2000, para. 86:

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 view, should be considered like or directly competitive. The report of the CDC does, in the final section contain-

such "emergency actions" are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not "foreseen" or "expected" when it incurred that obligation.

⁷⁰⁴ Appellate Body report, *US – Lamb*, paras. 86-87.

ing the recommendation, identify the tariff heading (1001.9000, "wheat other than durum wheat") of imported products to which the safeguard measures will apply. However, the identification of the tariff lines of the imported products to which the safeguard measures shall apply, does not say anything about whether the domestic product is like or directly competitive with the imported products.⁷⁰⁵

7.144 With respect to wheat flour, Chile has asserted that wheat and wheat flour are directly competitive products. In Chile's view, this reasoning is reflected in the CDC's report, where it reads that:

"(...) 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."⁷⁰⁶

7.145 This comment, however, relates to a possible relationship of likeness or direct competitiveness between two imported products, imported wheat and imported wheat flour, not between domestic wheat or wheat flour and the imported wheat flour.

7.146 Finally, as regards vegetable oils, Chile has confirmed that the safeguard measures on vegetable oils apply to both crude and refined oils.⁷⁰⁷ The CDC, however, does not provide any reasoned conclusions or finding as regards the likeness or direct competitiveness between domestic crude and refined oils and the imported crude and refined oils included in the 25 tariff lines subject to the safeguard measures. Chile has offered the following *ex post facto* explanation:

"(...) colza-oil (rape) produced domestically is a like product to all oils to which the measure applies since: (i) they are physically and chemically very similar, (ii) they are consumed without distinction, (iii) they have the same final use, and (iv) they utilize the same distribution channels."⁷⁰⁸

7.147 Even if these assertions were to be substantiated, however, they do not provide any explanation as regards the relationship of likeness or direct competitiveness between other domestic oils, such as maize and olive oil,⁷⁰⁹ and the imported oils included in the 25 tariff lines subject to the safeguard measures. In any event, we recall that even this incomplete explanation was not provided, as a

⁷⁰⁵ We note that Chile has offered some *ex post facto* explanation for the CDC's conclusions. Chile indicates that, as far as wheat is concerned:

"(...) in view of the inherent nature of the products under investigation, domestic wheat was considered to be a like product to imported wheat since the imports correspond to the same product at the agricultural production level." (Chile's response to question 27(a) of the Panel).

As indicated earlier, such *ex post facto* explanation, even if it were sufficient to support the CDC's likeness determination, could not cure the CDC's failure to provide such analysis in its report.

⁷⁰⁶ Minutes of CDC Session No. 193.

⁷⁰⁷ Chile's response to question 27(b) of the Panel.

⁷⁰⁸ *Ibid.*

⁷⁰⁹ *Ibid.*

reasoned conclusion, in the CDC's report, but only offered by Chile as *ex post facto* rationalization.

7.148 Furthermore, when asked by the Panel to identify the domestic industry as regards edible vegetable oils identified in reference to 25 tariff lines, Chile stated that "[t]he relevant domestic industry is the oils industry, which includes the rape-seed oil industry".⁷¹⁰ Nevertheless, Chile has clarified that the injury data in the minutes of CDC session No. 193 regarding production, employment and "marginalization" of producers concern the agricultural production of rape-seed, and not "the oils industry".⁷¹¹ Thus, by considering injury data relating to agricultural producers of rape-seed, the CDC would appear to have included such producers in its definition of the domestic industry. The CDC, however, provided in its report no explanation of how domestic rape-seeds can be regarded as like or directly competitive with imported vegetable oils. We note in this respect that, 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 notifications reveals that Chile did not demonstrate that there were increased imports, and that Chile therefore failed to comply with its obligations under Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards. Chile submits that the requirement regarding an increase in imports and the impact of the PBS in this case are factors that cannot be examined separately. According to Chile, the CDC's investigation did identify increased imports in accordance with the requirements of Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards. In addition, as regards the extension of the definitive measure, Chile argues that the justification of such an extension cannot require that the competent authority find for a second time that there is an increase in imports.

7.151 The relevant section of the Minutes of Session No. 193 of the CDC, at which the CDC decided to recommend the adoption of the definitive safeguard measures, reads as follows:

⁷¹⁰ Chile's response to question 27(b) of the Panel.

⁷¹¹ Chile's response to question 38 of the Panel.

⁷¹² Appellate Body report on *US - Lamb*, paras. 83-96.

"In its analysis of imports, the Commission 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. Even so, there has been an increase in imports in absolute terms which threatens to cause injury to the production sectors concerned. In its analysis, the Commission has taken into account the period commencing when, for each product, the specific tariffs determined by the application of the price band, added to the general tariff, exceeded the level bound in the WTO. Without prejudice to this analysis, information prior to this period shall also be considered for comparison and assessment. In this regard, the Commission points out that:

- Imports of wheat (in tons) increased by 6 per cent in 1998 in comparison with the previous year. Over the first ten months of 1999, imports rose by 281 per cent compared with the same period in 1998. There was an increase in imports from 1993 to 1996, with a drop in 1997. Imports of wheat flour fluctuated, but this can be explained by their low volume. Nevertheless, the Commission notes that 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.
- [...]
- Imports of the two main edible vegetable oils 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. In relation to this reduction, the Commission 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:

"[W]e agree with the Panel that the specific provisions of Article 4.2(a) require that 'the *rate* and *amount* of the increase in imports ... in absolute and relative terms'... must be evaluated. [...] Thus, we do not dispute the Panel's view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a).

[...] Although we agree with the Panel that the 'increased quantities' of imports cannot be just *any* increase, we do not agree with the Panel that it is reasonable to examine the trend in imports over a five-year historical period.

[...] [T]his language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'.⁷¹³

7.153 In addition, we recall that the Appellate Body in its report on *US – Lamb* stated:

"[W]e 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."⁷¹⁴

7.154 We consider that the analysis by the CDC contained in the minutes of its session No. 193 does not demonstrate that the products concerned are "being imported [...] in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause or threaten to cause serious injury," as required by Article 2.1 of the Agreement on Safeguards.

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

⁷¹³ Appellate Body report, *Argentina – Footwear (EC)*, WT/DS121/AB/R, adopted 12 January 2000, paras. 129-131.

⁷¹⁴ Appellate Body on *US – Lamb*, para. 138. We are aware that the Appellate Body made this observation with respect to the investigating authorities' injury analysis, and not with regard to their examination of import trends. We consider, however, in the light of Article 2.1 of the Agreement on Safeguards, that this reasoning is equally applicable to the analysis of actual import trends.

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 identified in the Minutes of Session No. 193 a 281 per cent increase in the first ten months of 1999. Although the Minutes of Session No. 193 do also indicate that imports increased by 6 per cent in 1998, they only state with respect to long-term trends that "[t]here was an increase in imports from 1993 to 1996, with a drop in 1997". We consider that such a conclusory statement does not meet the requirement of assessing short-term trends "in the light of the longer-term trends in the data for the whole period of investigation". For example, the import volumes for 1999, even though they represented a 281 per cent increase over the preceding year, were still smaller than the import volumes for 1995 and 1996. The CDC should have provided a reasoned analysis as regards the significance of the import volumes for 1999 in the context of the import volumes for 1995 and 1996.⁷¹⁶ Accordingly, we find that the CDC did not demonstrate that there was an increase in imports of wheat recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause serious injury.⁷¹⁷ We consider, therefore, that the CDC failed to identify such increase in imports of wheat as required by Article XIX:1(a) of GATT 1994 and Articles 2.1 and 4.2(a) of the Agreement on Safeguards.

⁷¹⁵ *Ibid.*, para. 131.

⁷¹⁶ We draw these data from the tables annexed to the Minutes of Session No. 224 of the CDC, which concerns the extension of the measures' duration. However, the Minutes of Session No. 193 contain an assessment of increased imports on the basis of unidentified data for the period 1993-1997, 1998 and the first ten months of 1999, and Chile has stated that "much of the information contained in the later of these two records (Record No. 224) is updated data from the investigation concerning the measures initially recommended" (Chile's response to question 50 of the Panel). Thus, Chile implicitly acknowledges that the CDC had such data on actual import trends that it should have examined and explained.

⁷¹⁷ *Ibid.*, para. 131.

7.158 Moreover⁷¹⁸, we note that table 3 annexed to the Minutes of Session No. 224 of the CDC (containing the recommendation to extend the period of application) actually shows a decrease in imports of wheat flour of 14 per cent in 1999, of 21 per cent in 1998, and of 28 per cent in 1997. In addition, table 7 annexed to the Minutes of Session No. 224 of the CDC shows a decrease of 4 per cent in total imports of vegetable oils during 1997, and increases of 4 per cent and 21 per cent in 1996 and 1998, respectively. As for wheat, the tables show a decrease of 60 per cent in 1997 and increases of 5, 11, and 4 per cent in 1995, 1996 and 1998, respectively.

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

⁷¹⁸ We wish to emphasize that in making these observations it was the CDC's responsibility to identify a discernable upward trend in imports at the time it recommended that definitive safeguard measures be applied.

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 investigating authorities must determine whether increased imports threaten to cause serious injury, whereas Article 2.1 provides that the investigative authorities may decide to apply a safeguard measure only *when* such a determination has been arrived at.

⁷²⁰ Although to the Minutes of Session No. 224 tables regarding sown surface and domestic output have been attached, the Minutes of Session No. 193 – in which adoption of the definitive measure is recommended by the CDC – do not contain any analysis in relative terms. Argentina has argued that this increase in imports of wheat during 1999 was due to extreme drought in Chile, severely affecting domestic output that year. We note in this respect that table 13 annexed to the Minutes of Session No. 224 shows a drop of 28 per cent in crop, 19.8 per cent in output of wheat, and 10.2 per cent in the sown surface during 1999.

⁷²¹ Chile's response to question 35 of the Panel.

⁷²² Chile's rebuttal submission, para. 63.

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 partly⁷²³, 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.

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.

⁷²³ The CDC states in the Minutes of Session No. 193 that "*even so, there has been an increase in imports*".

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 Chile has explained that the CDC's relevant findings and reasoned conclusions are contained in the following section of the Minutes of Session No. 193:

"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.

The Commission has also taken into account 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. Predicted trends in international prices for these products are also negative; i.e., prices should remain at their present levels or fall even more.

The situation described has left the Commission convinced of the existence of an imminent threat of injury *if only the tariff ceiling of 31.5 per cent is applied*, which can be summarized as follows:

- (i) In the case of wheat, a decrease of 34 per cent in the area under cultivation is expected (from 370 thousand hectares to 244 thousand hectares); a decrease 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 *US – Lamb* stated that,

"(...) an 'objective assessment' of a claim under Article 4.2(a) of the Agreement on Safeguards has, in principle, two elements. First, a panel must review whether competent authorities have evaluated all relevant factors, and, second, a panel must review whether the authorities have provided a reasoned and adequate explanation of how the facts support their determination. [...] Thus, the panel's objective assessment involves a formal aspect and a substantive aspect. The formal aspect is whether the competent authorities have evaluated 'all relevant factors'. The substantive aspect is

⁷²⁴ Emphasis added.

whether the competent authorities have given a reasoned and adequate explanation for their determination."⁷²⁵

7.168 As regards the *formal* aspect, the Appellate Body stated in *Argentina – Footwear* that:

"Article 4.2(a) of the Agreement on Safeguards requires a demonstration that the competent authorities evaluated, *at a minimum*, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned."⁷²⁶

7.169 Chile has conceded that the CDC did not evaluate certain relevant factors, such as changes in the level of sales and capacity utilization with respect to wheat, and productivity and employment with respect to vegetable oils.⁷²⁷ Chile has explained that it did not evaluate all the relevant factors explicitly listed in Article 4.2(a), including productivity and employment in the oils industry, because for those factors "information was unavailable from public sources and could not be found by consulting other sources either".⁷²⁸ At the same time, however, Chile has indicated that the questionnaires which the CDC had sent to the interested parties did not include "the more specific questions that are necessary in other cases, since the data contained in the application covered a large part of the background information from the industry and the data gathered from other sources was considered sufficient".⁷²⁹ We find it difficult to accept lack of information as a justification for failure to evaluate all relevant factors, if the investigating authorities were apparently satisfied that the available information was sufficient and no further investigative steps had to be taken. Accordingly, by failing to evaluate each of the factors listed in Article 4.2(a), we consider that Chile has acted inconsistently with its obligations under Article 4.2(a).

7.170 We now proceed to examine whether Chile has complied with the substantive requirements of the injury analysis. We recall in this respect that, pursuant to Article 4.1(b), a threat of serious injury shall be understood to mean serious injury that is clearly imminent, and that a determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility. We also recall that the Appellate Body in *US – Lamb* has stated:

"[I] making a 'threat' determination, the competent authorities must find that serious injury is 'clearly imminent'. As we have already concluded, this requires a high degree of likelihood that the antici-

⁷²⁵ Appellate Body report on *US - Lamb*, para. 103. Emphasis added.

⁷²⁶ Appellate Body report on *Argentina – Footwear (EC)*, paras. 135-136. Emphasis added.

⁷²⁷ Chile's response to question 21(a) of the Panel. In addition, Chile has informed the Panel that the injury data in the minutes of CDC session No. 193 regarding production, employment and "marginalization" of producers concern the agricultural production of rape-seed, and not "the oils industry" (Chile's response to question 38 of the Panel). As indicated above, unless rape-seeds are shown to be like or directly competitive with oils, rape-seed growers should not be included in the domestic industry. Absent this demonstration, injury data relating to rape-seed growers would be irrelevant.

⁷²⁸ Chile's response to question 21 of the Panel.

⁷²⁹ Chile's response to question 17(c) of the Panel.

pated serious injury will materialize in the very near future. Accordingly, we agree with the Panel that a threat determination is 'future-oriented'. However, Article 4.1(b) requires that a 'threat' determination be based on 'facts' and not on 'conjecture'. As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts. There is, therefore, a tension between a future-oriented 'threat' analysis, which, ultimately, calls for a degree of 'conjecture' about the likelihood of a future event, and the need for a fact-based determination. Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future, namely that serious injury is 'clearly imminent'. Thus, a fact-based evaluation, under Article 4.2(a) of the *Agreement on Safeguards*, must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future.⁷³⁰

[...] [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 The CDC did not provide in the Minutes of Session No. 193 any indication regarding either the data which it had based its injury projections on, or the relevant time-period during which such data would have been examined. The data mentioned in the CDC's report refer to hypothetical growth rates taken with respect to projected values. They do not reveal what the most recent historical values were. Consequently, the CDC does not appear to have based its injury

⁷³⁰ [original footnote] We observe that the projections made must relate to the overall state of the domestic industry, and not simply to certain relevant factors.

⁷³¹ Appellate Body report on *US – Lamb*, paras. 136-138.

determination on data relating to the most recent past, and did not assess such data in the context of the data for the entire investigative period. We therefore find that, also in this respect, Chile has acted inconsistently with its obligations under Article 4.2(a).

7.172 Moreover, we note that, according to Chile, a threat of serious injury exists because imports would increase unless the full duties specified in the Chilean PBS are applied. We consider this reasoning insufficient to support the CDC's conclusion. As we have stated earlier, at the time of the adoption of the safeguard measures, the Chilean PBS was already operating without restriction, and PBS duties were being imposed in excess of the 31.5 per cent bound rate. Chile argues that there would be a threat of serious injury if the Chilean PBS were not to be applied without restriction, and that, therefore, safeguard measures equal to the portion of the PBS duties exceeding the 31.5 per cent bound rate should be adopted. Put another way, Chile based its determination of a threat of serious injury on a counterfactual analysis: if they were to restrict the operation of the Chilean PBS to the 31.5 per cent bound rate, injury may occur. Thus, in their threat of injury analysis, for "projecting" the future condition of the domestic industry, the investigative authorities did not rely on an extrapolation of existing trends, but on the results from a counterfactual exercise, simulating what that condition would be if the safeguard measure were to be removed.⁷³² Such counterfactual analysis cannot justify the imposition of definitive safeguard measures.

7.173 In reply to the Panel's questions, Chile has argued that "the determination of whether or not serious injury would occur if a safeguard measure were withdrawn is possible", because the Agreement on Safeguards "envisages that such an analysis will be made by the competent authorities in that it assumes that a safeguard measure will be *maintained* only for the time necessary to prevent or remedy serious injury."⁷³³ We do not disagree with Chile that this type of analysis is indeed 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.

⁷³² We note that the CDC's threat of injury analysis is also flawed since its report does not provide historical data on the "relevant factors" (other than data on import growth), and thus it is impossible to assess the significance of the projected drops against the background of the data for the most recent past. This approach is inconsistent with Article 4.2(a), as interpreted by the Appellate Body in its report on *US – Lamb*, para. 138.

⁷³³ Chile's response to question 7(b) of the Panel. Emphasis added.

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 *US – Wheat Gluten*:

"Article 4.2(b) presupposes [...] as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent

⁷³⁴ Minutes of CDC session No. 193.

⁷³⁵ Appellate Body report on *Argentina – Footwear (EC)*, para. 145.

⁷³⁶ See the Panel report on *Canada – Countervailing Duties on Grain Corn from the United States*, BISD 39/411, at 433-435 (paras. 5.2.6 and 5.2.9-5.2.10).

authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on 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.

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 Políticas Agrarias, Ministerio de Agricultura, *Temporada Agrícola*, 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.

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*:

"(...) 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 ap-

⁷⁴¹ Appellate Body report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea – Dairy"), WT/DS98/AB/R, adopted 12 January 2000, para. 96.

propriate" 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 rational connection to a state of the domestic industry below which (a threat of) serious injury will be experienced. We find accordingly that Chile did not ensure that the safeguards measures are applied to the extent necessary to prevent or remedy serious injury and facilitate adjustment, as required by Article XIX:1(a) of GATT 1994 and Article 5.1 of the Agreement on Safeguards.

7.185 Moreover, we note the following statement by the Appellate Body regarding the obligation of Article 5.1 in its report on *US – Line Pipe*:⁷⁴³

"For all these reasons, we conclude that the phrase 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment' in Article 5.1, first sentence, must be read as requiring that safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports."⁷⁴⁴

Having reached this conclusion, we must consider now whether the Panel erred in concluding that Korea did not make a *prima facie* case that the United States had not fulfilled this substantive obligation in Article 5.1, first sentence. On this, we conclude that, by establishing that the United States violated Article 4.2(b) of the Agreement on Safeguards, Korea has made a *prima facie* case that the application of the line pipe measure was not limited to the extent permissible under Article 5.1. In the absence of a rebuttal by the United States of this *prima facie* case by Korea, we find that the United States applied the line pipe measure beyond the "extent necessary to prevent or remedy serious injury and to facilitate adjustment".⁷⁴⁵

[...]

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 fa-*

⁷⁴² Chile's reply to Panel question 29.

⁷⁴³ Appellate Body report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("US – Line Pipe"), WT/DS202/AB/R, adopted 8 March 2002.

⁷⁴⁴ *Ibid.*, para. 260.

⁷⁴⁵ *Ibid.*, para. 261.

cie 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' in the context of its Article 4.2(b) causation analysis⁷⁴⁷ or otherwise establish that the Chilean measures address the serious injury arising from imports alone in the context of Article 5.1.

7.187 We note that Argentina has also based its claim on Article 3.1, which requires the investigating authorities, *inter alia*, to set forth their findings and reasoned conclusions on all pertinent issues of fact and law, thus raising the question of whether Chile was under an obligation to justify, in its report, the application of the measures.⁷⁴⁸

7.188 As we have already found that Chile has acted inconsistently with Article 5.1 of the Agreement on Safeguards, we do not find it necessary for the settlement of this dispute to address Argentina's claim regarding the justification of the application of the measure to the extent that it has been based on Article 3.1. We accordingly decide to exercise judicial economy to that extent.

11. *Appropriate Investigation (Articles 3.1 and 3.2 of the Agreement on Safeguards)*

7.189 Argentina claims that Chile breached its obligation under Articles 3.1 and 3.2 to conduct a "appropriate investigation" because Argentina did not have a full opportunity to participate in the investigation. Specifically, Argentina asserts that it did not have access to any public summary of the confidential information on which the Chilean authorities may have based their determination. Chile responds that Argentina participated in two hearings before the CDC and had access to the file containing submissions of other interested parties. It further contends that there were no non-confidential summaries of confidential information because there was no confidential information to discuss; the information regarding these products was completely public.

7.190 We note that, pursuant to Article 3.2 of the Agreement on Safeguards, parties submitting confidential information may be requested to furnish non-

⁷⁴⁶ *Ibid*, para. 262.

⁷⁴⁷ See para. 7.179 above.

⁷⁴⁸ We recall in this respect that, according to the Appellate Body, no formal requirement for an explanation in the decision of the investigating authorities flows from the provision of Article 5.1 for a safeguard measure other than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. (See Appellate Body report, *Korea – Dairy*, paras. 98-99, and Appellate Body report, *US – Line Pipe*, paras. 230-235) Since the safeguard measures at issue are not in the form of a quantitative restriction reducing the quantity of imports below the average of imports in the last three representative years, Chile was under no obligation pursuant to Article 5.1 to give a justification for those measures at the time of the CDC's decision.

confidential summaries or, if such information cannot be summarized, the reasons why such summaries cannot be provided. Argentina has not however established in this case that the record contained any confidential information⁷⁴⁹; 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 findings and reasoned conclusions in its report regarding unforeseen developments and the application of the measures.⁷⁵¹ In addition, we have also found that Chile has not demonstrated that the CDC complied with the substantive requirements of Articles 2 and 4 of the Agreement on Safeguards. In the light of these findings, we do not consider it necessary to make any additional findings under Article 3.1

⁷⁴⁹ We recall in this respect that, for each stage of the investigation, the CDC receives a "technical report" from its Secretariat. Chile has explained that this technical report is an internal working document which is not binding *vis-à-vis* the decisions taken by the CDC. The technical report is restricted and not part of the public record because it includes the confidential information contributed by the interested parties. According to Chile, in the case at issue, the technical report did not contain any confidential information. See Chile's second submission, paras. 63-65.

⁷⁵⁰ Argentina second submission, para. 109.

⁷⁵¹ We recall that Argentina had explicitly reiterated its Article 3.1 claim with respect to those aspects of the CDC's report.

of the Agreement on Safeguards, and, accordingly, will exercise judicial economy in this respect.

13. Provisional Measures (Article XIX:2 of GATT 1994 and Article 6 of the Agreement on Safeguards)

7.194 Argentina claims that the CDC did not comply with Article XIX:2 of GATT 1994 and Article 6 of the Agreement on Safeguards, which lay down the requirements for the application of provisional measures. Chile submits that the Minutes of Session No. 185 set out the critical circumstances and assessments required in order to determine the need for the recommended provisional measures, as required by Article XIX:2 of GATT 1994 and Article 6 of the Agreement on Safeguards.

7.195 We have stated above that the provisional safeguard measures are within our jurisdiction. Nonetheless, 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 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

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).

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 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 above⁷⁵³, we do not make any recommendation with respect to the safeguard measures challenged by Argentina in these proceedings.

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

EUROPEAN COMMUNITIES – TRADE DESCRIPTION OF SARDINES

Report of the Appellate Body WT/DS231/AB/R

*Adopted by the Dispute Settlement Body
on 23 October 2002*

European Communities, *Appellant*
Peru, *Appellee*
Canada, *Third Participant*
Chile, *Third Participant*
Ecuador, *Third Participant*
United States, *Third Participant*
Venezuela, *Third Participant*

Present:
Bacchus, Presiding Member
Abi-Saab, Member
Baptista, Member

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I. INTRODUCTION

1. The European Communities appeals from certain issues of law and legal interpretations in the Panel Report, *European Communities – Trade Description of Sardines* (the "Panel Report").¹

2. This dispute concerns the name under which certain species of fish may be marketed in the European Communities. The measure at issue is Council Regulation (EEC) 2136/89 (the "EC Regulation"), which was adopted by the Council of the European Communities on 21 June 1989 and became applicable on 1 January 1990.² The EC Regulation sets forth common marketing standards for preserved sardines.

3. Article 2 of the EC Regulation provides that:

Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:

- they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
- they must be prepared exclusively from fish of the species "Sardina pilchardus Walbaum";

¹ WT/DS231/R, 29 May 2002, WT/DS231/R/Corr.1, 10 June 2002.

² OJ No L 212, 22.07.1989, reproduced as Annex 1 to the Panel Report, pp. 79–81.

- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
- they must be sterilized by appropriate treatment. (emphasis added)

4. *Sardina pilchardus* Walbaum ("*Sardina pilchardus*"), the fish species referred to in the EC Regulation, is found mainly around the coasts of the Eastern North Atlantic Ocean, in the Mediterranean Sea, and in the Black Sea.³

5. In 1978, the Codex Alimentarius Commission (the "Codex Commission"), of the United Nations Food and Agriculture Organization and the World Health Organization, adopted a world-wide standard for preserved sardines and sardine-type products, which regulates matters such as presentation, essential composition and quality factors, food additives, hygiene and handling, labelling, sampling, examination and analyses, defects and lot acceptance. This standard, CODEX STAN 94–1981, Rev.1–1995 ("*Codex Stan 94*"), covers preserved sardines or sardine-type products prepared from the following 21 fish species:

- *Sardina pilchardus*
- *Sardinops melanostictus*, *S. neopilchardus*, *S. ocellatus*, *S. sagax*[,] *S. caeruleus*
- *Sardinella aurita*, *S. brasiliensis*, *S. maderensis*, *S. longiceps*, *S. gibbosa*
- *Clupea harengus*
- *Sprattus sprattus*
- *Hyperlophus vittatus*
- *Nematalosa vlaminghi*
- *Etrumeus teres*
- *Ethmidium maculatum*
- *Engraulis anchoita*, *E. mordax*, *E. ringens*
- *Opisthonema oglinum*.⁴

6. Section 6 of Codex Stan 94 provides as follows:

6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following special provisions apply:

6.1 NAME OF THE FOOD

The name of the product shall be:

- 6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or

³ Panel Report, para. 2.2.

⁴ Codex Stan 94, as reproduced in Annex 2 to the Panel Report, section 2.1.1.

- (ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

6.1.2 The name of the packing medium shall form part of the name of the food.

6.1.3 If the fish has been smoked or smoke flavoured, this information shall appear on the label in close proximity to the name.

6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer.⁵ (emphasis added)

7. Peru exports preserved products prepared from *Sardinops sagax sagax* ("*Sardinops sagax*"), one of the species of fish covered by Codex Stan 94. This species is found mainly in the Eastern Pacific Ocean, along the coasts of Peru and Chile.⁶

8. *Sardina pilchardus* and *Sardinops sagax* both belong to the *Clupeidae* family and the *Clupeinae* subfamily. As their scientific name suggests, however, they belong to different genus. *Sardina pilchardus* belongs to the genus *Sardina*, while *Sardinops sagax* belongs to the genus *Sardinops*.⁷ Additional factual aspects of this dispute are set forth in paragraphs 2.1–2.9 of the Panel Report.

⁵ We note, however, that the text of Codex Stan 94, published in the print version of the Codex Alimentarius, presents certain differences in respect to the version used by the Panel and submitted by Peru to the Panel as Exhibit PERU-3. Section 6 published in the print version of the Codex Alimentarius reads as follows:

6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, *Rev. 1-1991*) the following *specific* provisions apply:

6.1 NAME OF THE FOOD

The name of the product shall be:

- 6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or
- (ii) "X sardines" *where "X" is the name of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.*

6.1.2 The name of the packing medium shall form part of the name of the food.

6.1.3 If the fish has been smoked or smoke flavoured, this information shall appear on the label in close proximity to the name.

6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer. (emphasis added)

(Codex Alimentarius (Secretariat of the Joint FAO/WHO Food Standards Programme, 2001), Volume 9A, Fish and Fishery Products, pp. 75–81)

⁶ Panel Report, para. 2.2.

⁷ Panel Report, para. 2.3.

9. The Panel in this dispute was established on 24 July 2001. Before the Panel, Peru argued that the EC Regulation is inconsistent with Articles 2.4, 2.2 and 2.1 of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*") and Article III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").⁸

10. In the Panel Report circulated to Members of the World Trade Organization (the "WTO") on 29 May 2002, the Panel found that the EC Regulation is inconsistent with Article 2.4 of the *TBT Agreement*, and exercised judicial economy in respect of Peru's claims under Articles 2.2 and 2.1 of the *TBT Agreement* and III:4 of the GATT 1994.⁹ The Panel, therefore, recommended that the Dispute Settlement Body (the "DSB") request the European Communities to bring its measure into conformity with its obligations under the *TBT Agreement*.¹⁰

11. On 25 June 2002, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 27 June 2002, we received a communication from Peru requesting a Preliminary Ruling pursuant to Rule 16(1) of the *Working Procedures*. Peru requested that we exclude from the appeal four of the nine points raised in the European Communities' Notice of Appeal, because these points allegedly did not meet the requirements of Rule 20(2)(d) of the *Working Procedures*.

12. In a letter dated 27 June 2002, we invited the European Communities and the third parties to submit, by 2 July 2002, written comments on the issues raised by Peru in its Request for a Preliminary Ruling.

13. On 28 June 2002, the European Communities sent letters to the Chairman of the DSB and to the Appellate Body, indicating its intention to withdraw the Notice of Appeal of 25 June 2002, pursuant to Rule 30 of the *Working Procedures*, conditionally on the right to file a new Notice of Appeal. The European Communities filed a new Notice of Appeal on the same day.

14. In a letter dated 1 July 2002, we informed the participants and third parties that neither the European Communities nor the third parties should file written submissions on the issues raised in the Request for a Preliminary Ruling submitted by Peru.

15. Peru submitted a letter, dated 2 July 2002, in which it challenged the right of the European Communities to withdraw conditionally the Notice of Appeal of 25 June 2002, and to file a second Notice of Appeal on 28 June 2002.

16. On 4 July 2002, we informed the participants and third parties that it was our intention to conduct the appellate proceedings in conformity with the Work-

⁸ *Ibid.*, para. 3.1.

⁹ *Ibid.*, paras. 8.1 and 7.152.

¹⁰ *Ibid.*, para. 8.3.

ing Schedule drawn up further to the Notice of Appeal of 28 June 2002, without prejudice to the right of the participants and the third participants to present in their submissions arguments relating to the matters raised in Peru's letter dated 2 July 2002.

17. The European Communities filed an appellant's submission on 8 July 2002.¹¹ Peru filed an appellee's submission on 23 July 2002.¹² Ecuador filed a third participant's submission on 22 July 2002.¹³ Canada, Chile, the United States, and Venezuela filed third participant's submissions on 23 July 2002.¹⁴

18. On 23 July 2002, we received a letter from Colombia indicating that, although it would not file a third participant's submission, it had an interest in attending the oral hearing in this appeal. Colombia had participated in the proceedings before the Panel as a third party which had notified its interest to the DSB under Article 10.2 of the DSU. By letter of 7 August 2002, we informed the participants and third participants that we were inclined to allow Colombia to attend the oral hearing as a passive observer, and to notify us if they had any objection. The European Communities had no objection to Colombia attending the oral hearing as a third participant, but did object to Colombia attending as a passive observer. Ecuador had no objection to Colombia attending the hearing, but found there was no legal basis to apply a passive observer status and deny them the right to attend as a third participant. On 9 August 2002, we informed the participants and third participants that Colombia would be permitted to attend the oral hearing as a passive observer.

19. An *amicus curiae* brief was received, on 18 July 2002, from a private individual. The Kingdom of Morocco also filed an *amicus curiae* brief on 22 July 2002. In a letter dated 26 July 2002, Peru objected to the acceptance and consideration of both *amicus curiae* briefs. Ecuador expressed similar objections in a letter received on 2 August 2002. Canada submitted a letter, on 26 July 2002, requesting that we decide whether or not to accept the briefs in advance of the oral hearing.

20. By letter of 31 July 2002, the participants and third participants were informed that they would have an opportunity to address the issues relating to the *amicus curiae* briefs during the oral hearing, without prejudice to their legal status or to any action the we might take in connection with these briefs.

21. The oral hearing in the appeal was held on 13 August 2002. The participants and third participants presented oral arguments and responded to questions put to them by Members of the Division hearing the appeal.

¹¹ Pursuant to Rule 21 of the *Working Procedures*.

¹² Pursuant to Rule 22 of the *Working Procedures*.

¹³ Pursuant to Rule 24 of the *Working Procedures*.

¹⁴ *Ibid.*

II. ARGUMENTS OF THE PARTICIPANTS AND THE THIRD PARTICIPANTS

A. *Claims of Error by the European Communities – Appellant*

1. *Procedural Issues*

22. The European Communities argues that the preliminary objections raised by Peru on the adequacy of the Notice of Appeal filed by the European Communities on 25 June 2002 are now moot and settled. The European Communities responded to this objection by Peru with its letter to the Appellate Body of 28 June 2002 and the replacement of that Notice of Appeal with a new one of the same day. The European Communities asserts that, in conditionally withdrawing its initial Notice of Appeal and then filing a new Notice of Appeal, it proceeded in conformity with the DSU, the *Working Procedures* and previous practice.

23. The European Communities also underscores that it proceeded expeditiously and that the issues listed in the Notice of Appeal of 28 June 2002 were identical to those in the Notice of Appeal of 25 June 2002. The only difference between the two Notices of Appeal is that the Notice of Appeal of 28 June 2002 included additional information on the issues being appealed, which was provided in response to Peru's request.

24. The European Communities asserts that it is absolutely clear that Peru's rights of defence have not been harmed in any way by the replacement of the original Notice of Appeal with a new one and by the new Working Schedule drawn up by the Appellate Body. It also rejects Peru's allegation that the European Communities was engaging in litigation tactics.

25. The European Communities states that, in any event, the objection submitted by Peru on 27 June 2002 was clearly unfounded.

2. *The Characterization of the EC Regulation as a "Technical Regulation"*

26. The European Communities acknowledges that the EC Regulation is a "technical regulation" for purposes of the *TBT Agreement*, because it lays down product characteristics for preserved *Sardina pilchardus*. The European Communities claims, however, that the Panel erred in finding that the EC Regulation is a "technical regulation" relating to preserved *Sardinops sagax*.

27. According to the European Communities, the EC Regulation does not lay down product characteristics for *Sardinops sagax*. The European Communities thus argues that, with respect to *Sardinops sagax*, the EC Regulation does not apply to an identifiable product as required by the Appellate Body in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos").¹⁵

¹⁵ Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001.

28. The European Communities also argues that a name—as opposed to a label—is not a product characteristic for purposes of the definition of a "technical regulation" in the *TBT Agreement*. It explains that the requirement to state the name of a product on a label is a labelling requirement. In its view, however, the requirement to state a certain name on a label involves not only a labelling requirement, but also a substantive naming rule that is not subject to the *TBT Agreement*. The European Communities claims that Article 2 of the EC Regulation contains such a substantive naming requirement for preserved *Sardina pilchardus* and does not contain any labelling requirements for preserved *Sardinops sagax*.

3. *The Temporal Scope of Application of Article 2.4 of the TBT Agreement*

29. The European Communities argues that the Panel erred in finding that Article 2.4 of the *TBT Agreement* applies to technical regulations prepared and adopted before the *TBT Agreement* entered into force, and in considering that Article 2.4 applies to the maintenance of a technical regulation and not just to its adoption. In its view, the text of Article 2.4 indicates no obligation to reassess existing technical regulations in the light of the adoption of new international standards.

30. According to the European Communities, Article 2.4 applies only to the preparation and adoption of technical regulations, not to their maintenance. The preparation and adoption of the EC Regulation is an act that had "ceased to exist" when the obligation in Article 2.4 became effective. Article 28 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")¹⁶ states that provisions of a treaty do not bind a party in relation to any act or fact which took place or any situation which "ceased to exist" before the treaty came into effect.

31. The European Communities objects to the Panel's use of *EC Measures Concerning Meat and Meat Products (Hormones)* ("*EC – Hormones*")¹⁷ to support its finding because the Appellate Body, in that case, based its conclusion on the wording of Articles 2.2, 2.3, 3.3, and 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), all of which include the word "maintain".¹⁸ Article 2.4 of the *TBT Agreement*, however, does not include the word "maintain".

32. The terms "use" and "as a basis for" in Article 2.4 of the *TBT Agreement* and the introductory language "where technical regulations are required" imply, according to the European Communities, that this provision relates to the drawing up, drafting or preparation of technical regulations. This conclusion, furthermore, is supported by the inclusion of the word "imminent" in Article 2.4. The

¹⁶ Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

¹⁷ Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.

¹⁸ We note that, although the European Communities refers to Article 2.3 of the *SPS Agreement* in its appellant's submission, this provision does not include the word "maintain".

European Communities notes that Article 2.4 does not impose an obligation to use a draft international standard whose completion is not imminent. It argues, therefore, that it could not have been intended that an existing technical regulation would become inconsistent with Article 2.4 once completion of the draft international standard became "imminent", or even once the standard is actually adopted and becomes "existing".

33. The European Communities further alleges that Article 2.5 of the *TBT Agreement* provides contextual support for a conclusion that is the complete opposite of that reached by the Panel. According to the European Communities, Article 2.5 shows that when provisions of the *TBT Agreement* are intended to cover the *application* of technical regulations, they say so explicitly. Similar contextual support is found in Article 12.4, which uses the word "adopt", and in paragraph F of the Code of Good Practice for the Preparation, Adoption and Application of Standards, included as Annex 3 to the *TBT Agreement*, which uses the word "develops". The European Communities also rejects the Panel's conclusion that Article 2.6 of the *TBT Agreement* would be redundant if Article 2.4 did not apply to existing measures. The objective of Article 2.6 is the harmonization of technical regulations. Thus, for the European Communities, it is obvious that WTO Members who have technical regulations on a subject should be encouraged to participate in the preparation of an international standard.

34. The European Communities, in addition, disagrees with the Panel's assertion that excluding existing technical regulations from the scope of application of Article 2.4 would create "grandfather rights", given that these measures would be subject to other obligations in the *TBT Agreement* that do relate to their maintenance, such as Article 2.3.

4. *The Characterization of Codex Stan 94 as a "Relevant International Standard"*

35. The European Communities claims that the Panel erred in concluding that Codex Stan 94 is a relevant international standard for purposes of Article 2.4 of the *TBT Agreement*.

36. The European Communities contends that only standards adopted by international bodies by consensus may be considered relevant international standards. According to the European Communities, this is evident from the penultimate sentence of the Explanatory note to the definition of "standard" in Annex 1.2 to the *TBT Agreement*, which states that standards prepared by the international standardization community are adopted by consensus. In its view, the reference to documents not based on consensus found in the last sentence of the Explanatory note covers documents adopted by entities other than international bodies. The European Communities asserts that the Panel erred in failing to verify whether Codex Stan 94 was adopted by consensus.

37. The European Communities alleges further that the Panel erred in law when interpreting the meaning of Codex Stan 94. According to the European

Communities, the drafting history of Codex Stan 94 demonstrates that section 6.1.1(ii) should be interpreted as allowing the common name for the species of fish to be a possible name for the preserved "sardine-type" product, and that the word "sardine" does not have to be part of that name.

38. The European Communities notes that the draft of Codex Stan 94 at Step 7 of the elaboration procedures for Codex standards, listed "the common name for the species" in a subsection separate from that which referred to the name "X sardines". It then explains that because only editorial changes are allowed between Steps 7 and 8 of the elaboration procedures, the final text of Codex Stan 94, which contains both "names" in the same subsection, must be interpreted as providing that the common name of the species is an option independent from "X sardines". The European Communities contends that the Panel's contrary reading of the standard, which does not recognize "the common name" as separate from "X sardines", is not feasible because it would imply that an invalid, substantive change (as opposed to an editorial one) was made to the draft standard at Step 8 of the elaboration procedures.

39. The European Communities adds that Codex Stan 94, interpreted consistently with its drafting history, is not a relevant international standard in this case for purposes of Article 2.4 of the *TBT Agreement*, because its scope is different from that of the EC Regulation. It explains that Article 2 of the EC Regulation contains only a naming requirement for preserved sardines. For its part, Codex Stan 94, correctly interpreted, includes as a naming option for preserved "sardine-type" products the common name of the species alone, without the word "sardine".

5. *Whether Codex Stan 94 was Used "As a Basis For" the EC Regulation*

40. The European Communities claims that the Panel erred in concluding that Codex Stan 94 was not used "as a basis for" the EC Regulation. The European Communities argues that, despite the finding that the term "use as a basis" does not mean "conform to or comply with", the Panel applied the "as a basis" test in this case in such a narrow and restrictive manner as to make it, in practice, equivalent to the "conform to or comply with" test. In its view, the Panel erroneously considered that to meet the "as a basis" test, almost every single section and sentence of Codex Stan 94 must have been used in the technical regulation.

41. According to the European Communities, the EC Regulation covers only *Sardina pilchardus* and does not regulate *Sardinops sagax*, nor fish of other species. The European Communities thus argues that the relevant part of Codex Stan 94, for purposes of Article 2.4 of the *TBT Agreement*, is section 6.1.1(i), which states that the name "Sardines" is to be used exclusively for *Sardina pilchardus*. According to the European Communities, section 6.1.1(i) of Codex Stan 94 is used "as a basis for" the EC Regulation. The European Communities contends that section 6.1.1(ii) is not a relevant part of the standard because it refers to

products that are not regulated by the EC Regulation. Therefore, it need not be used "as a basis for" the EC Regulation.

42. The European Communities also alleges that the Panel performed an incorrect analysis to determine whether the relevant international standard was used "as a basis for" the technical regulation. The appropriate analysis, in its view, is not whether the European Communities used Codex Stan 94 as the "principal constituent or fundamental principle" for the purpose of enacting the EC Regulation, but whether there is a "rational relationship" between them on the substantive aspects of the standard in question.

43. The European Communities explains that, pursuant to its legitimate objectives, the EC Regulation reserves the name "sardines" for *Sardina pilchardus*. Given that this is expressly foreseen in section 6.1.1(i) of Codex Stan 94, the European Communities asserts that the EC Regulation has a substantial relationship with Codex Stan 94. The European Communities concludes by stating that the substantial relationship between the two documents demonstrates that Codex Stan 94 was used "as a basis for" the EC Regulation.

6. *The Question of the "Ineffectiveness or Inappropriateness" of Codex Stan 94*

44. The European Communities claims that the Panel applied an incorrect burden of proof with respect to the second part of Article 2.4 of the *TBT Agreement* and that it erred in finding that Codex Stan 94 is not an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued".

45. According to the European Communities, there is no general rule-exception relationship between the first and second parts of Article 2.4 and, therefore, there is no shift in the burden of proof from the complainant to the respondent. The European Communities rejects the Panel's claim that only the respondent can spell out the objectives pursued through a regulation, explaining that the objectives are usually described in the measure itself, as the EC Regulation demonstrates. Nor are the Panel's concerns regarding the lack of information on the part of the complainant sufficient, in the European Communities' view, to shift the burden to the respondent. The European Communities explains that, in addition to the obligation on a Member to justify a measure under Article 2.5 of the *TBT Agreement*, the complaining party may also enquire about a measure during consultations. The European Communities asserts, furthermore, that the Panel's finding on the burden of proof is not consistent with how the Appellate Body applied this burden regarding a similar provision of the *SPS Agreement* in the *EC – Hormones* case.

46. The European Communities argues that the Panel arrived at an incorrect finding with respect to the effectiveness or appropriateness of Codex Stan 94, because it misunderstood the objectives of the EC Regulation. In this regard, the European Communities explains that the purpose of the EC Regulation is to lay down marketing standards for preserved *Sardina pilchardus* and that the Euro-

pean Communities does not pursue thereby any objectives in relation to preserved *Sardinops sagax*.

47. The European Communities claims that the Panel erred in basing its conclusion regarding the effectiveness or appropriateness of the EC Regulation on the validity of the factual assumption that consumers in the European Communities have not always associated the term "sardines" exclusively with *Sardina pilchardus*. The European Communities states that even if consumers have different opinions with respect to what is a sardine, there may still be the possibility of confusion and the need for measures to improve market transparency, protect consumers, and maintain product diversity.

48. The European Communities also rejects the Panel's reliance in its reasoning on whether or not "sardines" is a common name for *Sardinops sagax*. According to the European Communities, even if "sardines" were a common name for preserved *Sardinops sagax*, this does not change the need to ensure that this product bears a *unique* name in the European Communities market.

49. The European Communities argues, finally, that the Panel erred in dismissing as irrelevant to the question of consumer expectations the domestic legislation of the member States of the European Communities. In its view, consumer expectations are generally based on some kind of legal protection.

7. *The Objectivity of the Assessment of Certain Facts by the Panel*

50. The European Communities claims that the Panel did not conduct "an objective assessment of the facts of the case" as required by Article 11 of the DSU. According to the European Communities, the Panel deliberately and without motivation refused to consider facts that were brought to its attention, although panels are obliged to examine all relevant facts and evidence presented to them by the parties or obtained through their own initiative. In the European Communities' view, the Panel also failed to provide an adequate and reasonable explanation for its findings. The European Communities then refers to four specific instances where the Panel allegedly failed to discharge its duty under Article 11 of the DSU.

51. The first instance referred to by the European Communities is the Panel's conclusion that the Spanish and French dictionaries submitted by the European Communities supported the view that the term "sardines" is not limited to *Sardina pilchardus*. The European Communities claims next that the Panel should not have treated as evidence the letter of the United Kingdom Consumers' Association submitted by Peru, because it was prejudiced and contained a manifestly incorrect appreciation of United Kingdom law.

52. As a third instance, the European Communities alleges that the Panel disregarded evidence concerning the actual names given to "sardine-type" products in the European Communities. This evidence consisted of tins and supermarket receipts for preserved herring, sardinellas, sprats, mackerel and anchovies, as well as labels of preserved *Sardinops sagax* sold in the European Communities

under the name "Pacific Pilchards". The European Communities finally claims that the Panel erred in refusing to ask the Codex Commission for its opinion concerning the meaning, status and validity of Codex Stan 94.

8. *The References in the Panel Report to Trade-Restrictiveness*

53. The European Communities submits that the Panel erred in qualifying the EC Regulation as trade-restrictive. It rejects the qualification and asserts that the EC Regulation is neither trade-restrictive with respect to preserved *Sardinops sagax*, nor with respect to preserved *Sardina pilchardus*.

54. In addition, the European Communities argues that the issue of trade-restrictiveness is not relevant to the analysis under Article 2.4 of the *TBT Agreement* and that, having exercised judicial economy with respect to Peru's other claims, it was improper for the Panel to have examined this issue.

55. The European Communities states, moreover, that Article 15.2 of the DSU does not permit panels to make additional legal findings at the interim review stage.

9. *Completing the Legal Analysis*

56. The European Communities asserts that there are insufficient undisputed facts in the Panel record for the Appellate Body to complete the legal analysis in respect of Peru's other claims. It further argues that Articles 2.2 and 2.1 of the *TBT Agreement* involve complex issues of law that, contrary to Peru's contention, are completely different from those related to Article 2.4 of the *TBT Agreement*, and which have not been clarified by the Appellate Body or by dispute settlement panels.

B. *Arguments of Peru – Appellee*

1. *Procedural Issues*

57. Before addressing the merits of the appeal, Peru challenges the admissibility of what it terms is a second appeal by the European Communities—that is, the proceedings that began with the Notice of Appeal filed by the European Communities on 28 June 2002, after withdrawing the Notice of Appeal it had filed on 25 June 2002.

58. According to Peru, a notice of appeal cannot be withdrawn and resubmitted in revised form without the consent of the appellee. It notes that there is nothing in the *Working Procedures* that establishes the right to commence an appeal twice. Peru asserts that, although Rule 30 of the *Working Procedures* makes clear that an appeal can be withdrawn at any time—which the European Communities did through its communication of 28 June 2002—nothing in that Rule permits the appellant to attach conditions to the withdrawal. Peru submits that if

an appellant withdraws its appeal subject to conditions, the appeal must therefore be deemed withdrawn, irrespective of whether or not the conditions are met.

59. Peru argues that unless the *Working Procedures* are strictly enforced to prevent an appellant from commencing an appeal repeatedly or withdrawing an appeal subject to unilaterally determined conditions, there is immense potential for abuse and disorder in appellate review proceedings.

60. Peru also states that the facts of *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea ("US – Line Pipe")*¹⁹, which the European Communities cites as precedent, are distinguishable from those involved in the present dispute. It explains that in *US – Line Pipe*, as well as in *United States – Tax Treatment for "Foreign Sales Corporations" ("US – FSC")*²⁰, the Notices of Appeal were withdrawn with the agreement of the appellees, while in this case the European Communities adopted a unilateral approach. Moreover, in the two previous cases, the appellants resubmitted an *identical* Notice of Appeal, which is not the case in this appeal.

61. In Peru's view, the approach adopted by the European Communities in the present appeal presupposes the existence of a fundamental procedural right that neither the DSU nor the *Working Procedures* accords. Peru asserts that creating procedural rights on an *ad hoc* basis to address problems caused by one WTO Member in an individual case, rather than through generally applicable new procedures of which all Members are informed in advance, calls into question the principle of equal treatment of all WTO Members.

62. Peru further notes that, even though the Appellate Body has ruled that the *Working Procedures* should be read so as to give full meaning and effect to the right to appeal, this right is not deprived of meaning and effect just because it can be exercised only once. Peru states, in addition, that when the Appellate Body has addressed an issue that is not provided for in the *Working Procedures*, the Appellate Body has consulted the participants and third parties. Peru asserts that, as the Appellate Body did not consult the parties at the time that the second Notice of Appeal was filed, it cannot be concluded that the Appellate Body has accepted the European Communities' second appeal. Otherwise, the Appellate Body would have waived Peru's procedural rights, which the Appellate Body has no authority to do under the DSU or under its *Working Procedures*.

63. Peru argues, moreover, that the circumstances of this case do not allow the Appellate Body to rule that the procedure adopted by the European Communities can be justified under Rule 16(1) of the *Working Procedures*, because that Rule does not justify the creation of procedural rights that the DSU does not accord.

64. Peru requests, therefore, that the Appellate Body reject the European Communities' second appeal.

¹⁹ Appellate Body Report, WT/DS202/AB/R, adopted 8 March 2002.

²⁰ Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619.

65. Peru further objects to the acceptance and consideration of the *amicus curiae* briefs submitted in this appeal. It states that, while it welcomes non-Member submissions where they are attached to the submission of a WTO Member engaged in dispute settlement proceedings, the DSU makes clear that only WTO Members can make independent submissions to panels and to the Appellate Body. Peru argues further that the DSU already provides conditions under which WTO Members can participate as third parties in dispute settlement proceedings. According to Peru, accepting *amicus curiae* briefs from WTO Members that did not notify their third party interest to the DSB would be allowing a WTO Member impermissibly to circumvent the DSU.

66. Peru thus requests that the Appellate Body reject the *amicus curiae* briefs submitted in this appeal.

2. *The Characterization of the EC Regulation as a "Technical Regulation"*

67. Peru submits that, contrary to the European Communities' contention, the EC Regulation is a "technical regulation" that applies to identifiable products and lays down characteristics for products marketed as sardines. Peru explains that Article 2 of the EC Regulation does not apply to *any* product, but to products clearly identified as *products marketed as preserved sardines*. It further claims that these clearly identified products must, according to Article 2 of the EC Regulation, have a number of physical characteristics, including that of having been prepared exclusively from fish of the species *Sardina pilchardus*. Peru asserts, therefore, that the EC Regulation lays down product characteristics for products that are clearly identified.

68. Peru rejects the European Communities' claim that a name applied to a product is not itself a characteristic of that product. According to Peru, Annex 1.1 to the *TBT Agreement* provides that any document that lays down product characteristics with which compliance is mandatory is a "technical regulation", irrespective of the purpose for which the product characteristics are laid down. In Peru's view, a regulation that prescribes the characteristics of products marketed under a particular trade name is, therefore, clearly a document which lays down product characteristics and hence a "technical regulation" as defined in Annex 1.1 to the *TBT Agreement*.

69. According to Peru, the European Communities' argument on this issue is irrelevant to this dispute. It explains that at issue in this dispute is not a "technical regulation" prescribing a particular name for products made from *Sardinops sagax*, but rather that part of the EC Regulation that requires any product marketed as sardines to be made from *Sardina pilchardus*. Peru submits that the European Communities would thus not have to prescribe a specific trade name for products made from *Sardinops sagax* to resolve this dispute.

3. *The Temporal Scope of Application of Article 2.4 of the TBT Agreement*

70. Peru submits that the Panel correctly relied on Appellate Body rulings and on Article 28 of the *Vienna Convention* in concluding that, unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. Peru claims that the EC Regulation is a situation that has not ceased to exist and, therefore, Article 2.4 of the *TBT Agreement* is applicable to the EC Regulation.

71. Peru disagrees with the European Communities' allegation that Article 2.4 of the *TBT Agreement* applies only to the preparation and adoption of technical regulations. According to Peru, this allegation is based on a distinction between the adoption and maintenance of technical regulations that the text of Article 2.4 does not make. Peru asserts that the obligation to use the existing international standard as a basis for technical regulations arises according to the terms of Article 2.4 "where technical regulations are required"—that is, in situations in which the Member considered the adoption of a technical regulation necessary—and not when Members consider they need to introduce technical regulations, as the European Communities alleges. Peru contends, moreover, that the terms "use" and "as a basis for" in Article 2.4 do not imply that the obligation under that provision arises only when a new technical regulation is drawn up, drafted or prepared.

72. Peru submits that the Panel correctly concluded that the references in other Articles of the *TBT Agreement* to the *application* of technical regulations confirm that this Agreement was meant to extend to existing technical regulations.

4. *The Characterization of Codex Stan 94 as a "Relevant International Standard"*

73. Peru states that the Panel correctly concluded that the *TBT Agreement* covers international standards that are not based on consensus. Peru notes, in this regard, the last two sentences of the Explanatory note to the definition of the term "standard" in Annex 1.2 to the *TBT Agreement*. It then asserts that the only logical and reasonable conclusion that can be drawn from these last two sentences is that the drafters wished to note the practice of consensus-based decision-making of the international standardization bodies, but at the same time clarify that consensus-based decision-making was not an absolute requirement.

74. Peru maintains that, in any event, the Codex Commission observes the principle of consensus and followed this principle in the adoption of the Codex standard at issue in this dispute. According to Peru, the report of the Codex Commission on the meeting at which the standard was adopted leaves no doubt that it was adopted without a vote. Peru concludes, therefore, that by asking the Appellate Body to rule that standards which have not been adopted by consensus

are not covered by the *TBT Agreement*, the European Communities is asking the Appellate Body to make a ruling on an issue that need not be resolved to settle the present dispute.

75. In respect of the European Communities' argument that the Panel incorrectly interpreted Codex Stan 94, Peru asserts that the European Communities mistakenly treats this alleged error as an error in interpretation, rather than a failure to conduct an objective assessment of a fact. According to Peru, the Codex standard is not a covered agreement within the meaning of Article 1.1 of the DSU, nor is it a treaty or another source of international law. Peru thus contends that, like municipal law, the Codex standard must be treated by an international tribunal as a fact to be examined, not as law to be interpreted. Peru then states that the European Communities does not claim—and therefore does not attempt to demonstrate—that the Panel's determination that the meaning of this standard is not ambiguous constitutes an error in the assessment of a fact.

76. Peru argues that, even if the Appellate Body were to conclude that its task is to determine whether the Panel's interpretation of the standard is in error, the European Communities' claim should be rejected. In Peru's view, section 6.1.1(ii) of Codex Stan 94 clearly states that the name of sardines other than *Sardina pilchardus* shall be "X sardines" and, therefore, the text after "X sardines" can only be interpreted as defining what is meant by "X". Peru states, moreover, that whatever ambiguity may result from the use of the comma in the English text of Codex Stan 94—to separate the phrase "or the common name of the species in accordance with the law and custom of the country in which the product is sold"—the French and Spanish versions of the standard, which are equally authentic, leave no uncertainty on this point. Peru thus concludes that the Panel was correct in refraining from basing its interpretation on the standard's drafting history. In any event, Peru submits that the drafting history does not support the European Communities' interpretation of Codex Stan 94.

5. *Whether Codex Stan 94 was Used "As a Basis For" the EC Regulation*

77. Peru states that the Panel correctly interpreted and applied the term "as a basis for" in Article 2.4 of the *TBT Agreement*. It agrees with the Panel's conclusion that "basis" means "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".

78. Peru submits that the European Communities does not explain according to what interpretative principle the term "as a basis for" could be given the meaning "having a substantive rational relationship". Peru asserts that the ordinary meaning of this term is not "having a substantive rational relationship" and it cannot be given that meaning in the light of its context and the object and purpose of the *TBT Agreement*.

79. Peru contends, furthermore, that the EC Regulation would not meet the "as a basis" test even if the terms were interpreted according to the definition submitted by the European Communities. In Peru's view, the relevant part of

Codex Stan 94 is section 6.1.1(ii) and thus, according to the European Communities' own argument, what would need to be established is a rational and substantive relationship between section 6.1.1(ii) of Codex Stan 94 and the European Communities' prohibition against using the term "sardines" in combination with the name of a country or a geographical area or the species or the common name. Peru asserts that there is no relationship between section 6.1.1(ii) and that prohibition that can be described as "substantive" or "rational".

80. Peru rejects the European Communities' claim that, despite its finding that the term "use as a basis" does not mean "conform to or comply with", the Panel applied the "as a basis" test in this case in such a narrow and restrictive manner as to make it, in practice, equivalent to the "conform to or comply with" test. Peru states, in response, that there is not a single element of the standard foreseen in section 6.1.1(ii) of Codex Stan 94 that is reflected in the EC Regulation.

6. *The Question of the "Ineffectiveness or Inappropriateness" of Codex Stan 94*

81. Peru asserts that the Panel correctly articulated and applied the principle on burden of proof in this dispute. Peru explains that the Panel applied the principle enunciated by the Appellate Body, namely, that the party asserting the affirmative of a particular claim or defence has the burden of proving its claim. It further states that the question of the distribution of the evidentiary burden should not be considered in the abstract, but in the context of the provision at issue in the dispute.

82. According to Peru, Article 2.4 of the *TBT Agreement* is expressed in the form of a positive requirement and an exception. It explains that the second part of Article 2.4, which states "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued", is not a positive requirement, but is rather expressed in the form of an affirmative defence. This means, in Peru's view, that a Member departing from a relevant international standard must show that the relevant international standard is not applicable to its particular set of circumstances.

83. Peru states, additionally, that the Panel correctly considered that the second part of Article 2.4 addresses motives and facts that are privy to the Member imposing a technical regulation. Peru argues that to accept the argument of the European Communities would be to require a complaining party to explain that the deviation from an international standard is not necessary to pursue a "legitimate objective", which would mean requiring a complaining party to prove a negative. Moreover, accepting the European Communities' argument would mean, in Peru's view, that the complaining party would have to speculate on the legitimacy of the objectives pursued by the responding party. Peru therefore argues that it is only logical that the responding Member should carry the burden of proving that its departure from the international standard is necessary to pursue the "legitimate objectives".

84. Peru claims that, even if the Appellate Body were to find that the Panel incorrectly allocated the burden of proof, Peru nevertheless adduced evidence sufficient to show that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

7. *The Objectivity of the Assessment of Certain Facts by the Panel*

85. Peru submits that the Panel made "an objective assessment of the matter before it" consistently with its obligations under Article 11 of the DSU. According to Peru, to succeed in this claim the European Communities must show, as stated in *EC – Hormones*²¹, that the Panel was guilty of "deliberate disregard of, or refusal to consider, the evidence", that there was "wilful distortion or misrepresentation of the evidence", or that the Panel committed an "egregious error that calls into question the good faith" of the Panel. Peru asserts that the European Communities has not shown this.

86. Peru rejects the European Communities' claim that the Panel erred in refraining from seeking the opinion of the Codex Commission. Peru argues that Article 13.2 of the DSU leaves it to the discretion of panels to determine whether or not to seek expert opinion in particular cases and that Article 14.2 of the *TBT Agreement* gives panels discretion in deciding whether or not to establish a technical expert group. Peru further submits that, because the English text, together with the French and Spanish texts, remove any ambiguity or obscurity regarding the meaning of section 6.1.1(ii) of Codex Stan 94, there was no reason for the Panel to have recourse to its drafting history or to consult the Codex Commission on this issue.

87. Peru asserts that the Panel made proper use of dictionaries and that, in its claim on appeal, the European Communities is mischaracterizing the Panel Report. Peru explains that it referred to several technical dictionaries to support its claim that the term "sardines" is a common term for *Sardinops sagax* in the European Communities. The Panel referred to this evidence, as well as other evidence presented by the parties, in determining whether Peru had met its burden of proof. According to Peru, the purpose of the Panel's assessment was not, as suggested by the European Communities, to arrive at a definitive conclusion as to the common name for *Sardinops sagax* in each member State of the European Communities, but to determine whether European consumers would be misled if the trade description of products made from *Sardinops sagax* comprised the word "sardines" and a geographical qualifier. Peru therefore submits that the Panel used the dictionaries in an appropriate manner to make this determination, consistent with its obligations under Article 11 of the DSU.

88. Peru argues that the Panel did not ignore the evidence submitted by the European Communities concerning the actual names given to "sardine-type"

²¹ Appellate Body Report, *supra*, footnote 17.

products in the European Communities. Peru states that it is clear from paragraphs 7.125–7.129 of the Panel Report that the Panel looked at this evidence, but disagreed with it.

89. Peru claims that the Panel properly took into account the evidence provided by the United Kingdom Consumers' Association. Peru explains that the Association arrived at the conclusion that European consumers would not be misled if sardines from Europe and sardines from Peru were distinguished by the addition of a geographical indication in the trade name and that the EC Regulation does nothing to promote the interests of European consumers. Contrary to the assertion of the European Communities, Peru argues that these are factual, not legal, conclusions that the Panel could appropriately consider as part of the wide range of evidence submitted to it on this question. Peru therefore concludes that the European Communities has not shown that the Panel distorted this evidence, or that it used this evidence in bad faith.

8. *The References in the Panel Report to Trade-Restrictiveness*

90. Peru explains that the Panel's statements on trade-restrictiveness should be considered keeping in mind, as background, the fact that Peru requested the Panel to exercise judicial economy with respect to its subsidiary claims, including its claim under Article 2.2 of the *TBT Agreement*. Peru submits, nonetheless, that the Panel's description of the EC Regulation as trade-restrictive is entirely accurate.

91. Peru recognizes that these statements are not necessary to the Panel's analysis under Article 2.4 of the *TBT Agreement* and, to the extent that the Panel's finding on that Article is confirmed, requests that the Appellate Body decline to address these statements or rule that they were not necessary or pertinent to the disposition of the issues before the Panel. If the Appellate Body does not confirm the finding that the EC Regulation is inconsistent with Article 2.4, Peru requests that the Appellate Body complete the analysis with respect to Articles 2.2 and 2.1 of the *TBT Agreement* and, in so doing, that it consider the Panel's statements on the trade-restrictiveness of the EC Regulation.

9. *Completing the Legal Analysis*

92. Peru submits that, if the Appellate Body concludes that the EC Regulation is consistent with Article 2.4, it would be appropriate in such circumstances for the Appellate Body to complete the Panel's analysis and resolve the dispute by making findings on those provisions of Article 2 of the *TBT Agreement* on which the Panel did not make any findings. Peru explains that it asked the Panel to exercise judicial economy in accordance with the guidance given by the Appellate Body to panels to address only those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings. Peru then points to several cases where, after reversing a panel's

finding, the Appellate Body completed the legal analysis of those claims where the panel had exercised judicial economy.

93. Peru states that it requested the Panel to include in the Panel Report all of the arguments and evidence submitted to it on the legal claims not addressed, so as to provide the Appellate Body with the factual basis to rule on those claims if this became necessary. Peru further asserts that the fundamental rationale of Articles 2.1, 2.2, and 2.4 of the *TBT Agreement* is the same, so that the facts required to rule on the consistency of a measure with Article 2.4 of the *TBT Agreement* include those required to rule on the consistency of that measure with Articles 2.1 and 2.2 of that Agreement.

94. Peru therefore requests that, if the Appellate Body concludes that the EC Regulation is consistent with Article 2.4, the Appellate Body complete the Panel's analysis and find that the EC Regulation is inconsistent with Article 2.2. If the Appellate Body concludes that the EC Regulation is consistent with Article 2.2, Peru requests the Appellate Body to complete the Panel's analysis and find that the EC Regulation is inconsistent with Article 2.1 of the *TBT Agreement*.

C. Arguments of the Third Participants

1. Canada

95. Canada agrees with the Panel's finding that the EC Regulation is a "technical regulation" for the purposes of the *TBT Agreement*. It submits that the Panel correctly applied the Appellate Body's reasoning in *EC – Asbestos*, by finding that the EC Regulation identifies a product, namely preserved sardines, lays down product characteristics in a negative form by prohibiting fish of species other than *Sardina pilchardus* to be marketed as preserved sardines, and is mandatory.

96. Canada further asserts that, pursuant to Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*, the European Communities had an obligation on 1 January 1995 to ensure the conformity of its existing technical regulations with its obligations under, *inter alia*, Article 2.4 of the *TBT Agreement*. Canada adds that the European Communities failed to comply with this obligation in respect of the EC Regulation.

97. Canada also claims that the Panel correctly found that Codex Stan 94 was not used "as a basis for" the EC Regulation. According to Canada, the EC Regulation is not "founded or built upon" or "supported by" Codex Stan 94, because the EC Regulation prohibits preserved sardines of species other than *Sardina pilchardus* from being marketed as "sardines", regardless of whether the term "sardine" is used in conjunction with the country, geographical area, species, or common name of the species.

98. Canada agrees with the Panel's finding that under Article 2.4 of the *TBT Agreement*, the burden rests with the European Communities, as the party asserting the affirmative of a particular claim or defence, to demonstrate that Codex Stan 94 is an "ineffective or inappropriate" means to fulfil the "legitimate

objectives" of the EC Regulation. It further notes that, even if this were not the case, Peru provided sufficient evidence and legal arguments to meet this burden.

99. According to Canada, the Panel made an "objective assessment of the matter before it". Canada submits that in order to establish that the Panel acted inconsistently with Article 11 of the DSU, the European Communities must do more than merely contend that the Panel should have reached different factual findings than those it reached.

100. Canada further submits that the Panel's interpretation of Codex Stan 94 is correct and that it was within the Panel's discretion to decline to consult the Codex Commission.

101. Canada disagrees with the Panel's comment that, under Article 2.5 of the *TBT Agreement*, a regulation that is not in accordance with "relevant international standards" creates an unnecessary obstacle to trade. Canada notes, however, that the Panel's comment played no part in its determination that the EC Regulation is inconsistent with Article 2.4 of the *TBT Agreement*.

102. Canada submits that, in the event that the Appellate Body finds the EC Regulation to be consistent with Article 2.4 of the *TBT Agreement*, the Appellate Body has an adequate basis to complete the legal analysis of the claims made by Peru under Articles 2.2 and 2.1 of the *TBT Agreement* and Article III:4 of the GATT 1994.

103. In referring to the *amicus curiae* briefs received in this appeal, Canada notes that there is a lack of clear agreement among WTO Members as to the role of *amicus curiae* briefs in dispute settlement. It also states that the DSU provides WTO Members with the legal right to make submissions in a dispute, but only if they reserve their third party rights at the outset of the dispute settlement process. Canada finally asserts that, in any event, the *amicus curiae* briefs should be rejected because they are not pertinent or useful.

2. Chile

104. Chile agrees with Peru's claim that the European Communities could not conditionally withdraw its Notice of Appeal of 25 June 2002 and replace it with a new Notice of Appeal.

105. Chile also agrees with the Panel's conclusion that the EC Regulation is a "technical regulation" for purposes of the *TBT Agreement*.

106. Chile states that the Panel was correct in concluding that Article 2.4 of the *TBT Agreement* applies to all technical regulations that existed prior to 1 January 1995. According to Chile, the commitment under the *TBT Agreement* not to restrict trade more than necessary is a permanent and continuous one.

107. Chile rejects the European Communities' contention that Article 2.4 applies only to the preparation and adoption of technical regulations. Chile states that Article 2 of the *TBT Agreement* is entitled "*Preparation, Adoption and Application of Technical Regulations by Central Government Bodies*". Given the title of Article 2, Chile argues that if Article 2.4 were limited to the preparation

and adoption of technical regulations, its text would have indicated this explicitly or the provision would have been included in a different article.

108. Chile agrees with the Panel's conclusion that Codex Stan 94 is a "relevant international standard". Chile, nevertheless, disagrees with the Panel's interpretation of the Explanatory note to the definition of "standard" in Annex 1.2 to the *TBT Agreement*. According to Chile, the Explanatory note provides that international standards must be based on consensus, and this was confirmed in the Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement, adopted by the WTO Committee on Technical Barriers to Trade.²² Chile notes, however, that the European Communities has not provided any evidence to demonstrate that Codex Stan 94 was not approved by consensus.

109. Chile submits that the Panel was correct in finding that Codex Stan 94 was not used "as a basis for" the EC Regulation. Chile explains that the EC Regulation monopolizes the term "sardines" for *Sardina pilchardus* in circumstances where Codex Stan 94 provides otherwise. Chile then asserts that, had the European Communities used Codex Stan 94 "as a basis", the European Communities would have had to incorporate all relevant parts of it, and not only section 6.1.1(i).

110. Chile asserts that the burden of proving that Codex Stan 94 is not "ineffective or inappropriate" rests with the European Communities, because it is impossible for the Panel or for the other Members to prove what are the true "legitimate objectives" pursued by the Member adopting a technical regulation. In Chile's view, the European Communities failed to meet this burden.

111. Chile requests, furthermore, that the Appellate Body reject the *amicus curiae* briefs received in this appeal. Chile argues that accepting *amicus curiae* briefs from WTO Members who have not notified the DSB of their interest as third parties would mean that those Members would be accorded more favourable treatment than those accorded passive observer status in an appeal.

3. Ecuador

112. Ecuador requests clarification of the issues raised by the European Communities' conditional withdrawal of the original Notice of Appeal and the submission of a second Notice of Appeal.

113. Ecuador submits that the EC Regulation is a "technical regulation" for purposes of the *TBT Agreement*. It agrees with the Panel's finding that Codex Stan 94 is a "relevant international standard" which must be used "as a basis for" the adoption and maintenance of the EC Regulation.

114. According to Ecuador, the Panel correctly found that Codex Stan 94 allows Members to provide a precise trade description for preserved sardines,

²² G/TBT/9, Committee on Technical Barriers to Trade, Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade, 13 November 2000, Annex 4.

thereby promoting market transparency, consumer protection, and fair competition. Ecuador further agrees with the Panel's finding that Peru presented sufficient evidence to prove that Codex Stan 94 is neither "ineffective" nor "inappropriate" to achieve the "legitimate objectives" pursued by the European Communities through the EC Regulation.

115. Finally, Ecuador objects to the acceptance and consideration of the *amicus curiae* briefs submitted in this appeal. According to Ecuador, this would accord Morocco more favourable treatment than Colombia who was accorded passive observer status in this appeal.

4. United States

116. According to the United States, the Panel correctly found, as a factual matter, that the EC Regulation lays down product characteristics that must be complied with in order for a product to be labelled and sold as preserved sardines, and that one of those mandatory product characteristics is that the fish must be of the species *Sardina pilchardus*. It further notes that the European Communities has not contested that the EC Regulation is a "technical regulation", but only that it is a "technical regulation" relating to *Sardinops sagax*.

117. The United States submits that, contrary to what the European Communities claims, there is no need to prove that the EC Regulation is an explicit "technical regulation" for *Sardinops sagax*. Although the EC Regulation mentions only *Sardina pilchardus* by name, the United States asserts that this does not mean that the EC Regulation cannot be challenged by another Member, especially when that Member is precluded from labelling its sardine species as "sardines" by that regulation.

118. The United States also rejects the European Communities' attempt to distinguish between labels and names, and states that the Panel correctly noted that both labelling and naming requirements are means of identifying a product.

119. The United States agrees with the Panel's conclusion that Article 2.4 applies to technical regulations that were in effect when the *TBT Agreement* came into force. The United States submits that the Appellate Body's reasoning in *EC – Hormones*²³ regarding the temporal application of the *SPS Agreement* is also relevant for interpreting Article 2.4 of the *TBT Agreement*.

120. The United States further asserts that the European Communities' allegation that Article 2.4 applies only to the drafting, drawing up or preparation of technical regulations is not supported by the text of that provision nor by its context. In this regard, the United States argues that this provision "follows fast" upon Article 2.3 of the *TBT Agreement*, which requires that technical regulations not be maintained if they are no longer necessary or if the objectives can be attained in a less trade-restrictive manner. This provides contextual support, according to the United States, to the conclusion that the phrase "where technical

²³ Appellate Body Report, *supra*, footnote 17.

regulations are required" in Article 2.4 can refer to existing technical regulations that are being maintained because they are still required.

121. The United States submits that the Panel correctly found that Codex Stan 94 is a "relevant international standard". It further states that the Panel properly rejected the European Communities' allegations that the international standard at issue does not mean what it says, or is invalid because of drafting changes made in the course of developing the standard.

122. The United States disagrees, however, with the Panel's conclusion that international standards do not have to be based on consensus. According to the United States, this conclusion is contrary to the Explanatory note to the definition of "standard" in Annex 1.2 to the *TBT Agreement*, which states that international standards *are* based on consensus. It argues that the *TBT Agreement* does not impose any obligations on an international body or system with respect to the development of international standards. In the United States' view, the obligations set out in the *TBT Agreement* apply only to WTO Members and thus do not *cover* the international standards referred to in Article 2.4. The last phrase of the Explanatory note, referring to the application of the *TBT Agreement* to documents not adopted by consensus, would cover instead those standards adopted by Members even if not adopted by consensus.

123. The United States, therefore, urges the Appellate Body to modify this aspect of the Panel Report, but clarifies that this would not invalidate the Panel's conclusion that Codex Stan 94 is a "relevant international standard", given the Panel's finding that there was no evidence that Codex Stan 94 was not based on consensus.

124. The United States submits that the Panel was correct in finding that the European Communities is not using Codex Stan 94 "as a basis for" the EC Regulation. The United States asserts that the EC Regulation is directly contrary to the international standard because Codex Stan 94 provides that a number of sardine species can be marketed with the name "sardines", appropriately qualified, while the EC Regulation explicitly forbids such marketing.

125. The United States rejects the European Communities' allegation that the Panel effectively required conformity or compliance with the international standard. According to the United States, the Panel simply said that an international standard could not have been used as a basis for a technical regulation if the technical regulation directly contradicts the standard. The United States further states that the EC Regulation would not meet the European Communities' proposed definition for the term "as a basis", given that the only rational relationship between the EC Regulation and Codex Stan 94 is that they contradict each other.

126. The United States also asserts that the European Communities is incorrect to argue that it appropriately used relevant parts of Codex Stan 94 on the grounds that the EC Regulation is based on that part of the standard that permits Members to reserve the name "sardine", without a qualifier, for the species *Sardina pilchardus*. The United States argues that, given that the EC Regulation also for-

bids the name "X sardines" for other sardine species, that part of Codex Stan 94 concerning "X sardines" is therefore plainly a relevant part of the standard.

127. The United States claims that the Panel correctly concluded that Codex Stan 94 is not an "ineffective or inappropriate" means for pursuing the European Communities' "legitimate objectives", identified as market transparency, consumer protection, and fair competition, because, *inter alia*, this international standard provides for conveying accurate information to the consumer concerning the content of the product. The United States also agrees with the Panel's finding that Peru met the burden of showing that Codex Stan 94 is not "ineffective or inappropriate".

128. The United States alleges, however, that the Panel erred in stating that Peru was not required to meet this burden—even though it found that Peru had done so. According to the United States, this reasoning is unnecessary to the Panel's finding and legally erroneous. In the United States' view, it is the complaining party, not the responding party, that has the burden of presenting evidence and arguments sufficient to make a *prima facie* demonstration of each claim that the measure is inconsistent with a provision of a covered agreement. This includes the demonstration under Article 2.4 of the *TBT Agreement* that the relevant international standards are not "ineffective or inappropriate". The United States argues, moreover, that this burden does not shift to the responding party because the obligation is characterized as an exception, or because the responding party asserts that the international standard is "ineffective or inappropriate", or because the responding party may have more information at its disposal concerning the "legitimate objectives."

129. The United States, therefore, requests the Appellate Body to modify the portion of the Panel's reasoning dealing with the allocation of the burden of proving that relevant international standards are an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" through the technical regulation.

130. The United States submits that the Appellate Body has the discretion to accept both *amicus curiae* briefs received in this appeal, but that it need not do so because they are not pertinent or useful.

5. Venezuela

131. Venezuela states that the Panel correctly found that the EC Regulation is a "technical regulation". It also agrees with the Panel's finding that Article 2.4 of the *TBT Agreement* applies to measures adopted before 1 January 1995, but which have not ceased to exist. According to Venezuela, the Panel properly applied the principle set forth in Article 28 of the *Vienna Convention*²⁴, as interpreted by the Appellate Body.

²⁴ *Supra*, footnote 16.

132. Venezuela agrees with the Panel's conclusion that Codex Stan 94 is a "relevant international standard" and contends that the EC Regulation does not take into account the standard established in Codex Stan 94.

133. Venezuela disagrees with the European Communities' assertion that Codex Stan 94, by authorizing use of the term "sardines" for products other than *Sardina pilchardus*, is "ineffective or inappropriate" to fulfil the "legitimate objectives" of consumer protection, market transparency, and fair competition. Venezuela also submits that Peru presented sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

III. ISSUES RAISED IN THIS APPEAL

134. This appeal raises the following issues:

- (a) whether the appeal is inadmissible as a result of the conditional withdrawal of the Notice of Appeal filed on 25 June 2002, and the filing of a new Notice of Appeal on 28 June 2002;
- (b) whether the *amicus curiae* briefs submitted by the Kingdom of Morocco and a private individual are admissible, and, if so, whether they assist us in this appeal;
- (c) whether the Panel erred by finding that Council Regulation (EEC) 2136/89 (the "EC Regulation") is a "technical regulation" within the meaning of Annex 1.1 of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*");
- (d) whether the Panel erred by finding that Article 2.4 of the *TBT Agreement* applies to existing measures, such as the EC Regulation;
- (e) whether the Panel erred by finding that CODEX STAN 94–1981, Rev.1–1995 ("Codex Stan 94") is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*;
- (f) whether the Panel erred by finding that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*;
- (g) whether the Panel correctly interpreted and applied the second part of Article 2.4 of the *TBT Agreement*, which allows Members not to use international standards "as a basis for" their technical regulations "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued";
- (h) whether the Panel properly discharged its duty under Article 11 of the *Understanding on Rules and Procedures Governing the Set-*

tlement of Disputes (the "DSU") to make "an objective assessment of the facts of the case";

- (i) whether the Panel has made a determination that the EC Regulation is trade-restrictive, and, if so, whether the Panel erred in making such a determination; and
- (j) whether we should complete the analysis under Article 2.2 of the *TBT Agreement*, Article 2.1 of the *TBT Agreement*, or Article III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), in the event that we find that the EC Regulation is consistent with Article 2.4 of the *TBT Agreement*.

IV. PROCEDURAL ISSUES

A. Admissibility of Appeal

135. We begin with the question of the admissibility of the appeal. Peru submits that the Notice of Appeal of 25 June 2002 was withdrawn, that the withdrawal was subject to an "impermissible" condition of filing a new notice of appeal, and that the Notice of Appeal filed on 28 June 2002 is inadmissible because there is no right to appeal twice.²⁵ The European Communities responds that it did not appeal twice, that it withdrew the original Notice of Appeal in response to Peru's request for additional information on the grounds of appeal, and that Peru did not suffer any prejudice as a result of the timely filing of the new Notice of Appeal based on the same legal grounds as the original Notice.²⁶

136. We set out earlier in this Report²⁷ the sequence of events relevant to the filing by the European Communities of a Notice of Appeal on 25 June 2002, the withdrawal of that Notice three days later, and the filing of a replacement Notice of Appeal on 28 June 2002. Before commencing our analysis of the admissibility of the Notice of Appeal of 28 June 2002, we note first that Peru does not request that we rule in this Report on Peru's Request for a Preliminary Ruling, submitted on 27 June 2002, regarding the sufficiency of paragraphs (d), (f), (g), and (h) of the European Communities' Notice of Appeal dated 25 June 2002.²⁸ Peru states in its appellee's submission that "[t]he Division presumably considers the original Notice of Appeal to be withdrawn"²⁹, and Peru does not address further the question of the insufficiency of the original Notice of Appeal. The European Communities submits that "the preliminary objections raised by Peru on the adequacy of the Notice of Appeal filed by the [European Communities] on 25 June 2002 is a matter that is now moot and settled."³⁰ In the light of these submissions, we need not, and, therefore, we do not decide the issues raised in the Re-

²⁵ Peru's letter dated 2 July 2002.

²⁶ European Communities' response to questioning at the oral hearing.

²⁷ *Supra*, paras. 11 *ff.*

²⁸ WT/DS231/10, 27 June 2002.

²⁹ Peru's appellee's submission, para. 42.

³⁰ European Communities' appellant's submission, para. 235.

quest for a Preliminary Ruling filed by Peru regarding the sufficiency of the Notice of Appeal filed on 25 June 2002.

137. We turn to the claim by Peru that the European Communities was not entitled to attach a condition to its withdrawal of the Notice of Appeal filed on 25 June 2002. Rule 30(1) of the *Working Procedures for Appellate Review* (the "*Working Procedures*"), which governs the withdrawal of an appeal, provides:

At any time during an appeal, the appellant may withdraw its appeal by notifying the Appellate Body, which shall forthwith notify the DSB.

138. This rule accords to the appellant a broad right to withdraw an appeal at any time. This right appears, on its face, to be unfettered: an appellant is not subject to any deadline by which to withdraw its appeal; an appellant need not provide any reason for the withdrawal; and an appellant need not provide any notice thereof to other participants in an appeal. More significantly for this appeal, there is nothing in the Rule prohibiting the attachment of conditions to a withdrawal. Indeed, in two previous cases, notices of appeal were withdrawn subject to the condition that new notices would be filed.³¹ Nor is the right to withdraw an appeal expressly subject to the condition that no new notice be filed on the same matter after the withdrawal.

139. However, despite this permissive language, we emphasize that the *Working Procedures* must not be interpreted in a way that could undermine the effectiveness of the dispute settlement system, for they have been drawn up pursuant to the DSU and as a means of ensuring that the dispute settlement mechanism achieves the aim of securing a positive solution to a dispute.³² As we have said:

The procedural rules of WTO dispute settlement are designed to promote ... the fair, prompt and effective resolution of trade disputes.³³

140. This obligation to interpret the *Working Procedures* in a way that promotes the effective resolution of disputes is complemented by the obligation of Members, set out in Article 3.10 of the DSU, to "engage in [dispute settlement] procedures in good faith in an effort to resolve the dispute." Hence, the right to withdraw an appeal must be exercised subject to these limitations, which are applicable generally to the dispute settlement process.

141. Peru submits that nothing in Rule 30 of the *Working Procedures* permits the attachment of conditions to the withdrawal of a notice of appeal, and that, therefore, this appeal must be deemed to have been withdrawn irrespective of whether the conditions are met. We find no support in Rule 30 for Peru's posi-

³¹ We note that, in both previous cases, unlike in this case, the Divisions hearing those appeals and the appellees had prior knowledge of, and agreed with, the process. (Appellate Body Report, *US – FSC*, *supra*, footnote 20, para. 4; Appellate Body Report, *US – Line Pipe*, *supra*, footnote 19, para. 13) Peru distinguishes this case on that basis; however, the mere fact that there was both notice and agreement in those cases does not, on its own, mean that such notice and agreement are required.

³² DSU, Article 3.7.

³³ Appellate Body Report, *US – FSC*, *supra*, footnote 20, para. 166.

tion. While it is true that nothing in the text of Rule 30(1) explicitly permits an appellant to exercise its right subject to conditions, it is also true that nothing in the same text prohibits an appellant from doing so. As we have just explained, in our view, the right to withdraw a notice of appeal under Rule 30(1) is broad, subject only to the limitations we have described. Therefore, we see no reason to interpret Rule 30 as granting a right to withdraw an appeal only if that withdrawal is unconditional. Rather, the correct interpretation, in our view, is that Rule 30(1) permits conditional withdrawals, unless the condition imposed undermines the "fair, prompt and effective resolution of trade disputes", or unless the Member attaching the condition is not "engag[ing] in [dispute settlement] procedures in good faith in an effort to resolve the dispute." Therefore, it is necessary to examine any such conditions attached to withdrawals on a case-by-case basis to determine whether, in fact, the particular condition in a particular case in any way obstructs the dispute settlement process, or in some way diminishes the rights of the appellee or other participants in the appeal.

142. With this in mind, we examine next whether, by withdrawing the Notice of Appeal of 25 June 2002 subject to the condition of filing a replacement notice of appeal, the European Communities has effectively undermined the "fair, prompt and effective resolution of trade disputes" or has not "engage[d] in [dispute settlement] procedures in good faith in an effort to resolve the dispute."

143. According to the European Communities, it withdrew the Notice of Appeal of 25 June 2002 after receiving Peru's Request for a Preliminary Ruling in order to "enlarge ... the description of the points" in paragraphs (d), (f), (g), and (h) of the original Notice and, thus, "clarify the points that Peru considered were not clear".³⁴ The European Communities maintains that the "replacement"³⁵ Notice contained "no new grounds of appeal, or modified ones."³⁶ Moreover, the European Communities contends that "Peru's rights of defense have not been harmed in any way by the replacement of the original Notice of Appeal with a new one and by the new Working Schedule".³⁷ The European Communities submits that it acted in a timely manner, "within the 60 days provided by the DSU [for adoption of panel reports]" and "well in advance of any substantial exchange between the parties".³⁸

144. In our view, attaching the condition to the withdrawal was not unreasonable under the circumstances. The conditioning by the European Communities of its withdrawal of the Notice of Appeal of 25 June 2002 on the right to file a replacement Notice of Appeal arose as a response to the Request for a Preliminary Ruling filed by Peru. Although Peru contests the European Communities' contention that no prejudice was suffered by Peru—arguing that Peru was "forced to address a completely novel procedural issue and waste time on that issue that

³⁴ European Communities' response to questioning at the oral hearing.

³⁵ European Communities' appellant's submission, para. 235.

³⁶ European Communities' response to questioning at the oral hearing.

³⁷ European Communities' appellant's submission, para. 235.

³⁸ European Communities' response to questioning at the oral hearing.

[Peru] could have used for better purposes"³⁹—we are not persuaded that the European Communities' response in any way obstructed the process or diminished Peru's rights. Indeed, it may well have had the opposite effect. Although the European Communities states that it thought Peru's Request for a Preliminary Ruling "to be without merit"⁴⁰, the European Communities sought to remedy the difficulty perceived by Peru, and not to delay the proceedings further by contesting the allegations of insufficiency.

145. Moreover, the European Communities responded in a timely manner, providing the additional information in a replacement Notice of Appeal the day following receipt of Peru's objections to the Notice of Appeal of 25 June 2002, and only three days after filing the original Notice of Appeal. The replacement Notice was provided well before any submissions were filed. Thus, for the reasons explained, we find that the withdrawal of the original Notice on condition of filing a replacement Notice was appropriate and had the effect of conditionally withdrawing the original Notice.

146. In making this finding, we are mindful of Peru's argument that allowing the withdrawal of a notice of appeal subject to a unilaterally declared condition of the right to file a new notice of appeal, and the filing thereafter of a new notice of appeal, creates an "immense potential for abuse and disorder in appellate review proceedings."⁴¹ Peru suggests a number of examples of possible abusive practices that could result—including the delaying of the adoption of a panel report by submitting a new notice of appeal each time a panel report is before the Dispute Settlement Body (the "DSB"), the amending of allegations of error in the light of arguments made by the appellee or of questions posed by the Division at the oral hearing, and the attempt to have a different division selected or a different date chosen for the oral hearing.⁴² We agree with Peru that there may be situations where the withdrawal of an appeal on condition of refileing a new notice, and the filing thereafter of a new notice, could be abusive and disruptive. However, in such cases, we would have the right to reject the condition, and also to reject any filing of a new notice of appeal, on the grounds either that the Member seeking to file such a new notice would not be engaging in dispute settlement proceedings in good faith, or that Rule 30(1) of the *Working Procedures* must not be used to undermine the fair, prompt, and effective resolution of trade disputes. We agree with Peru that the rules must be interpreted so as to "ensure that appellate review proceedings do not become an arena for unfortunate litigation techniques that frustrate the objectives of the DSU, and that developing countries do not have the resources to deal with".⁴³ The case before us, however, presents none of these circumstances.

147. In addition, we believe there are circumstances that, although not constituting "abusive practices", would be in violation of the DSU, and would, thus,

³⁹ Peru's response to questioning at the oral hearing.

⁴⁰ European Communities' letter to the Appellate Body dated 28 June 2002.

⁴¹ Peru's appellee's submission, para. 45.

⁴² *Ibid.*

⁴³ *Ibid.*, para. 51.

compel us to disallow the conditional withdrawal of a notice of appeal as well as the filing of a replacement notice. For example, if the conditional withdrawal or the filing of a new notice were to take place after the 60-day deadline in Article 16.4 of the DSU for adoption of panel reports, this would effectively circumvent the requirement to file appeals within 60 days of circulation of panel reports. In such circumstances, we would reject the conditional withdrawal and the new notice of appeal.

148. We turn now to Peru's request that we declare the Notice of Appeal of 28 June 2002 inadmissible because neither the DSU nor the *Working Procedures* "accord[s] an appellant the right to appeal the same panel report twice on different grounds."⁴⁴ In our view, this argument by Peru is also misplaced, for we do not consider that the European Communities has in fact appealed "twice". The European Communities maintains that it "never intended to appeal twice", and also that it "considered that [the European Communities] only appealed once".⁴⁵ The European Communities contends as well that the replacement Notice contained "no new grounds of appeal, or modified ones."⁴⁶ Peru, for its part, states that the replacement Notice "reformulated the points to which Peru had objected"⁴⁷ and was based on "different allegations of error"⁴⁸, but Peru does not point to any new or modified grounds of appeal.⁴⁹

149. As we have explained, we are of the view that the conditional withdrawal of the Notice of Appeal of 25 June 2002 was appropriate and effective, and that, therefore, the filing of a replacement Notice on 28 June 2002 did not constitute a second appeal. Moreover, we agree with the European Communities that the replacement Notice of Appeal contains no additional grounds of appeal, and that it merely added information to the paragraphs in the initial Notice that Peru considered deficient.

150. Peru alleges that, in sanctioning the approach of the European Communities in this appeal, we would be creating a procedural right for which the DSU has not provided—a right that can only be added to the DSU through a formal amendment by the Members of the World Trade Organization (the "WTO"). We are, however, not creating a new procedural right; we are only upholding the right to withdraw an appeal. In addition, in admitting the replacement Notice of Appeal in this dispute, we are, as we were in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("US – Shrimp"), seeking to:

... give full meaning and effect to the right of appeal and to give a party which regards itself aggrieved by some legal finding or in-

⁴⁴ Peru's appellee's submission, para. 179.

⁴⁵ European Communities' response to questioning at the oral hearing.

⁴⁶ *Ibid.*

⁴⁷ Peru's appellee's submission, para. 38.

⁴⁸ *Ibid.*, para. 48.

⁴⁹ Peru stated that the first Notice was "vague as to the scope of the appeal" and therefore it did not know whether the new Notice covered the same grounds. (Peru's response to questioning at the oral hearing)

terpretation in a panel report a real and effective opportunity to demonstrate the error in such finding or interpretation.⁵⁰

In that same Report, we added that "an appellee is, of course, always entitled to its full measure of due process."⁵¹ In the circumstances of this case, we believe that Peru has been accorded the full measure of its due process rights, because the withdrawal of the original Notice and the filing of a replacement Notice were carried out in response to objections raised by Peru, the replacement Notice was filed in a timely manner and early in the process, and the replacement Notice contained no new or modified grounds of appeal. Also, Peru has not demonstrated that it suffered prejudice as a result. Moreover, Peru was given an adequate opportunity to address its concerns about the European Communities' actions during the course of the appeal.

151. In our view, the withdrawal of the original Notice of Appeal of 25 June 2002 and its replacement with the Notice of Appeal of 28 June 2002 was not an exercise of abusive litigation techniques by the European Communities, but rather was an appropriate response under the circumstances to Peru's objections regarding the original Notice of Appeal.

152. For all these reasons, we reject Peru's claims that the withdrawal of the Notice of Appeal of 25 June 2002 by the European Communities cannot be subject to a condition, and that the Notice of Appeal of 28 June 2002 by the European Communities is inadmissible.

B. Amicus Curiae Briefs

153. We turn next to the second procedural issue in this case, namely whether we may accept and consider the *amicus curiae* briefs that have been submitted to us. One brief was filed by a private individual, and the other by the Kingdom of Morocco ("Morocco"), a Member of the WTO that did not exercise its third party rights at the panel stage of these proceedings.

154. Peru objects to our acceptance and consideration of these unsolicited submissions. Peru argues that, although it "welcomes non-Member submissions where they are attached to the submission of a WTO Member engaged in dispute settlement proceedings, the DSU makes clear that only WTO Members can make independent submissions to panels and to the Appellate Body".⁵² As for the brief submitted by Morocco, a WTO Member, Peru contends that accepting such a brief "would be to allow a WTO Member impermissibly to circumvent the DSU", which "establishes the conditions under which WTO Members can participate as third parties in dispute settlement proceedings."⁵³ On this basis, Peru requests us to reject both of these briefs.

⁵⁰ Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 97.

⁵¹ *Ibid.*

⁵² Peru's letter dated 26 July 2002.

⁵³ *Ibid.*

155. The European Communities does not address this issue in its written submission. In response to our questioning at the oral hearing, however, the European Communities stated that the *amicus curiae* briefs are pertinent, and that we have the discretion to accept them. Among the third participants, Canada argues that there is a lack of clear agreement among WTO Members as to the role of *amicus curiae* briefs in dispute settlement, and contends that WTO Members have a legal right to participate in dispute settlement proceedings only if they reserve their third party rights at the outset of the dispute settlement process. Moreover, Canada asserts that both *amicus curiae* briefs should be rejected because they are not pertinent or useful. Chile and Ecuador also ask us to reject the *amicus curiae* briefs, alleging that the DSU does not permit participation by *amici*. The United States is of the view that we have the authority to accept both briefs, but believes we should not consider either of them because they are not pertinent or useful.

156. We recall that, in *US – Shrimp*⁵⁴, we admitted three *amicus curiae* briefs that were attached as exhibits to the appellant's submission in that appeal. We concluded that those briefs formed part of the appellant's submission, and observed that it is for a participant in an appeal to determine for itself what to include in its submission.⁵⁵ We followed this approach in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*")⁵⁶, and in *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*").⁵⁷ In subsequent cases, *amicus curiae* briefs were submitted by private individuals or organizations separately from participants' submissions. We admitted those briefs as well.⁵⁸

157. We have the authority to accept *amicus curiae* briefs. We enunciated this authority for the first time in our Report in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ("*US – Lead and Bismuth II*"), where we reasoned:

In considering this matter, we first note that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On

⁵⁴ Appellate Body Report, *supra*, footnote 50.

⁵⁵ *Ibid.*, para 91.

⁵⁶ Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/AB/R, adopted 5 April 2001.

⁵⁷ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*"), WT/DS58/AB/RW, adopted 21 November 2001.

⁵⁸ Appellate Body Report, *EC – Asbestos*, *supra*, footnote 15, Appellate Body Report, *Thailand – H-Beams*, *supra*, footnote 56, Appellate Body Report, *US – Lead and Bismuth II*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601.

the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit[s] acceptance or consideration of such briefs. ... [Article 17.9⁵⁹] makes clear that the Appellate Body has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements. Therefore, we are of the opinion that as long as we act consistently with the provisions of the DSU and the covered agreements, we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.⁶⁰ (footnote omitted)

158. In that finding, we drew a distinction between, on the one hand, parties and third parties to a dispute, which have a *legal right* to participate in panel and Appellate Body proceedings, and, on the other hand, private individuals and organizations, which are not Members of the WTO, and which, therefore, do not have a *legal right* to participate in dispute settlement proceedings. We said there:

We wish to emphasize that in the dispute settlement system of the WTO, the DSU envisages *participation* in panel or Appellate Body proceedings, as a matter of legal right, *only* by parties and third parties to a dispute. And, under the DSU, *only* Members of the WTO have a legal right to participate as parties or third parties in a particular dispute. ...

Individuals and organizations, which are not Members of the WTO, have no legal right to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal *duty* to accept and consider *only* submissions from WTO Members which are parties or third parties in a particular dispute.⁶¹ (original emphasis; underlining added; footnotes omitted)

159. We explained further in that appeal that participation by private individuals and organizations is dependent upon our permitting such participation if we find it useful to do so. We observed that:

... we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it nec-

⁵⁹ Article 17.9 of the DSU provides as follows:
Procedures for Appellate Review

9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

⁶⁰ Appellate Body Report, *supra*, footnote 58, para. 39.

⁶¹ *Ibid.*, paras. 40–41.

essary to take the two *amicus curiae* briefs filed into account in rendering our decision.⁶²

We have followed this same approach in a number of subsequent appeals.⁶³

160. Peru conceded at the oral hearing that its "position is not exactly supported by the case law of the Appellate Body".⁶⁴ On this, Peru is correct. Accordingly, we believe that the objections of Peru with regard to the *amicus curiae* brief submitted by a private individual are unfounded. We find that we have the authority to accept the brief filed by a private individual, and to consider it. We also find that the brief submitted by a private individual does not assist us in this appeal.

161. We turn now to the issue of the *amicus curiae* brief filed by Morocco, which raises a novel issue, as this is the first time that a WTO Member has submitted such a brief in any WTO dispute settlement proceeding. The European Communities is of the view that we should not treat *amicus curiae* briefs submitted by private individuals differently from *amicus curiae* briefs submitted by WTO Members.⁶⁵ Peru objects to our accepting Morocco's brief, arguing that such acceptance would circumvent the rules in the DSU setting out the conditions under which WTO Members can participate as third parties in dispute settlement proceedings.⁶⁶ Peru refers specifically to Articles 10.2 and 17.4 of the DSU, which provide, respectively:

Article 10

2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

Article 17

4. Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

⁶² Appellate Body Report, *US – Lead and Bismuth II*, *supra*, footnote 58, para. 42.

⁶³ The issue of unsolicited *amicus curiae* briefs submitted to us by private individuals also arose in *EC – Asbestos*, *supra*, footnote 15; *Thailand – H-Beams*, *supra*, footnote 56; and *US – Shrimp (Article 21.5 – Malaysia)*, *supra*, footnote 57.

⁶⁴ Peru's response to questioning at the oral hearing.

⁶⁵ European Communities' response to questioning at the oral hearing.

⁶⁶ Peru's letter dated 26 July 2002.

Peru asserts that, because Morocco did not notify its interest to the DSB in accordance with these provisions, Morocco cannot be given an opportunity to be heard by us.

162. We do not agree. As we said earlier, we found in *US – Lead and Bismuth II* that "nothing in the DSU or the *Working Procedures* specifically provides that we may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal."⁶⁷ We also stated in that appeal that "neither the DSU nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs."⁶⁸ In so ruling, we did *not* distinguish between, on the one hand, submissions from WTO Members that are not participants or third participants in a particular appeal, and, on the other hand, submissions from *non*-WTO Members.

163. It is true that, unlike private individuals or organizations, WTO Members are given an explicit right, under Articles 10.2 and 17.4 of the DSU, to participate in dispute settlement proceedings as third parties. Thus, the question arises whether the existence of this explicit right, which is not accorded to non-Members, justifies treating WTO Members differently from non-WTO Members in the exercise of our authority to receive *amicus curiae* briefs. We do not believe that it does.

164. We have been urged by the parties to this dispute not to treat Members less favourably than non-Members with regard to participation as *amicus curiae*.⁶⁹ We agree. We have not. And we will not. As we have already determined that we have the authority to receive an *amicus curiae* brief from a private individual or an organization, *a fortiori* we are entitled to accept such a brief from a WTO Member, provided there is no prohibition on doing so in the DSU. We find no such prohibition.

165. None of the participants in this appeal has pointed to any provision of the DSU that can be understood as prohibiting WTO Members from participating in

⁶⁷ Appellate Body Report, *supra*, footnote 58, para. 39.

⁶⁸ *Ibid.*

⁶⁹ European Communities' response to questioning at the oral hearing; Peru's response to questioning at the oral hearing.

Ecuador and Chile argued that if we were to accept and consider an *amicus curiae* brief submitted by a WTO Member that had not followed the procedures for participation as a third party or third participant, we would be according such Member greater rights than we would a WTO Member which had followed those procedures, but had not filed a written submission on appeal as specified in Rule 27(3) of our *Working Procedures*. According to Chile and Ecuador, the Member that had not filed a written submission on appeal would have an opportunity only to participate as a passive observer at the oral hearing, but would not be permitted to make its views known at that hearing. Chile and Ecuador argue that, by contrast, the Member which had filed an *amicus curiae* brief would have greater rights because its views would be before us. We do not agree. A Member that has participated as a third party at the panel stage has a right to file a written submission on appeal in accordance with Rule 24, and if it does so we would have a duty to consider it. If such Member chooses for its own reasons not to file a written submission on appeal, our practice is to permit such Member to attend the oral hearing. By contrast, a Member which files an *amicus curiae* brief is not guaranteed that we will accept or consider the brief, and the Member will not be entitled to attend the oral hearing in any capacity.

panel or appellate proceedings as an *amicus curiae*. Nor has any participant in this appeal demonstrated how such participation would contravene the DSU. Peru states only that the DSU provides that participation as a third party is governed by Articles 10.2 and 17.4, and appears to draw from this a negative inference such that Members may participate pursuant to those rules, or not at all. We have examined Articles 10.2 and 17.4, and we do not share Peru's view. Just because those provisions stipulate when a Member may participate in a dispute settlement proceeding as a third party or third participant, does not, in our view, lead inevitably to the conclusion that participation by a Member as an *amicus curiae* is prohibited.

166. As we explained in *US – Lead and Bismuth II*, the DSU gives WTO Members that are participants and third participants a legal *right* to participate in appellate proceedings.⁷⁰ In particular, WTO Members that are third participants in an appeal have the *right* to make written and oral submissions. The corollary is that we have a *duty*, by virtue of the DSU, to accept and consider these submissions from WTO Members. By contrast, participation as *amici* in WTO appellate proceedings is not a legal *right*, and we have no duty to accept any *amicus curiae* brief. We may do so, however, based on our legal authority to regulate our own procedures as stipulated in Article 17.9 of the DSU. The fact that Morocco, as a sovereign State, has chosen not to exercise its *right* to participate in this dispute by availing itself of its third-party rights at the panel stage does not, in our opinion, undermine our *legal authority* under the DSU and our *Working Procedures* to accept and consider the *amicus curiae* brief submitted by Morocco.

167. Therefore, we find that we are entitled to accept the *amicus curiae* brief submitted by Morocco, and to consider it. We wish to emphasize, however, that, in accepting the brief filed by Morocco in this appeal, we are not suggesting that each time a Member files such a brief we are required to accept and consider it. To the contrary, acceptance of any *amicus curiae* brief is a matter of discretion, which we must exercise on a case-by-case basis. We recall our statement that:

The procedural rules of WTO dispute settlement are designed to promote ... the fair, prompt and effective resolution of trade disputes.⁷¹

Therefore, we could exercise our discretion to reject an *amicus curiae* brief if, by accepting it, this would interfere with the "fair, prompt and effective resolution of trade disputes." This could arise, for example, if a WTO Member were to

⁷⁰ Appellate Body Report, *supra*, footnote 58, para. 40. This is subject to meeting the requirements in Rule 27(3) of the *Working Procedures*, which provides that "[a]ny third participant who has filed a submission pursuant to Rule 24 may appear to make oral arguments or presentations at the oral hearing." However, we have on several occasions permitted third parties who have not filed a submission to attend the oral hearing as passive observers.

⁷¹ Appellate Body Report, *US – FSC*, *supra*, footnote 20, para. 166. In that appeal, we were not referring in the quoted excerpt to the issue of *amicus curiae* briefs. The issue there related to the exercise of the right of appeal. We nevertheless believe that our views on how to interpret the *Working Procedures* are of general application and are thus pertinent to the *amicus curiae* issue as it arises in this case.

seek to submit an *amicus curiae* brief at a very late stage in the appellate proceedings, with the result that accepting the brief would impose an undue burden on other participants.

168. Having concluded that we have the legal authority to accept the *amicus curiae* brief submitted by Morocco, we now consider whether Morocco's brief assists us in this appeal.

169. Morocco's *amicus curiae* brief provides mainly factual information. It refers to the scientific differences between *Sardina pilchardus* Walbaum ("*Sardina pilchardus*") and *Sardinops sagax sagax* ("*Sardinops sagax*"), and it also provides economic information about the Moroccan fishing and canning industries. As Article 17.6 of the DSU limits an appeal to issues of law and legal interpretations developed by the panel, the factual information provided in Morocco's *amicus curiae* brief is not pertinent in this appeal. In addition, Morocco has alleged in its *amicus curiae* brief that the measure at issue in this appeal is consistent with relevant international standards, including those of the Codex Alimentarius Commission (the "Codex Commission"). Morocco does not elaborate on this allegation, and provides no support for this position. Therefore, this, too, fails to assist us in this appeal. However, some of the legal arguments put forward by Morocco relate to Article 2.1 of the *TBT Agreement* and to the GATT 1994. Therefore, we will consider whether these arguments are of assistance when we consider Article 2.1 and the GATT 1994 later in this Report.

170. In sum, with the exception of the arguments relating to Article 2.1 of the *TBT Agreement* and the GATT 1994, to which we will return later, we find that Morocco's *amicus curiae* brief does not assist us in this appeal.

V. THE CHARACTERIZATION OF THE EC REGULATION AS A "TECHNICAL REGULATION"

171. We now turn to whether the Panel erred by finding that the EC Regulation is a "technical regulation" for purposes of Article 2.4 of the *TBT Agreement*. We recall that we have described the measure at issue—the EC Regulation—earlier in this Report.⁷²

172. The Panel found that:

... the EC Regulation is a technical regulation as it lays down product characteristics for preserved sardines and makes compliance with the provisions contained therein mandatory.⁷³

173. The European Communities does not contest that the EC Regulation is a "technical regulation" *per se*.⁷⁴ Instead, on appeal, the European Communities reiterates two arguments that the Panel rejected. First, the European Communi-

⁷² *Supra*, paras. 2–3.

⁷³ Panel Report, para. 7.35.

⁷⁴ European Communities' appellant's submission, paras. 21 and 23; European Communities' statement at the oral hearing.

ties argues that the product coverage of the EC Regulation is limited to preserved *Sardina pilchardus*. The European Communities contends that the EC Regulation does not regulate preserved fish made from *Sardinops sagax* or from any other species, and that, accordingly, *Sardinops sagax* is not an *identifiable* product under the EC Regulation.⁷⁵ The European Communities concludes that, in the light of our ruling in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("EC – Asbestos")⁷⁶ that a "technical regulation" must apply to *identifiable* products, the EC Regulation is not a "technical regulation" for *Sardinops sagax*.⁷⁷

174. Second, the European Communities contends that a "naming" rule is distinct from a labelling requirement. The European Communities argues that, "[t]he requirement to state a certain name on the label ... involves not only a labelling requirement but also a substantive naming rule, which is not subject to the TBT Agreement."⁷⁸ Thus, according to the European Communities, even if it were determined that the EC Regulation relates to *Sardinops sagax*, the "naming" rule set out in Article 2 of the EC Regulation—the provision challenged by Peru—is not a product characteristic.⁷⁹ On this basis, the European Communities argues that Article 2 of the EC Regulation—which the European Communities contends sets out a "naming" rule and not a labelling requirement—does not meet the definition of the term "technical regulation" provided in the *TBT Agreement*.⁸⁰

175. As we explained in *EC – Asbestos*, whether a measure is a "technical regulation" is a threshold issue because the outcome of this issue determines whether the *TBT Agreement* is applicable.⁸¹ If the measure before us is not a "technical regulation", then it does not fall within the scope of the *TBT Agreement*.⁸² The term "technical regulation" is defined in Annex 1.1 to the *TBT Agreement* as follows:

1. *Technical Regulation*

⁷⁵ European Communities' response to questioning at the oral hearing.

⁷⁶ Appellate Body Report, *supra*, footnote 15.

⁷⁷ European Communities' appellant's submission, para. 49.

⁷⁸ European Communities' statement at the oral hearing.

⁷⁹ Article 2 of the EC Regulation reads as follows:

Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:

- they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
- they must be prepared exclusively from fish of the species "*Sardina pilchardus* Walbaum";
- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
- they must be sterilized by appropriate treatment.

⁸⁰ European Communities' statement at the oral hearing.

⁸¹ Appellate Body Report, *supra*, footnote 15, para. 59.

⁸² The *TBT Agreement* covers also "standards" and "conformity assessment procedures". However, none of the participants has alleged that the measure at issue in this dispute is either a "standard" or a "conformity assessment procedure".

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

176. We interpreted this definition in *EC – Asbestos*.⁸³ In doing so, we set out *three criteria* that a document must meet to fall within the definition of "technical regulation" in the *TBT Agreement*. *First*, the document must apply to an identifiable product or group of products. The *identifiable* product or group of products need not, however, be expressly *identified* in the document. *Second*, the document must lay down one or more characteristics of the product. These product characteristics may be intrinsic, or they may be related to the product. They may be prescribed or imposed in either a positive or a negative form. *Third*, compliance with the product characteristics must be mandatory. As we stressed in *EC – Asbestos*, these three criteria are derived from the wording of the definition in Annex 1.1. At the oral hearing, both participants confirmed that they agree with these criteria for determining whether a document is a "technical regulation" under the *TBT Agreement*.⁸⁴

177. The European Communities concedes that the EC Regulation is a "technical regulation" *per se*.⁸⁵ All the same, the European Communities argues that the EC Regulation is *not* a "technical regulation" for the purposes of this dispute because—in relation to *Sardinops sagax*—it does not fulfil two of the criteria that a document must meet to be considered a "technical regulation" under the *TBT Agreement*.⁸⁶ The European Communities' assertion that the EC Regulation does not regulate preserved *Sardinops sagax* relates to the first criterion, which requires that a document apply to *identifiable* products. The European Communities' argument distinguishing "naming" from labelling requirements relates to the second criterion, which requires that a document lay down *product characteristics*. We will consider each of these arguments in turn.

178. We begin with the European Communities' contention that the EC Regulation is a "technical regulation" only for preserved *Sardina pilchardus*, and that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation.

179. The Panel rejected this argument because, in the Panel's view, it:

... disregards the notion that a document may prescribe or impose product characteristics in either a positive or negative form — that is, by inclusion or by exclusion.⁸⁷ (footnote omitted)

⁸³ Appellate Body Report, *supra*, footnote 15, paras. 66–70.

⁸⁴ European Communities' response to questioning at the oral hearing; Peru's response to questioning at the oral hearing.

⁸⁵ European Communities' response to questioning at the oral hearing.

⁸⁶ *Ibid.*

⁸⁷ Panel Report, para. 7.44.

The Panel then concluded that:

... by requiring the use of only the species *Sardina pilchardus* as preserved sardines, the EC Regulation in effect lays down product characteristics in a negative form, that is, by excluding other species, such as *Sardinops sagax*, from being "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. *It is for this reason that we do not accept the European Communities' argument that the EC Regulation is not a technical regulation for preserved Sardinops sagax.* This argument would be persuasive only if technical regulations were to lay down product characteristics in a positive form.⁸⁸ (emphasis added)

This excerpt from the Panel Report suggests that the Panel examined the European Communities' argument on this issue in the light of the *second* criterion, which requires that a document lay down product characteristics.⁸⁹ In our view, the European Communities' argument, as presented on appeal, relates rather to the *first* criterion: the European Communities is claiming that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation.⁹⁰

180. In *EC – Asbestos*, we made the following observations about the requirement that a document apply to identifiable products:

A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, "of the *products to be covered*" by a proposed "technical regulation". (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "*given*" products which are actually *named, identified or specified* in the regulation. (emphasis added) Although the *TBT Agreement* clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does *not* expressly identify products by name, but simply makes them identifiable – for instance, through the "characteristic" that is the subject of regulation.⁹¹ (original emphasis; footnote omitted)

⁸⁸ *Ibid.*, para. 7.45.

⁸⁹ Before examining this argument, the Panel had concluded that the EC Regulation applies to an identifiable product because it *identifies* preserved sardines. (*Ibid.*, para. 7.26)

⁹⁰ European Communities' appellant's submission, paras. 43–47.

⁹¹ Appellate Body Report, *supra*, footnote 15, para 70.

Thus, a product does not necessarily have to be mentioned *explicitly* in a document for that product to be an *identifiable* product. *Identifiable* does not mean expressly identified.

181. The European Communities argues that the Panel erred in failing to acknowledge that the EC Regulation uses the term "preserved sardines" to mean—exclusively—preserved *Sardina pilchardus*.⁹² The European Communities is of the view that preserved *Sardina pilchardus* and preserved *Sardinops sagax* are not like products. The European Communities reasons that preserved *Sardinops sagax* can neither be an identified nor an identifiable product under the EC Regulation.⁹³

182. In our view, the Panel correctly found that the EC Regulation is applicable to an identified product, and that the identified product is "preserved sardines". This is abundantly clear from a plain reading of the EC Regulation itself. The EC Regulation is entitled "Council Regulation (EEC) 2136/89 of 21 June 1989 Laying Down Common Marketing Standards for *Preserved Sardines*". (emphasis added) Article 1, which sets forth the scope of the EC Regulation, states that "[t]his Regulation defines the standards governing the marketing of *preserved sardines* in the Community." (emphasis added) Article 2 states that "[o]nly products meeting the following requirements may be marketed as *preserved sardines*". (emphasis added)

183. This alone, however, does not dispose of the European Communities' argument, as the European Communities reproaches the Panel for failing to acknowledge that the EC Regulation uses the term "preserved sardines" to mean—exclusively—preserved *Sardina pilchardus*. We observe that the EC Regulation does not expressly identify *Sardinops sagax*. However, this does not necessarily mean that *Sardinops sagax* is not an *identifiable* product. As we stated in *EC – Asbestos*, a product need not be expressly identified in the document for it to be *identifiable*.⁹⁴

184. Even if we were to accept, for the sake of argument, the European Communities' contention that the term "preserved sardines" in the EC Regulation refers exclusively to preserved *Sardina pilchardus*, the EC Regulation would still be applicable to a range of *identifiable* products beyond *Sardina pilchardus*. This is because preserved products made, for example, of *Sardinops sagax* are, by virtue of the EC Regulation, *prohibited* from being identified and marketed under an appellation including the term "sardines".

185. As we explained in *EC – Asbestos*, the requirement that a "technical regulation" be applicable to *identifiable* products relates to aspects of compliance and enforcement, because it would be impossible to comply with or enforce a "technical regulation" without knowing to what the regulation applied.⁹⁵ As the Panel record shows, the EC Regulation has been enforced against preserved fish

⁹² European Communities' appellant's submission, para. 38.

⁹³ *Ibid.*, para. 49.

⁹⁴ Appellate Body Report, *EC – Asbestos*, *supra*, footnote 15, para. 70.

⁹⁵ *Ibid.*

products imported into Germany containing *Sardinops sagax*.⁹⁶ This confirms that the EC Regulation is applicable to preserved *Sardinops sagax*, and demonstrates that preserved *Sardinops sagax* is an *identifiable product* for purposes of the EC Regulation. Indeed, the European Communities admits that the EC Regulation is applicable to *Sardinops sagax*, when it states in its appellant's submission that "[t]he only legal consequence of the [EC] Regulation for preserved *Sardinops sagax* is that they may not be called 'preserved sardines'."⁹⁷

186. Therefore, we reject the contention of the European Communities that preserved *Sardinops sagax* is not an identifiable product under the EC Regulation.

187. Next, we examine whether the EC Regulation meets the second criterion of a "technical regulation", which is that it must be a document that lays down product characteristics. According to the European Communities, Article 2 of the EC Regulation does not lay down product characteristics; rather, it sets out a "naming" rule. The European Communities argues that, although the definition of "technical regulation" in the *TBT Agreement* covers labelling requirements, it does not extend to "naming" rules. Therefore, the European Communities asserts that Article 2 of the EC Regulation is not a "technical regulation".⁹⁸

188. The Panel rejected this assertion for two reasons. First, the Panel stated:

... even if it were determined that the EC Regulation does not contain a labelling requirement, it cannot detract from our conclusion that the EC Regulation constitutes a technical regulation because that conclusion is based on our finding that it lays down certain product characteristics we have already identified. A finding to the effect that the EC Regulation does not contain a related product characteristic in the form of a labelling requirement does not negate the existence of other product characteristics set out in the EC Regulation.⁹⁹

The Panel continued:

Second, we fail to see the basis on which a distinction can be drawn between a requirement to "name" and a requirement to "label" a product for the purposes of the TBT Agreement. ... Based on the ordinary meaning, we consider that labelling and naming requirements are essentially "means of identification" of a product and as such, they come within the scope of the definition of "technical regulation".

⁹⁶ Letter from German importer submitted as Exhibit PERU-13 by Peru to the Panel. Reference to this is also found in Peru's first submission to the Panel, paras. 5-7; Peru's second submission to the Panel, para. 12; Peru's appellee's submission, para. 60; and Peru's response to questioning at the oral hearing.

⁹⁷ European Communities' appellant's submission, para 43.

⁹⁸ European Communities' statement at the oral hearing.

⁹⁹ Panel Report, para. 7.39.

In any event, the distinction which we have been asked to draw between "naming" and "labelling" requirements is not supported by the text and structure of the EC Regulation.¹⁰⁰ (footnotes omitted)

189. In *EC – Asbestos*, we examined what it means to lay down product characteristics, and concluded that:

The heart of the definition of a "technical regulation" is that a "document" must "lay down" – that is, set forth, stipulate or provide – "product *characteristics*". The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal *exclusively* with terminology, symbols, packaging, marking or labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".¹⁰¹ (original emphasis; underlining added)

Accordingly, product characteristics include not only "features and qualities intrinsic to the product", but also those that are related to it, such as "means of identification".

190. We do not find it necessary, in this case, to decide whether the definition of "technical regulation" in the *TBT Agreement* makes a distinction between "naming" and labelling. This question is irrelevant to the issue before us. As we stated earlier, the EC Regulation expressly identifies a product, namely "preserved sardines". Further, Article 2 of the EC Regulation provides that, to be marketed as "preserved sardines", products must be prepared exclusively from

¹⁰⁰ *Ibid.*, paras. 7.40–7.41.

¹⁰¹ Appellate Body Report, *supra*, footnote 15, para. 67.

fish of the species *Sardina pilchardus*. We are of the view that this requirement—to be prepared exclusively from fish of the species *Sardina pilchardus*—is a product characteristic "intrinsic to" preserved sardines that is laid down by the EC Regulation.¹⁰² Thus, we agree with the Panel's finding in this regard that:

... one product characteristic required by Article 2 of the EC Regulation is that preserved sardines must be prepared exclusively from fish of the species *Sardina pilchardus*. This product characteristic must be met for the product to be "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. We consider that the requirement to use exclusively *Sardina pilchardus* is a product characteristic as it objectively defines features and qualities of preserved sardines for the purposes of their "market[ing] as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation.¹⁰³

191. In any event, as we said in *EC – Asbestos*, a "means of identification" is a product characteristic.¹⁰⁴ A name clearly identifies a product; indeed, the European Communities concedes that a name is a "means of identification".¹⁰⁵ As the following excerpt from the Panel Report illustrates, the European Communities itself underscored the important role that a "name" plays as a "means of identification" when it argued before the Panel that one of the objectives pursued by the European Communities through the EC Regulation is to provide precise information to avoid misleading the consumer:

The European Communities argues that the provisions of its Regulation laying down minimum quality standards, harmonizing the ways in which the product may be presented and regulating the indications to be contained on the label, all serve to facilitate comparisons between competing products. It further submits that some of these objectives are pursued by the Regulation at issue in conjunction with EC Directive 2000/13. The European Communities argues that this is particularly true of the name; *accurate and precise names allow products to be compared with their true equivalents rather than with substitutes and imitations whereas inaccu-*

¹⁰² We observe that Article 2 of the EC Regulation lays down another intrinsic product characteristic in requiring that only products "sterilized by appropriate treatment" may be marketed as preserved sardines.

¹⁰³ Panel Report, para. 7.27.

¹⁰⁴ Appellate Body Report, *supra*, footnote 15, para. 67.

¹⁰⁵ European Communities' response to questioning at the oral hearing. The European Communities argues that the distinction between a labelling requirement and a "naming" rule is similar to the difference between, on the one hand, requirements relating to markings indicating the origin of a product, and, on the other hand, rules used to determine the origin of a product. We are not persuaded by this analogy. A "naming" rule bears no similarity to a rule of origin. A name is a clear means of identifying a product. Furthermore, as the facts of this case illustrate, affixing a name to the label of a product is a highly practical way of identifying a product when goods are marketed. Indeed, Codex Stan 94 includes the provisions relating to the name of the product—that is, section 6.1—within the section dealing with labelling generally.

*rate and imprecise names reduce transparency, cause confusion, mislead the consumer, allow products to benefit from the reputation of other different products, give rise to unfair competition and reduce the quality and variety of products available in trade and ultimately for the consumer.*¹⁰⁶ (emphasis added)

192. Before concluding on this second criterion and proceeding to the third criterion in the definition of "technical regulation", we observe that, although the European Communities argued before the Panel that Article 2 of the EC Regulation could not be analyzed in isolation, on appeal, the European Communities asks us to focus our attention exclusively on whether Article 2, taken by itself, lays down product characteristics.¹⁰⁷ As the Panel correctly points out, in *EC – Asbestos*, we stated that "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole".¹⁰⁸ With this in mind, we observe that the Panel analyzed other articles of the EC Regulation and found that those, too, lay down product characteristics.¹⁰⁹

193. For all these reasons, we agree with the Panel's conclusion that the EC Regulation lays down product characteristics.

194. The third and final criterion that a document must fulfil to meet the definition of "technical regulation" in the *TBT Agreement* is that compliance must be mandatory. The European Communities does not contest that compliance with the EC Regulation is mandatory.¹¹⁰ We also find that it is mandatory.¹¹¹

195. We, therefore, uphold the Panel's finding, in paragraph 7.35 of the Panel Report, that the EC Regulation is a "technical regulation" for purposes of the *TBT Agreement*, because it meets the three criteria we set out in *EC – Asbestos* as necessary to satisfy the definition of a "technical regulation" under the *TBT Agreement*.

VI. THE TEMPORAL SCOPE OF APPLICATION OF ARTICLE 2.4 OF THE *TBT AGREEMENT*

196. We turn now to the European Communities' claim that Article 2.4 of the *TBT Agreement* does not apply to pre-existing technical regulations because it deals only with the *preparation* and *adoption* of technical regulations and not with their continued application. On this issue, we begin by recalling that the EC Regulation and Codex Stan 94 came into effect before the entry into force of the *TBT Agreement* on 1 January 1995.

¹⁰⁶ Panel Report, para. 4.71.

¹⁰⁷ Panel Report, para. 7.31.

¹⁰⁸ Appellate Body Report, *supra*, footnote 15, para. 64.

¹⁰⁹ The Panel referred to Articles 3–7 of the EC Regulation. (Panel Report, para. 7.28)

¹¹⁰ European Communities' response to questioning at the oral hearing.

¹¹¹ Article 9 of the EC Regulation states in relevant part that "[t]his Regulation shall be binding in its entirety and directly applicable in all Member States."

197. The Panel found that:

...the EC Regulation is a "situation or measure that did not cease to exist" and the TBT Agreement does not reveal a contrary intention to limit the temporal application of the TBT Agreement to measures adopted after 1 January 1995.

Therefore, Article 2.4 of the TBT Agreement applies to measures that were adopted before 1 January 1995 but which have not ceased to exist.¹¹²

198. The Panel also rejected "the European Communities' argument that Article 2.4 [of the *TBT Agreement*] does not apply to existing technical regulations."¹¹³

199. The European Communities appeals this finding. The European Communities "does not argue that the *TBT Agreement* does not apply to technical regulations enacted before 1995".¹¹⁴ Instead, the European Communities contends that Article 2.4 of that Agreement does not impose an ongoing obligation on Members to reassess their existing technical regulations in the light of the adoption of new international standards, or the revision of existing ones.¹¹⁵

200. We recall that Article 28 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")¹¹⁶ provides that treaties generally do not apply retroactively. Article 28 provides:

Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to *any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty* with respect to that party. (emphasis added)

As we have said in previous disputes¹¹⁷, the interpretation principle codified in Article 28 is relevant to the interpretation of the covered agreements.

201. In the European Communities' view, both the text and the context of Article 2.4 make plain that the scope of application of Article 2.4 is limited to the *preparation* and *adoption* of technical regulations, and not to their *maintenance*.¹¹⁸ The European Communities does not contest that the EC Regulation—which is currently in force—is an act that has not "ceased to

¹¹² Panel Report, paras. 7.59–7.60.

¹¹³ *Ibid.*, para. 7.83. The Panel addressed this argument in the context of its analysis of whether Codex Stan 94 is a relevant international standard.

¹¹⁴ European Communities' statement at the oral hearing.

¹¹⁵ *Ibid.*

¹¹⁶ *Supra*, footnote 16.

¹¹⁷ Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167, at 179–180; Appellate Body Report, *Canada – Term of Patent Protection*, WT/DS170/AB/R, adopted 12 October 2000, paras. 71–72; Appellate Body Report, *EC – Hormones*, *supra*, footnote 17, para. 128.

¹¹⁸ European Communities' appellant's submission, paras. 66–83.

exist". However, according to the European Communities, the *preparation* and *adoption* of the EC Regulation are both "acts that ceased to exist"—in the sense that they were completed—before the date of the entry into force of the *TBT Agreement*. Therefore, the European Communities contends that, consistent with Article 28 of the *Vienna Convention*¹¹⁹, Article 2.4 of the *TBT Agreement* is not applicable to the EC Regulation.¹²⁰

202. The text of Article 2.4 of the *TBT Agreement* provides as follows:

TECHNICAL REGULATIONS AND STANDARDS

Article 2

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

With respect to their central government bodies:

...

2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

203. According to the European Communities, it is evident from the text of Article 2.4 that the temporal scope of the provision is limited to the two stages of *preparation* and *adoption* of technical regulations, and that the continued existence thereafter of these regulations is not governed by that provision. The European Communities finds support for this contention in what the European Communities sees as the time-limited nature of the terms "where technical regulations are required", "exist", "imminent", "use", and "as a basis for" in the text of Article 2.4, and also in the absence in the text of that provision of the words "maintain" or "apply".¹²¹

204. The Panel took a contrary view, and concluded that a textual reading does not support the European Communities' assertion because:

Article 2.4 of the TBT Agreement starts with the language "where technical regulations are required". We construe this expression to cover technical regulations that are already in existence as it is entirely possible that a technical regulation that is already in existence can continue to be required. ... Moreover, we note that the

¹¹⁹ *Supra*, footnote 16.

¹²⁰ European Communities' appellant's submission, para. 63; European Communities' response to questioning at the oral hearing.

¹²¹ European Communities' appellant's submission, paras. 66–67; European Communities' response to questioning at the oral hearing.

first part of the sentence of Article 2.4 is in the present tense ("exist") and not in the past tense — "[w]here technical regulations are required and relevant international standards *exist or their completion is imminent*", Members are obliged to use such international standards as a basis. This supports the view that Members have to use relevant international standards that currently exist or whose completion is imminent with respect to the technical regulations that are already in existence. We do not consider that the word "imminent", the ordinary meaning of which is "likely to happen without delay", is intended to limit the scope of the coverage of technical regulations to those that have yet to be adopted. Rather, the use of the word "imminent" means that Members cannot disregard a relevant international standard whose completion is imminent with respect to their existing technical regulations.¹²² (original emphasis; footnote omitted)

205. We concur with the Panel's view that the text of Article 2.4 of the *TBT Agreement* does not support the European Communities' contention. We fail to see how the terms "where technical regulations are required", "exist", "imminent", "use", and "as a basis for" give any indication that Article 2.4 applies only to the two stages of *preparation* and *adoption* of technical regulations. To the contrary, as the Panel noted, the use of the present tense suggests a continuing obligation for existing measures, and not one limited to regulations prepared and adopted after the *TBT Agreement* entered into force. The European Communities reads Article 2.4 as if it said "where technical regulations are in preparation or are to be adopted", which is clearly not the case. The obligation refers to technical regulations generally and without limitations.

206. The European Communities' claim is also at odds with our reasoning in *EC Measures Concerning Meat and Meat Products (Hormones)* ("*EC – Hormones*")¹²³, which, as the Panel correctly pointed out, is relevant to the issue before us. In *EC – Hormones*, we addressed the temporal scope of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), and stated:

We agree with the Panel that the *SPS Agreement* would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the *SPS Agreement* reveals a contrary intention. We also agree with the Panel that the *SPS Agreement* does not reveal such an intention. The *SPS Agreement* does not contain any provision limiting the temporal application of the *SPS Agreement*, or of any provision thereof, to SPS measures adopted after 1 January 1995. In the absence of such a provision, it cannot be assumed that central provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, do not apply to measures which were

¹²² Panel Report, para. 7.74.

¹²³ Appellate Body Report, *supra*, footnote 17.

enacted before 1995 but which continue to be in force thereafter.

If the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 from the disciplines of provisions as important as Articles 5.1 and 5.5, it appears reasonable to us to expect that they would have said so explicitly.¹²⁴ (emphasis added; footnote omitted)

207. Like the sanitary measure in *EC – Hormones*, the EC Regulation is currently in force. The European Communities has conceded that the EC Regulation is an act or fact that has not "ceased to exist".¹²⁵ Accordingly, following our reasoning in *EC – Hormones*, Article 2.4 of the *TBT Agreement* applies to existing measures unless that provision "reveals a contrary intention".¹²⁶ As we have said, we see nothing in Article 2.4 which would suggest that the provision does not apply to existing measures.

208. Furthermore, like Articles 5.1 and 5.5 of the *SPS Agreement*, Article 2.4 is a "central provision" of the *TBT Agreement*, and it cannot just be assumed that such a central provision does not apply to existing measures. Again, following our reasoning in *EC – Hormones*, we must conclude that, if the negotiators had wanted to exempt the very large group of existing technical regulations from the disciplines of a provision as important as Article 2.4 of the *TBT Agreement*, they would have said so explicitly.¹²⁷ No such explicit exemption is found in the terms "where technical regulations are required", "exist", "imminent", "use", or "as a basis for".

209. The European Communities' argument that our ruling in *EC – Hormones* is not relevant to Article 2.4 of the *TBT Agreement* is not persuasive. The European Communities contends that we based our ruling in *EC – Hormones* on the wording of Articles 2.2, 2.3, 3.3, and 5.6 of the *SPS Agreement*, and that all these provisions include the word "maintain".¹²⁸ The European Communities argues that the word "maintain" implies that a provision applies to measures already prepared and adopted. The European Communities then notes that Article 2.4 of the *TBT Agreement* does not include the word "maintain".¹²⁹ It is true that, in *EC – Hormones*, we referred to Articles 2.2, 2.3, 3.3, and 5.6 of the *SPS Agreement*. But we did so as relevant context.¹³⁰ Our analysis there focused on the meaning of Articles 5.1 and 5.5 of the *SPS Agreement*, which, like Article 2.4 of the *TBT Agreement*, do *not* include the word "maintain".¹³¹ As we have explained, we found in that appeal that Articles 5.1 and 5.5 of the *SPS Agreement* apply to existing measures, despite the absence of the word

¹²⁴ Appellate Body Report, *supra*, footnote 17, para. 128.

¹²⁵ European Communities' response to questioning at the oral hearing.

¹²⁶ Appellate Body Report, *supra*, footnote 17, para. 128.

¹²⁷ *Ibid.*

¹²⁸ European Communities' appellant's submission, paras. 62–63; European Communities' response to questioning at the oral hearing. We note that although the European Communities referred to Article 2.3, this provision does not include the word "maintain".

¹²⁹ *Ibid.*; European Communities' response to questioning at the oral hearing.

¹³⁰ Appellate Body Report, *supra*, footnote 17, para. 128.

¹³¹ *Ibid.*

"maintain". Thus, this argument by the European Communities fails on its own logic.

210. Having considered the European Communities' arguments based on the text of Article 2.4, we turn to examine the arguments of the European Communities that are based on the context of that provision. The European Communities argues that Article 2.5 of the *TBT Agreement* demonstrates that, when a provision is intended to cover the *application* of technical regulations, the provision says so explicitly. The European Communities finds similar contextual support in Article 12.4 of the *TBT Agreement*, which uses the word "adopt", and in paragraph F of the Code of Good Practice for the Preparation, Adoption and Application of Standards, included as Annex 3 to the *TBT Agreement*, which uses the word "develops".¹³²

211. In discussing what it considered the relevant context of Article 2.4, the Panel looked first to Article 2.5 of the *TBT Agreement*:

There is contextual support for the interpretation that Article 2.4 applies to technical regulations that are already in existence. The context provided by Article 2.5, which explicitly refers to Article 2.4, speaks of "preparing, adopting or *applying*" a technical regulation and is not limited to, as the European Communities claims, to preparing and adopting. A technical regulation can only be applied if it is already in existence. The first sentence imposes an obligation on a Member "preparing, adopting or applying" a technical regulation that may have a significant effect on trade of other Members to provide the justification for that technical regulation. The second sentence of Article 2.5 states that whenever a technical regulation is "prepared, adopted or *applied*" for one of the legitimate objectives explicitly set out in Article 2.2 and is in accordance with relevant international standards, it is to be rebuttably presumed not to create an unnecessary obstacle to trade. The use of the term "apply", in our view, confirms that the requirement contained in Article 2.4 is applicable to existing technical regulations.¹³³ (original emphasis)

The Panel also looked to Article 2.6 of the *TBT Agreement*:

Article 2.6 provides another contextual support. It states that Members are to participate in preparing international standards by the international standardizing bodies for products which they have either "*adopted*", or expect to adopt technical regulations." Those Members that have in place a technical regulation for a certain product are expected to participate in the development of a

¹³² European Communities' appellant's submission, paras. 75–78; European Communities' statement at the oral hearing. We note that, although the European Communities referred, in its statement at the oral hearing, to paragraph B of the Code of Good Practice for the Preparation, Adoption and Application of Standards as including the word "develops", this word is found in paragraph F.

¹³³ Panel Report, para. 7.75.

relevant international standard. Article 2.6 would be redundant and it would be contrary to the principle of effectiveness, which is a corollary of the general rule of interpretation in the Vienna Convention, if a Member is to participate in the development of a relevant international standard and then claim that such standard need not be used as a basis for its technical regulation on the ground that it was already in existence before the standard was adopted. Such reasoning would allow Members to avoid using international standards as a basis for their technical regulations simply by enacting preemptive measures and thereby undermine the object and purpose of developing international standards.¹³⁴ (original emphasis)

212. We agree with the Panel's analysis. Thus, we find no support for the European Communities' claim in the context of Article 2.4 of the *TBT Agreement*. Rather than supporting the European Communities' argument, Articles 2.5 and 2.6 of the *TBT Agreement* provide support for the argument advanced by Peru that Article 2.4 of the *TBT Agreement* regulates measures adopted before the date of the entry into force of the *TBT Agreement*. We note also that there is additional contextual support in the title of Article 2, which reads "Preparation, Adoption and *Application* of Technical Regulations by Central Government Bodies". (emphasis added) This express reference to the *application* of technical regulations in the title of Article 2 runs counter to an interpretation of Article 2.4 that would limit its scope to the preparation and adoption of technical regulations.

213. Moreover, as general context for all the covered agreements, Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* is of great significance. Article XVI:4 reads:

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

This provision establishes a clear obligation for all WTO Members to ensure the conformity of their existing laws, regulations, and administrative procedures with the obligations in the covered agreements.

214. In our view, the European Communities' reading of Article 2.4 also flies in the face of the object and purpose of the *TBT Agreement*. In several of its provisions, the *TBT Agreement* recognizes the important role that international standards play in promoting harmonization and facilitating trade. For example, Article 2.5 of the *TBT Agreement* establishes a rebuttable presumption that technical regulations that are in accordance with relevant international standards do not create unnecessary obstacles to trade. Article 2.6, for its part, encourages Members to participate in international standardizing bodies with a view to harmonizing technical regulations on as wide a basis as possible.

¹³⁴ *Ibid.*, para. 7.76.

215. The significant role of international standards is also underscored in the Preamble to the *TBT Agreement*. The third recital of the Preamble recognizes the important contribution that international standards can make by improving the efficiency of production and facilitating the conduct of international trade. The eighth recital recognizes the role that international standardization can have in the transfer of technology to developing countries. In our view, excluding existing technical regulations from the obligations set out in Article 2.4 would undermine the important role of international standards in furthering these objectives of the *TBT Agreement*. Indeed, it would go precisely in the opposite direction.

216. For all these reasons, we uphold the Panel's finding, in paragraph 7.60 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to measures that were adopted before 1 January 1995 but which have not ceased to exist, such as the EC Regulation. We also uphold the Panel's finding, in paragraph 7.83 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to existing technical regulations, including the EC Regulation.

VII. THE CHARACTERIZATION OF CODEX STAN 94 AS A "RELEVANT INTERNATIONAL STANDARD"

217. We proceed to the European Communities' claim that the Panel erred in finding that Codex Stan 94 is a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*.

218. The Panel found that "Codex Stan 94 is a relevant international standard".¹³⁵ The European Communities challenges this finding for two reasons. The European Communities asserts, first, that only standards adopted by international bodies by consensus are "relevant international standards" under Article 2.4 of the *TBT Agreement*.¹³⁶ The European Communities argues that the Panel assumed "that Codex Stan 94 ... was adopted by consensus ... without undertaking positive steps to verify the accuracy of the conflicting statements made in this respect by the parties".¹³⁷ Second, the European Communities asserts that, even if Codex Stan 94 were considered an international standard, it is not a "*relevant* international standard" because its product coverage is different from that of the EC Regulation. The European Communities contends that the EC Regulation covers only preserved sardines, while Codex Stan 94 covers that product as well as "sardine-type" products.¹³⁸ We will address each of these arguments in turn.

¹³⁵ Panel Report, para. 7.70.

¹³⁶ European Communities' appellant's submission, para. 123.

¹³⁷ *Ibid.*, para. 134.

¹³⁸ This argument is based on the European Communities' interpretation of Codex Stan 94, which differs from that of the Panel. The European Communities explains that when Codex Stan 94 was in draft form, and particularly when it was at Step 7 of the elaboration procedures of the Codex Commission, it provided three naming options: (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus*); (ii) "X Sardines", where "X" is the name of a country, a geographic area, or the species;

A. *The European Communities' Argument that Consensus is Required*

219. The European Communities argues that only standards that have been adopted by an international body by consensus can be *relevant* for purposes of Article 2.4. The European Communities contends that the Panel did not verify that Codex Stan 94 was not adopted by consensus, and that, therefore, it cannot be a "relevant international standard".¹³⁹

220. However, in our view, the European Communities' contention is essentially related to whether Codex Stan 94 meets the definition of a "standard" in Annex 1.2 of the *TBT Agreement*. The term "standard", is defined in Annex 1.2 as follows:

2. *Standard*

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Explanatory note

The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus. (emphasis added)

221. The European Communities does not contest that the Codex Commission is an international standardization body, and that it is a "recognized body" for

and (iii) the common name of the species. The European Communities claims that the first two options—"Sardines" and "X Sardines"—apply to sardine products, while the third option—the common name of the species—was envisaged as a separate option for "*sardine-type products*". Given that only editorial changes are allowed between Steps 7 and 8 of the elaboration procedures, when the second and third options were merged, the European Communities alleges that the draft standard at Step 7 should guide the interpretation of Codex Stan 94, even though the text approved at Step 8 includes the common name of the species in the same subsection as "X Sardines". (European Communities' appellant's submission, paras. 135–148; European Communities' response to questioning at the oral hearing) The Panel's interpretation of Codex Stan 94 focuses on its final version. The Panel is of the view that the "common name of the species" is part of the "X Sardines" option. (See *infra*, paras. 235–239)

¹³⁹ European Communities' response to questioning at the oral hearing.

purposes of the definition of a "standard" in Annex 1.2.¹⁴⁰ The issue before us, rather, is one of *approval*. The definition of a "standard" refers to documents *approved* by a recognized body. Whether approval takes place by consensus, or by other methods, is not addressed in the definition, but it is addressed in the last two sentences of the Explanatory note.

222. The Panel interpreted the last two sentences of the Explanatory note as follows:

The first sentence reiterates the norm of the international standardization community that standards are prepared on the basis of consensus. The following sentence, however, acknowledges that consensus may not always be achieved and that international standards that were not adopted by consensus are within the scope of the TBT Agreement.⁸⁶ This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard.

⁸⁶ The record does not demonstrate that Codex Stan 94 was not adopted by consensus. In any event, we consider that this issue would have no bearing on our determination in light of the explanatory note of paragraph 2 of Annex 1 of the TBT Agreement which states that the TBT Agreement covers "documents that are not based on consensus".¹⁴¹

We agree with the Panel's interpretation. In our view, the text of the Explanatory note supports the conclusion that consensus is not required for standards adopted by the international standardizing community. The last sentence of the Explanatory note refers to "documents". The term "document" is also used in the singular in the first sentence of the definition of a "standard". We believe that "document(s)" must be interpreted as having the same meaning in both the definition and the Explanatory note. The European Communities agrees.¹⁴² Interpreted in this way, the term "documents" in the last sentence of the Explanatory note must refer to standards *in general*, and not only to those adopted by entities *other than* international bodies, as the European Communities claims.

223. Moreover, the text of the last sentence of the Explanatory note, referring to documents not based on consensus, gives no indication whatsoever that it is departing from the subject of the immediately preceding sentence, which deals with standards adopted by international bodies. Indeed, the use of the word "also" in the last sentence suggests that the same subject is being addressed—namely standards prepared by the international standardization community. Hence, the logical assumption is that the last phrase is simply continuing in the

¹⁴⁰ *Ibid.*

¹⁴¹ Panel Report, para. 7.90 and footnote 86 thereto.

¹⁴² European Communities' response to questioning at the oral hearing. The United States agreed. (United States' response to questioning at the oral hearing)

same vein, and refers to standards adopted by international bodies, including those not adopted by consensus.

224. The Panel's interpretation, moreover, gives effect to the chapeau of Annex 1 to the *TBT Agreement*, which provides:

The terms presented in the sixth edition of the ISO/IEC Guide 2:1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide ...

For the purpose of this Agreement, *however*, the following definitions shall apply ... (emphasis added)

Thus, according to the chapeau, the terms defined in Annex 1 apply for the purposes of the *TBT Agreement* only if their definitions *depart* from those in the ISO/IEC Guide 2:1991 (the "ISO/IEC Guide").¹⁴³ This is underscored by the word "however". The definition of a "standard" in Annex 1 to the *TBT Agreement* departs from that provided in the ISO/IEC Guide precisely in respect of whether consensus is expressly required.

225. The term "standard" is defined in the ISO/IEC Guide as follows:

Document, established by *consensus* and approved by a recognized *body*, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context.¹⁴⁴ (original emphasis)

Thus, the definition of a "standard" in the ISO/IEC Guide expressly includes a consensus requirement. Therefore, the logical conclusion, in our view, is that the *omission* of a consensus requirement in the definition of a "standard" in Annex 1.2 of the *TBT Agreement* was a deliberate choice on the part of the drafters of the *TBT Agreement*, and that the last two phrases of the Explanatory note were included to give effect to this choice. Had the negotiators considered consensus to be necessary to satisfy the definition of "standard", we believe they would have said so explicitly in the definition itself, as is the case in the ISO/IEC Guide. Indeed, there would, in our view, have been no point in the negotiators adding the last sentence of the Explanatory note.

226. Furthermore, we observe that the Panel found that, in any event, the European Communities did *not* prove that Codex Stan 94 was *not* adopted by consensus. Instead, the Panel found that, "[t]he record does not demonstrate that Codex Stan 94 was not adopted by consensus".¹⁴⁵

¹⁴³ ISO/IEC Guide (6th edition, 1991), submitted as Exhibit EC-1 to the European Communities' appellant's submission.

¹⁴⁴ *Ibid.*, subclause 3.2.

¹⁴⁵ Panel Report, footnote 86 to para. 7.90. The report of the meeting of the Codex Commission where Codex Stan 94 was adopted, which Peru submitted to the Panel, makes no mention of votes being cast before its approval. (Report of the Twelfth Session of the Joint FAO/WHO Codex Alimentarius Commission (ALINORM 78/41), submitted as Exhibit Peru-14 by Peru to the Panel) We note

227. Therefore, we uphold the Panel's conclusion, in paragraph 7.90 of the Panel Report, that the definition of a "standard" in Annex 1.2 to the *TBT Agreement* does not require approval by consensus for standards adopted by a "recognized body" of the international standardization community. We emphasize, however, that this conclusion is relevant only for purposes of the *TBT Agreement*. It is not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the *TBT Agreement* does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe an international standardization body should not require consensus for the adoption of its standards. That is not for us to decide.

B. The European Communities' Argument on the Product Coverage of Codex Stan 94

228. We turn now to examine the European Communities' argument that Codex Stan 94 is not a "relevant international standard" because its product coverage is different from that of the EC Regulation.

229. In analyzing the merits of this argument, the Panel first noted that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in hand; pertinent".¹⁴⁶ The Panel reasoned that, to be a "relevant international standard", Codex Stan 94 would have to bear upon, relate to, or be pertinent to the EC Regulation.¹⁴⁷ The Panel then conducted the following analysis:

The title of Codex Stan 94 is "Codex Standard for Canned Sardines and Sardine-type Products" and the EC Regulation lays down common marketing standards for preserved sardines. The European Communities indicated in its response that the term "canned sardines" and "preserved sardines" are essentially identical. *Therefore, it is apparent that both the EC Regulation and Codex Stan 94 deal with the same product, namely preserved sardines.* The scope of Codex Stan 94 covers various species of fish, including *Sardina pilchardus* which the EC Regulation covers, and includes, *inter alia*, provisions on presentation (Article 2.3), packing medium (Article 3.2), labelling, including a requirement that the packing medium is to form part of the name of the food (Article 6), determination of net weight (Article 7.3), foreign matter (Article 8.1) and odour and flavour (Article 8.2). The

that, at the oral hearing, the European Communities and Peru agreed that the Panel's conclusion that the record does not demonstrate that Codex Stan 94 was not adopted by consensus is a factual finding, which is beyond the purview of appellate review.

¹⁴⁶ Panel Report, para. 7.68, quoting *Webster's New World Dictionary* (William Collins & World Publishing Co., Inc. 1976), p. 1199.

¹⁴⁷ *Ibid.*

EC Regulation contains these corresponding provisions set out in Codex Stan 94, including the section on labelling requirement.¹⁴⁸ (emphasis added; footnote omitted)

230. We do not disagree with the Panel's interpretation of the ordinary meaning of the term "relevant". Nor does the European Communities.¹⁴⁹ Instead, the European Communities argues that, although the EC Regulation deals *only* with preserved sardines—understood to mean exclusively preserved *Sardina pilchardus*—Codex Stan 94 *also covers* other preserved fish that are "sardine-type".¹⁵⁰

231. We are not persuaded by this argument. First, even if we accepted that the EC Regulation relates only to preserved *Sardina pilchardus*, which we do not, the fact remains that section 6.1.1(i) of Codex Stan 94 also relates to preserved *Sardina pilchardus*. Therefore, Codex Stan 94 can be said to bear upon, relate to, or be pertinent to the EC Regulation because both refer to preserved *Sardina pilchardus*.

232. Second, we have already concluded that, although the EC Regulation expressly mentions only *Sardina pilchardus*, it has legal consequences for other fish species that could be sold as preserved sardines, including preserved *Sardinops sagax*.¹⁵¹ Codex Stan 94 covers 20 fish species in addition to *Sardina pilchardus*.¹⁵² These other species also are legally affected by the exclusion in the EC Regulation. Therefore, we conclude that Codex Stan 94 bears upon, relates to, or is pertinent to the EC Regulation.

233. For all these reasons, we uphold the Panel's finding, in paragraph 7.70 of the Panel Report, that Codex Stan 94 is a "relevant international standard" for purposes of Article 2.4 of the *TBT Agreement*.

VIII. WHETHER CODEX STAN 94 WAS USED "AS A BASIS FOR" THE EC REGULATION

234. We turn now to whether Codex Stan 94 has been used "as a basis for" the EC Regulation. It will be recalled that Article 2.4 of the *TBT Agreement* requires Members to use relevant international standards "as a basis for" their technical regulations under certain circumstances. The Panel found that "the relevant international standard, i.e., Codex Stan 94, was not used as a basis for the EC Regulation".¹⁵³ The European Communities appeals this finding.

235. The starting point of the Panel's analysis was the interpretation of section 6.1.1(ii) of Codex Stan 94, which reads as follows:

The name of the product shall be:

¹⁴⁸ Panel Report, para. 7.69.

¹⁴⁹ European Communities' response to questioning at the oral hearing.

¹⁵⁰ *Ibid.*

¹⁵¹ See *supra*, paras. 184–185.

¹⁵² The fish species covered by Codex Stan 94 are listed in section 2.1.1 thereto. (*Supra*, footnote 4) See also, *supra*, para. 5.

¹⁵³ Panel Report, para. 7.112.

...

(ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

236. Two interpretations of section 6.1.1(ii) of Codex Stan 94 were submitted to the Panel. The European Communities argued that the phrase "the common name of the species in accordance with the law and custom of the country in which the product is sold", found in section 6.1.1(ii) of Codex Stan 94, is intended as a self-standing option for "naming", independent of the formula "X sardines", and that, under this section, "each country has the option of choosing between 'X sardines' and the common name of the species".¹⁵⁴

237. For its part, Peru contended that, under section 6.1.1(ii), the species other than *Sardina pilchardus* to which Codex Stan 94 refers may be marketed as "X sardines" where "X" is one of the four following alternatives: (1) a country; (2) a geographic area; (3) the species; or (4) the common name of the species.¹⁵⁵ Thus, in Peru's view, "the common name of the species" is not a stand-alone option for naming, but rather is one of the qualifiers for naming sardines that are not *Sardina pilchardus*. Further, Peru argued that prohibiting the marketing in the European Communities of *Sardinops sagax* imported from Peru as, for example, "Peruvian sardines" would run counter to the first of the four options in section 6.1.1(ii).

238. The Panel was of the view that a textual reading of section 6.1.1(ii) favoured the interpretation advocated by Peru, adding that:

We consider that paragraph 6.1.1(ii) of Codex Stan 94 contains four alternatives and each alternative envisages the use of the term "sardines" combined with the name of a country, name of a geographic area, name of the species or the common name of the species in accordance with the law and custom of the country in which the product is sold.¹⁵⁶

239. We agree with Peru and with the Panel that section 6.1.1(ii) permits the marketing of non-*Sardina pilchardus* as "sardines" with one of four qualifiers. The French version of section 6.1.1(ii) supports this approach. It provides:

"Sardines X", "X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce en conformité des lois et usages du pays où le produit est vendu, de manière à ne pas induire le consommateur en erreur.

The French language is one official language of the Codex Commission. The French and English versions are equally authentic. The French version is drafted

¹⁵⁴ *Ibid.*, para. 7.101. See also, *supra*, footnote 138, explaining why the European Communities interprets this as a stand-alone option.

¹⁵⁵ Panel Report, para. 4.43.

¹⁵⁶ Panel Report, para. 7.103.

in a manner that puts all four qualifiers on an equal footing. In the French version, there is no comma after the word "espèce". The use of the term "'X' désignant" to introduce the enumeration in section 6.1.1(ii) of Codex Stan 94 makes clear that the common name of the species is *one* of the qualifiers that may be attached to the term "sardines" when marketing preserved sardines.¹⁵⁷

240. With this understanding of this international standard in mind, we turn to the requirement that relevant international standards must be used "as a basis for" technical regulations. We note that the Panel interpreted the word "basis" to mean "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".¹⁵⁸ In applying this interpretation of "basis" to the measure in this dispute, the Panel contrasted its interpretation of section 6.1.1(ii) of Codex Stan 94 as setting forth "four alternatives for labelling species other than *Sardina pilchardus*" that all "require the use of the term 'sardines' with a qualification"¹⁵⁹, with the fact that, under the EC Regulation, "species such as *Sardinops sagax* cannot be called 'sardines' even when ... combined with the name of a country, name of a geographic area, name of the species or the common name in accordance with the law and custom of the country in which the product is sold."¹⁶⁰ In the light of this contrast, the Panel concluded that Codex Stan 94 was *not* used "as a basis for" the EC Regulation.

241. On appeal, the European Communities contends that the Panel erred in finding that Codex Stan 94 was not used "as a basis for" the EC Regulation. The European Communities submits that the EC Regulation is "based on" Codex Stan 94 "because it used as a basis paragraph 6.1.1(i) of the Codex standard", and because this paragraph reserves the term "sardines" exclusively for *Sardina pilchardus*.¹⁶¹ According to the European Communities, the term "'as a basis' should involve a consideration of the texts as a whole, examining the basic structure of the domestic measure and deciding whether the international standard has been used in its preparation and adoption."¹⁶² The European Communities adds that, in order to determine whether a relevant international standard, or a part of it, is used "as a basis for" a technical regulation, the criterion to apply is not, as the Panel suggested, whether the standard is the principal constituent or the fundamental principle of the technical regulation, but, rather, whether there is a "rational relationship" between the standard and the technical regulation on the substantive aspects of the standard in question.¹⁶³

242. The question before us, therefore, is the proper meaning to be attributed to the words "as a basis for" in Article 2.4 of the *TBT Agreement*. In *EC –*

¹⁵⁷ Our interpretation is also consistent with the English print version of section 6.1.1(ii) of Codex Stan 94. See *supra*, footnote 5.

¹⁵⁸ Panel Report, para. 7.110, quoting *Webster's New World Dictionary*, *supra*, footnote 146, p. 117.

¹⁵⁹ Panel Report, para. 7.111.

¹⁶⁰ *Ibid.*, para. 7.112.

¹⁶¹ European Communities' appellant's submission, para. 150.

¹⁶² *Ibid.*, para. 155.

¹⁶³ *Ibid.*

Hormones, we addressed a similar issue, namely, the meaning of "based on" as used in Article 3.1 of the *SPS Agreement*, which provides:

Harmonization

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall *base their sanitary or phytosanitary measures on international standards*, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3. (emphasis added)

In *EC – Hormones*, we stated that "based on" does not mean the same thing as "conform to".¹⁶⁴ In that appeal, we articulated the ordinary meaning of the term "based on", as used in Article 3.1 of the *SPS Agreement* in the following terms:

A thing is commonly said to be "based on" another thing when the former "stands" or is "founded" or "built" upon or "is supported by" the latter.¹⁵⁰

¹⁵⁰ L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 187.¹⁶⁵

The Panel here referred to this conclusion in its analysis of Article 2.4 of the *TBT Agreement*. In our view, the Panel did so correctly, because our approach in *EC – Hormones* is also relevant for the interpretation of Article 2.4 of the *TBT Agreement*.¹⁶⁶

243. In addition, as we stated earlier, the Panel here used the following definition to establish the ordinary meaning of the term "basis":

The word "basis" means "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".⁹⁰

⁹⁰ [*Webster's New World Dictionary*, (William Collins & World Publishing Co., Inc., 1976)], p. 117.¹⁶⁷

Informed by our ruling in *EC – Hormones*, and relying on this meaning of the term "basis", the Panel concluded that an international standard is used "as a basis for" a technical regulation when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation.¹⁶⁸

244. We agree with the Panel's approach. In relying on the ordinary meaning of the term "basis", the Panel rightly followed an approach similar to ours in de-

¹⁶⁴ Appellate Body Report, *supra*, footnote 17, para. 166.

¹⁶⁵ *Ibid.*, para. 163 and footnote 150 thereto.

¹⁶⁶ Panel Report, para. 7.110.

¹⁶⁷ *Ibid.* and footnote 90 thereto.

¹⁶⁸ *Ibid.*, para. 7.110.

termining the ordinary meaning of "based on" in *EC – Hormones*.¹⁶⁹ In addition to the definition of "basis" in *Webster's New World Dictionary* that was used by the Panel, we note, as well, the similar definitions for "basis" that are set out in the *The New Shorter Oxford English Dictionary*, and also provide guidance as to the ordinary meaning of the term:

3 [t]he main constituent. ... 5 [a] thing on which anything is constructed and by which its constitution or operation is determined; a determining principle; a set of underlying or agreed principles.¹⁷⁰

245. From these various definitions, we would highlight the similar terms "principal constituent", "fundamental principle", "main constituent", and "determining principle"—all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is "the basis for" the other.

246. The European Communities, however, seems to suggest the need for something different. The European Communities maintains that a "rational relationship" between an international standard and a technical regulation is sufficient to conclude that the former is used "as a basis for" the latter.¹⁷¹ According to the European Communities, an examination based on the criterion of the existence of a "rational relationship" focuses on "the qualitative aspect of the substantive relationship that should exist between the relevant international standard and the technical regulation".¹⁷² In response to questioning at the oral hearing, the European Communities added that a "rational relationship" exists when the technical regulation is informed in its overall scope by the international standard.

247. Yet, we see nothing in the text of Article 2.4 to support the European Communities' view, nor has the European Communities pointed to any such support. Moreover, the European Communities does not offer any arguments relating to the context or the object and purpose of that provision that would support its argument that the existence of a "rational relationship" is the appropriate criterion for determining whether something has been used "as a basis for" something else.

248. We see no need here to define in general the nature of the relationship that must exist for an international standard to serve "as a basis for" a technical regulation. Here we need only examine this measure to determine if it fulfils this obligation. In our view, it can certainly be said—at a minimum—that something cannot be considered a "basis" for something else if the two are *contradictory*. Therefore, under Article 2.4, if the technical regulation and the international standard *contradict* each other, it cannot properly be concluded that the international standard has been used "as a basis for" the technical regulation.

¹⁶⁹ In the present case, we do not consider it necessary to decide whether the term "as a basis", in the context of Article 2.4 of the *TBT Agreement*, has the same meaning as the term "based on", in the context of Article 3.1 of the *SPS Agreement*.

¹⁷⁰ *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 188.

¹⁷¹ European Communities' appellant's submission, para. 155.

¹⁷² *Ibid.*

249. Thus, we need only determine here whether there is a *contradiction* between Codex Stan 94 and the EC Regulation. If there is, we are justified in concluding our analysis with that determination, as the only appropriate conclusion from such a determination would be that the Codex Stan 94 has not been used "as a basis for" the EC Regulation.

250. In making this determination, we note at the outset that Article 2.4 of the *TBT Agreement* provides that "Members shall use [relevant international standards], or the relevant parts of them, as a basis for their technical regulations". (emphasis added) In our view, the phrase "*relevant parts of them*" defines the appropriate focus of an analysis to determine whether a relevant international standard has been used "as a basis for" a technical regulation. In other words, the examination must be limited to those parts of the relevant international standards that relate to the subject-matter of the challenged prescriptions or requirements. In addition, the examination must be broad enough to address *all* of those relevant parts; the regulating Member is not permitted to select only *some* of the "relevant parts" of an international standard. If a "part" is "relevant", then it must be one of the elements which is "a basis for" the technical regulation.

251. This dispute concerns the WTO-consistency of the requirement set out in Article 2 of the EC Regulation that only products prepared exclusively from the species *Sardina pilchardus* may be marketed in the European Communities as preserved sardines. Consequently, the "relevant parts" of Codex Stan 94 are those elements of Codex Stan 94 that bear upon or relate to the marketing of preserved fish products under the name "sardines". The term "relevant parts of them", as used in Article 2.4, implies two things for the case before us. First, the determination whether Codex Stan 94 has been used "as a basis for" the EC Regulation must stem from an analysis that is limited to those "parts" of Codex Stan 94 relating to the use of the term "sardines" for the identification and marketing of preserved fish products. Those parts include not only sections 6.1.1(i) and 6.1.1(ii), but also section 2.1.1 of Codex Stan 94, which sets out the various species that may be given the names contemplated in sections 6.1.1(i) and 6.1.1(ii). Second, this analysis must address *all* of those relevant provisions of Codex Stan 94, and must not ignore any one of them.

252. In response to our questioning at the oral hearing, the European Communities expressed the view that, in order to determine whether Codex Stan 94 has been used "as a basis for" the EC Regulation, the whole of the standard and the whole of the EC Regulation should be compared. We disagree. We do so because there are several parts of Codex Stan 94 that are not relevant to the use of the term "sardines" for the identification and marketing of preserved fish products. We see no reason why this examination under Article 2.4 of the *TBT Agreement* should extend beyond Article 2 of the EC Regulation, which is the only provision of the EC Regulation whose WTO-consistency has been chal-

lenged by Peru in this dispute. There is simply no purpose served in examining other provisions of the EC Regulation that are irrelevant to this dispute.¹⁷³

253. As we have said, the European Communities contends that Codex Stan 94 was used "as a basis for" the EC Regulation "because it used as a basis paragraph 6.1.1(i) of the Codex standard"¹⁷⁴, which stipulates that only *Sardina pilchardus* may have the name "sardines", and that our examination as to whether Codex Stan 94 has been used "as a basis for" the EC Regulation must be limited to section 6.1.1(i).¹⁷⁵ This contention stems from the European Communities' proposition that the scope of the EC Regulation and that of Codex Stan 94 are different: the European Communities considers that the EC Regulation lays down prescriptions and technical requirements for *Sardina pilchardus* only, whereas Codex Stan 94 has a broader scope, as it also addresses other species, namely "sardine-type" products. In the view of the European Communities, section 6.1.1(ii) is not a "relevant part" of Codex Stan 94 for our determination of whether that standard has been used "as a basis for" the EC Regulation, because section 6.1.1(ii) concerns species other than *Sardina pilchardus*, a subject-matter the EC Regulation does not address.

254. We are not persuaded by this line of reasoning. Article 2 of the EC Regulation governs the use of the term "sardines" for the identification and marketing of preserved fish products. Section 6.1.1(ii) of Codex Stan 94 also relates to this same subject. Therefore, section 6.1.1(ii) is a "relevant part" of Codex Stan 94 for the purpose of determining whether Codex Stan 94 was used "as a basis for" the EC Regulation. As we stated earlier, the analysis must address *all* of the parts of Codex Stan 94 that relate to the use of the term "sardines" for the identification and the marketing of preserved fish products, and not only to selected parts. Moreover, the European Communities' argument that the EC Regulation does not relate to species other than *Sardina pilchardus* is simply untenable. It is tantamount to saying that a regulation stipulating 16 years as the age at which one may obtain a driver's licence, does not relate to persons that are under 16 years of age. Consequently, contrary to what the European Communities suggests, the "as a basis for" analysis cannot be restricted to section 6.1.1(i) of Codex Stan 94; it must, in addition, also encompass both section 6.1.1(ii), and section 2.1.1 of Codex Stan 94.

255. In the light of all this, we ask now whether there is a *contradiction* between the EC Regulation and Codex Stan 94 in the use of the term "sardines" for the identification and marketing of preserved fish products.

256. We accept the European Communities' contention that the EC Regulation contains the prescription set out in section 6.1.1(i) of Codex Stan 94. However, as we have just explained, the analysis must go beyond section 6.1.1(i); it must

¹⁷³ The other provisions of the EC Regulation deal with product presentation (trimming of head, gills, etc.; with or without bones or skin; as fillets or trunks), covering media (such as olive oil or natural juice), arrangement in containers, colour, odour, flavour, ratio between weight or sardines after sterilization and net weight, compliance measures and date of entry into force.

¹⁷⁴ European Communities' appellant's submission, para. 150.

¹⁷⁵ European Communities' response to questioning at the oral hearing.

extend also to sections 6.1.1(ii) and 2.1.1 of Codex Stan 94. And, a comparison between, on the one hand, sections 6.1.1(ii) and 2.1.1 of Codex Stan 94 and, on the other hand, Article 2 of the EC Regulation, leads to the inevitable conclusion that a contradiction exists between these provisions.

257. The effect of Article 2 of the EC Regulation is to prohibit preserved fish products prepared from the 20 species of fish other than *Sardina pilchardus* to which Codex Stan 94 refers—including *Sardinops sagax*—from being identified and marketed under the appellation "sardines", even with one of the four qualifiers set out in the standard. Codex Stan 94, by contrast, permits the use of the term "sardines" with any one of four qualifiers for the identification and marketing of preserved fish products prepared from 20 species of fish other than *Sardina pilchardus*. Thus, the EC Regulation and Codex Stan 94 are manifestly contradictory. To us, the existence of this contradiction confirms that Codex Stan 94 was not used "as a basis for" the EC Regulation.

258. We, therefore, uphold the finding of the Panel, in paragraph 7.112 of the Panel Report, that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*.

IX. THE QUESTION OF THE "INEFFECTIVENESS OR INAPPROPRIATENESS" OF CODEX STAN 94

259. We turn now to the second part of Article 2.4 of the *TBT Agreement*, which provides that Members need not use international standards as a basis for their technical regulations "when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued".

260. In interpreting this part of Article 2.4, the Panel, first, addressed the question of the burden of proof, and made the following finding:

... the burden of proof rests with the European Communities, as the party "assert[ing] the affirmative of a particular claim or defence", to demonstrate that the international standard is an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the EC Regulation.¹⁷⁶ (footnote omitted)

261. Regarding the substance of the phrase "except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued", the Panel began by examining the meaning of the terms "ineffective" and "inappropriate". The Panel said:

¹⁷⁶ Panel Report, para 7.50. See also, Panel Report, paras. 7.52 and 7.114.

Concerning the terms "ineffective" and "inappropriate", we note that "ineffective" refers to something which is not "having the function of accomplishing", "having a result", or "brought to bear",⁹¹ whereas "inappropriate" refers to something which is not "specially suitable", "proper", or "fitting".⁹² Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. An inappropriate means will not necessarily be an ineffective means and vice versa. That is, whereas it may not be *specially suitable* for the fulfilment of the legitimate objective, an inappropriate means may nevertheless be *effective* in fulfilling that objective, despite its "unsuitability". Conversely, when a relevant international standard is found to be an effective means, it does not automatically follow that it is also an appropriate means. The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed.

⁹¹ *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), p. 786.

⁹² *Ibid.*, p. 103.¹⁷⁷ (original emphasis)

262. Second, the Panel addressed the meaning of the phrase "legitimate objectives pursued". The Panel stated that the "legitimate objectives" referred to in Article 2.4 must be interpreted in the context of Article 2.2", which provides an illustrative, open list of objectives considered "legitimate".¹⁷⁸ Also, the Panel indicated that Article 2.4 of the *TBT Agreement* requires an examination and a determination whether the objectives of the measure at issue are "legitimate".¹⁷⁹

263. The Panel took note of the three "objectives" of the EC Regulation identified by the European Communities, namely market transparency, consumer protection, and fair competition.¹⁸⁰ The Panel also noted Peru's acknowledgement that those "objectives" are "legitimate", and the Panel saw "no reason to disagree with the parties' assessment in this respect."¹⁸¹ During questioning at the oral hearing, Peru confirmed that it does see these three objectives pursued by the European Communities as "legitimate" within the meaning of Article 2.4.

264. The Panel then examined whether Codex Stan 94 is "ineffective" or "inappropriate" for the fulfilment of the three objectives pursued by the European Communities through the EC Regulation in the light of the definitions that the

¹⁷⁷ *Ibid.*, para. 7.116 and footnotes 91–92 thereto.

¹⁷⁸ *Ibid.*, para. 7.118.

¹⁷⁹ *Ibid.*, para. 7.122.

¹⁸⁰ Panel Report, para. 7.123.

¹⁸¹ *Ibid.*, para. 7.122.

Panel articulated for those two terms. The Panel noted that the three objectives were founded on the factual premise that consumers in the European Communities associate "sardines" exclusively with *Sardina pilchardus*. The Panel was of the view that, if this factual premise is valid, it must be concluded that Codex Stan 94 is "ineffective or inappropriate" to meet the "legitimate objectives" of market transparency, consumer protection, and fair competition. In other words, if European Communities consumers associate the term "sardines" exclusively with *Sardina pilchardus*, a product identified as "sardines" would have to be made exclusively of *Sardina pilchardus* so as not to mislead those consumers.¹⁸² However, after reviewing the evidence adduced by the parties, the Panel stated that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus* and that the use of 'X sardines' would therefore not enable the European consumer to distinguish preserved *Sardina pilchardus* from preserved *Sardinops sagax*."¹⁸³ The Panel also found that, by establishing a precise labelling requirement "in a manner not to mislead the consumer"¹⁸⁴, "Codex Stan 94 allows Members to provide [a] precise trade description of preserved sardines which promotes market transparency so as to protect consumers and promote fair competition."¹⁸⁵ On this basis, the Panel concluded that Codex Stan 94 is *not* "ineffective or inappropriate" to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

265. Although the Panel had assigned the burden of proof under Article 2.4 to the European Communities—so that it was for the European Communities to prove that Codex Stan 94 was "ineffective or inappropriate" to meet the European Communities' "legitimate objectives"—the Panel stated that Peru had, in any event, adduced sufficient evidence and legal arguments to allow the Panel to reach the conclusion that the standard was not "ineffective or inappropriate".¹⁸⁶

266. The European Communities appeals the Panel's assignment of the burden of proof under Article 2.4 of the *TBT Agreement*. The European Communities disputes the Panel's conclusion that the burden rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate" means to fulfil the "legitimate objectives" of the EC Regulation. The European Communities maintains that the burden of proof rests rather with Peru, as Peru is the party claiming that the measure at issue is inconsistent with WTO obligations.

267. The European Communities also appeals the finding of the Panel that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. In particular, the European Communities argues that the Panel erred in founding its analysis on the factual premise that consumers in the European Communities associate "sardines" exclusively with *Sardina pil-*

¹⁸² *Ibid.*, para. 7.123.

¹⁸³ *Ibid.*, para. 7.137.

¹⁸⁴ Codex Stan 94, *supra*, footnote 4, section 6.1.1(ii).

¹⁸⁵ Panel Report, para. 7.133.

¹⁸⁶ Panel Report, para. 7.138.

chardus.¹⁸⁷ Furthermore, the European Communities contends that the Panel erred in concluding that the term "sardines", either by itself or when combined with the name of a country or geographic area, is a common name for *Sardinops sagax* in the European Communities. The European Communities also objects to the decision by the Panel to take this conclusion into account in its assessment of whether consumers in the European Communities associate the term "sardines" exclusively with *Sardina pilchardus*.

268. In considering these claims of the European Communities, we will address, first, the question of the burden of proof, and, next, the substantive content of the second part of Article 2.4 of the *TBT Agreement*.

A. *The Burden of Proof*

269. Before the Panel, the European Communities asserted that Codex Stan 94 is "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. The Panel was of the view that the European Communities was thus asserting the affirmative of a particular claim or defence, and, therefore, that the burden of proof rests with the European Communities to demonstrate that claim.¹⁸⁸ The Panel justified its position as follows: first, it reasoned that the complainant is not in a position to "spell out" the "legitimate objectives" pursued by a Member through a technical regulation; and, second, it reasoned "that the assessment of whether a relevant international standard is 'inappropriate' ... may extend to considerations which are proper to the Member adopting or applying a technical regulation."¹⁸⁹

270. We recall that, in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, we said the following about the burden of proof:

... the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case.¹⁹⁰
(footnote omitted)

¹⁸⁷ European Communities' appellant's submission, paras. 176–179.

¹⁸⁸ Panel Report, para. 7.50.

¹⁸⁹ *Ibid.*, para. 7.51.

¹⁹⁰ Appellate Body Report, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323, at 335.

271. In *EC – Hormones*, we stated that characterizing a treaty provision as an "exception" does not, by itself, place the burden of proof on the respondent Member.¹⁹¹ That case concerned, among other issues, the allocation of the burden of proof under Articles 3.1 and 3.3 of the *SPS Agreement*. Those Articles read as follows:

Article 3

Harmonization

1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

...

3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement. (footnote omitted)

272. In *EC – Hormones*, the panel assigned the burden of showing that the measure there was justified under Article 3.3 to the respondent, reasoning that Article 3.3 provides an exception to the general obligation contained in Article 3.1. The panel there was of the view that it was the *defending* party that was asserting the *affirmative* of that particular defence. We reversed the panel's finding.¹⁹² In particular, we stated:

The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an "exception". In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual

¹⁹¹ Appellate Body Report, *supra*, footnote 17, para. 104.

¹⁹² Appellate Body Report, *supra*, footnote 17, para. 109.

treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.¹⁹³ (original emphasis)

273. The Panel in this case acknowledged our finding in *EC – Hormones*, but concluded that it "does not have a direct bearing" on the question of the allocation of the burden of proof under the second part of Article 2.4 of the *TBT Agreement*.¹⁹⁴ The relevant statement in the Panel Report—found in a footnote—reads as follows:

We are cognizant of the Appellate Body's finding in *EC – Hormones* that, in reference to Articles 3.1 and 3.3 of the SPS Agreement, the latter provision, which allows Members to establish their own level of sanitary protection, does not constitute an exception to the general obligation of Article 3.1, and that the burden of the complaining party to establish a *prima facie* case of inconsistency "is not avoided by simply describing that provision as an 'exception'". However, we consider that the Appellate Body's finding in *EC – Hormones* does not have a direct bearing on the matter before us.¹⁹⁵ (emphasis added)

274. We disagree with the Panel's conclusion that our ruling on the issue of the burden of proof has no "direct bearing" on this case. The Panel provides no explanation for this conclusion and, indeed, could not have provided any plausible explanation. For there are strong conceptual similarities between, on the one hand, Article 2.4 of the *TBT Agreement* and, on the other hand, Articles 3.1 and 3.3 of the *SPS Agreement*, and our reasoning in *EC – Hormones* is equally apposite for this case. The heart of Article 3.1 of the *SPS Agreement* is a requirement that Members base their sanitary or phytosanitary measures on international standards, guidelines, or recommendations. Likewise, the heart of Article 2.4 of the *TBT Agreement* is a requirement that Members use international standards as a basis for their technical regulations. Neither of these requirements in these two agreements is absolute. Articles 3.1 and 3.3 of the *SPS Agreement* permit a Member to depart from an international standard if the Member seeks a level of protection higher than would be achieved by the international standard, the level of protection pursued is based on a proper risk assessment, and the international standard is not sufficient to achieve the level of protection pursued. Thus, under the *SPS Agreement*, departing from an international standard is permitted in circumstances where the international standard is ineffective to achieve the objective of the measure at issue. Likewise, under Article 2.4 of the *TBT Agreement*, a Member may depart from a relevant international standard when it would be an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by that Member through the technical regulation.

¹⁹³ *Ibid.*, para. 104.

¹⁹⁴ Panel Report, footnote 70 to para. 7.50.

¹⁹⁵ *Ibid.*

275. Given the conceptual similarities between, on the one hand, Articles 3.1 and 3.3 of the *SPS Agreement* and, on the other hand, Article 2.4 of the *TBT Agreement*, we see no reason why the Panel should not have relied on the principle we articulated in *EC – Hormones* to determine the allocation of the burden of proof under Article 2.4 of the *TBT Agreement*. In *EC – Hormones*, we found that a "general rule-exception" relationship between Articles 3.1 and 3.3 of the *SPS Agreement* does not exist, with the consequence that the complainant had to establish a case of inconsistency with *both* Articles 3.1 and 3.3.¹⁹⁶ We reached this conclusion as a consequence of our finding there that "Article 3.1 of the *SPS Agreement* simply excludes from its scope of application the kinds of situations covered by Article 3.3 of that Agreement".¹⁹⁷ Similarly, the circumstances envisaged in the second part of Article 2.4 are excluded from the scope of application of the first part of Article 2.4. Accordingly, as with Articles 3.1 and 3.3 of the *SPS Agreement*, there is no "general rule-exception" relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru—as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the *TBT Agreement* of the measure applied by the European Communities—to bear the burden of proving its claim. This burden includes establishing that Codex Stan 94 has not been used "as a basis for" the EC Regulation, as well as establishing that Codex Stan 94 is effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

276. The *TBT Agreement* acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations while affording every other Member adequate opportunities to obtain information about these objectives. That said, part of the reason why the Panel concluded that the burden of proof under Article 2.4 is on the respondent is because, in the Panel's view, the complainant cannot "spell out" the "legitimate objectives" of the technical regulation. In addition, the Panel reasoned that the assessment of the appropriateness of a relevant international standard involves considerations which are properly the province of the Member adopting or applying a technical regulation.¹⁹⁸

277. In our opinion, these two concerns are not justified. The *TBT Agreement* affords a complainant adequate opportunities to obtain information about the objectives of technical regulations or the specific considerations that may be relevant to the assessment of their appropriateness. A complainant may obtain relevant information about a technical regulation from a respondent under Article 2.5 of the *TBT Agreement*, which establishes a *compulsory* mechanism requiring the supplying of information by the regulating Member. This Article provides in relevant part:¹⁹⁹

¹⁹⁶ Appellate Body Report, *supra*, footnote 17, para. 104.

¹⁹⁷ *Ibid.*

¹⁹⁸ Panel Report, para. 7.51.

¹⁹⁹ We note that a similar provision to Article 2.5 is found in the *SPS Agreement*. Article 5.8 thereof requires a Member to provide an explanation of the reasons for its sanitary or phytosanitary measure.

A Member preparing, adopting or applying a technical regulation which may have a significant effect on trade of other Members shall, upon the request of another Member, explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4.

278. Peru expresses doubts about the usefulness and efficacy of this obligation in the *TBT Agreement*. Peru argues that a Member may not respond fully or adequately to a request for information under Article 2.5, and that, therefore, it is inappropriate to rely on this obligation to support assigning the burden of proof under Article 2.4 to the complainant.²⁰⁰ We are not persuaded by this argument. We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of *pacta sunt servanda* articulated in Article 26 of the *Vienna Convention*.²⁰¹ And, always in dispute settlement, every Member of the WTO must assume the good faith of every other Member.

279. Another source of information for the complainant is the "enquiry point" that must be established by the respondent under the *TBT Agreement*. Article 10.1 of the *TBT Agreement*, in relevant part, provides as follows:²⁰²

10.1 Each Member shall ensure that an enquiry point exists which is able to answer all reasonable enquiries from other Members and interested parties in other Members as well as to provide the relevant documents regarding:

10.1.1 any technical regulations adopted or proposed within its territory by central or local government bodies, by non-governmental bodies which have legal power to enforce a technical regulation, or by regional standardizing bodies of which such bodies are members or participants;

280. Indeed, the dispute settlement process itself also provides opportunities for the complainant to obtain the necessary information to build a case. Information can be exchanged during the consultation phase, and additional information may well become available during the panel phase itself. On previous occasions, we have stated that the arguments of a party "are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties"²⁰³, and that "[t]here is no requirement in the

²⁰⁰ Peru's response to questioning at the oral hearing.

²⁰¹ Appellate Body Report, *US – Shrimp*, *supra*, footnote 50, para. 158; Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, DSR 2000:I, 281, para.74.

²⁰² Article 3 of Annex B to the *SPS Agreement* also requires the establishment of an "enquiry point".

²⁰³ 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, DSR 1997:II, 591, para. 141. See also, Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 88; and Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products ("Korea – Dairy")*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 139.

DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel."²⁰⁴ Thus, it would not be necessary for the complainant to have all the necessary information about the technical regulation before commencing an action under the DSU. A complainant could collect information before and during the early stages of the panel proceedings and, on the basis of that information, develop arguments relating to the objectives or to the appropriateness that may be put forward during subsequent phases of the proceedings.

281. The degree of difficulty in substantiating a claim or a defence may vary according to the facts of the case and the provision at issue. For example, on the one hand, it may be relatively straightforward for a complainant to show that a particular measure has a text that establishes an explicit and formal discrimination between like products and is, therefore, inconsistent with the national treatment obligation in Article III of the GATT 1994. On the other hand, it may be more difficult for a complainant to substantiate a claim of a violation of Article III of the GATT 1994 if the discrimination does not flow from the letter of the legal text of the measure, but rather is a result of the administrative practice of the domestic authorities of the respondent in applying that measure. But, in both of those situations, the complainant must prove its claim. There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.

282. We, therefore, reverse the finding of the Panel, in paragraph 7.52 of the Panel Report, that, under the second part of Article 2.4 of the *TBT Agreement*, the burden rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate" means to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation. Accordingly, we find that Peru bears the burden of demonstrating that Codex Stan 94 is an effective and appropriate means to fulfil the "legitimate objectives" pursued by the European Communities through the EC Regulation.

283. We turn now to consider whether Peru effectively discharged its burden of proof under the second part of Article 2.4 of the *TBT Agreement*.

B. Whether Codex Stan 94 is an Effective and Appropriate Means to Fulfil the "Legitimate Objectives" Pursued by the European Communities Through the EC Regulation

284. We recall that the second part of Article 2.4 of the *TBT Agreement* reads as follows:

... except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued ...

²⁰⁴ Appellate Body Report, *EC – Bananas III*, *supra*, footnote 203, para. 145.

Before ruling on whether Peru met its burden of proof in this case, we must address, successively, the interpretation and the application of the second part of Article 2.4.

1. *The Interpretation of the Second Part of Article 2.4*

285. The interpretation of the second part of Article 2.4 raises two questions: first, the meaning of the term "ineffective or inappropriate means"; and, second, the meaning of the term "legitimate objectives". As to the first question, we noted earlier the Panel's view that the term "ineffective or inappropriate means" refers to two questions—the question of the *effectiveness* of the measure and the question of the *appropriateness* of the measure—and that these two questions, although closely related, are different in nature.²⁰⁵ The Panel pointed out that the term "ineffective" "refers to something which is not 'having the function of accomplishing', 'having a result', or 'brought to bear', whereas [the term] 'inappropriate' refers to something which is not 'specially suitable', 'proper', or 'fitting'".²⁰⁶ The Panel also stated that:

Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. ... The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed.²⁰⁷ (original emphasis)

We agree with the Panel's interpretation.

286. As to the second question, we are of the view that the Panel was also correct in concluding that "the 'legitimate objectives' referred to in Article 2.4 must be interpreted in the context of Article 2.2", which refers also to "legitimate objectives", and includes a description of what the nature of some such objectives can be.²⁰⁸ Two implications flow from the Panel's interpretation. First, the term "legitimate objectives" in Article 2.4, as the Panel concluded, must cover the objectives explicitly mentioned in Article 2.2, namely: "national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment." Second, given the use of the term "*inter alia*" in Article 2.2, the objectives covered by the term "legitimate objectives" in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2. Furthermore, we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure.²⁰⁹

²⁰⁵ See *supra*, para. 261.

²⁰⁶ Panel Report, para. 7.116.

²⁰⁷ *Ibid.*

²⁰⁸ Panel Report, para. 7.118.

²⁰⁹ *Ibid.*, para. 7.122.

2. *The Application of the Second Part of Article 2.4*

287. With respect to the application of the second part of Article 2.4, we begin by recalling that Peru has the burden of establishing that Codex Stan 94 is an effective *and* appropriate means for the fulfilment of the "legitimate objectives" pursued by the European Communities through the EC Regulation. Those "legitimate objectives" are market transparency, consumer protection, and fair competition. To satisfy this burden of proof, Peru must, at least, have established a *prima facie* case of this claim. If Peru has succeeded in doing so, then a presumption will have been raised which the European Communities must have rebutted in order to succeed in its defence. If Peru has established a *prima facie* case, and if the European Communities has failed to rebut Peru's case effectively, then Peru will have discharged its burden of proof under Article 2.4. In such an event, Codex Stan 94 must, consistent with the European Communities' obligation under the *TBT Agreement*, be used "as a basis for" any European Communities regulation on the marketing of preserved sardines, because Codex Stan 94 will have been shown to be both effective and appropriate to fulfil the "legitimate objectives" pursued by the European Communities. Further, in such an event, as we have already determined that Codex Stan 94 was not used "as a basis for" the EC Regulation, we would then have to find as a consequence that the European Communities has acted inconsistently with Article 2.4 of the *TBT Agreement*.

288. This being so, our task is to assess whether Peru discharged its burden of showing that Codex Stan 94 is appropriate and effective to fulfil these same three "legitimate objectives". In the light of our reasoning thus far, Codex Stan 94 would be *effective* if it had the capacity to accomplish all three of these objectives, and it would be *appropriate* if it were suitable for the fulfilment of all three of these objectives.

289. We share the Panel's view that the terms "ineffective" and "inappropriate" have different meanings, and that it is conceptually possible that a measure could be effective but inappropriate, or appropriate but ineffective.²¹⁰ This is why Peru has the burden of showing that Codex Stan 94 is both *effective* and *appropriate*. We note, however, that, in this case, a consideration of the *appropriateness* of Codex Stan 94 and a consideration of the *effectiveness* of Codex Stan 94 are interrelated—as a consequence of the nature of the objectives of the EC Regulation. The capacity of a measure to accomplish the stated objectives—its *effectiveness*—and the suitability of a measure for the fulfilment of the stated objectives—its *appropriateness*—are *both* decisively influenced by the perceptions and expectations of consumers in the European Communities relating to preserved sardine products.²¹¹

290. We note that the Panel concluded that "Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not ineffective

²¹⁰ Panel Report, para. 7.116.

²¹¹ We note that the Panel observed "that the European Communities has used the terms 'ineffective' and 'inappropriate' interchangeably throughout its oral and written statements." (*Ibid.*, footnote 93 to para. 7.117)

or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation."²¹² We have examined the analysis which led the Panel to this conclusion. We note, in particular, that the Panel made the factual finding that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus*".²¹³ We also note that the Panel gave consideration to the contentions of Peru that, under Codex Stan 94, fish from the species *Sardinops sagax* bear a denomination that is distinct from that of *Sardina pilchardus*²¹⁴, and that "the very purpose of the labelling regulations set out in Codex Stan 94 for sardines of species other than *Sardina pilchardus* is to ensure market transparency".²¹⁵ We agree with the analysis made by the Panel. Accordingly, we see no reason to interfere with the Panel's finding that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 meets the legal requirements of effectiveness and appropriateness set out in Article 2.4 of the *TBT Agreement*.

291. We, therefore, uphold the finding of the Panel, in paragraph 7.138 of the Panel Report, that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation. Our finding on this issue is, however, subject to our examination of whether the Panel acted consistently with Article 11 of the DSU. We turn to that issue now.

X. THE OBJECTIVITY OF THE ASSESSMENT OF CERTAIN FACTS BY THE PANEL

292. We next consider whether the Panel properly discharged its duty under Article 11 of the DSU to make an "objective assessment" of certain "facts of the case" before it. We recall that Article 11 reads as follows:

Function of Panels

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including *an objective assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels

²¹² *Ibid.*, para. 7.138.

²¹³ *Ibid.*, para. 7.137. In response to questioning at the oral hearing, the European Communities and Peru agreed that this statement of the Panel was a factual finding.

²¹⁴ *Ibid.*, para. 4.88.

²¹⁵ *Ibid.*, para. 4.86.

should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution. (emphasis added)

293. The European Communities contends that, in four specific instances, the Panel failed to discharge its duty under Article 11 of the DSU to make an objective assessment of the facts of the case. First, the European Communities submits that the Panel's treatment of the dictionary definitions of the term "sardines" amounts to a contravention of Article 11 of the DSU.²¹⁶ Second, the European Communities sees a violation of Article 11 of the DSU in the way the Panel handled a letter from the United Kingdom Consumers' Association and in the Panel's rejection of letters from other European consumers' associations submitted by the European Communities at the interim review stage.²¹⁷ Third, the European Communities submits that the Panel disregarded evidence in the form of tins, supermarket receipts, and labels relating to various preserved fish and thus violated Article 11 of the DSU.²¹⁸ Fourth, the European Communities finds a violation of Article 11 of the DSU in the decision of the Panel not to ask the Codex Commission "about the meaning, status and even validity of ... Codex Stan 94".²¹⁹

294. All four points were raised by the European Communities in the interim review and addressed by the Panel at that stage of the Panel proceedings. On the use of the dictionary definitions of the term "sardines", the Panel stated:

[W]e are of the view that the use of the dictionaries referred to by both parties is an appropriate means to examine whether the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name that refers to species other than *Sardina pilchardus*, especially in light of the fact that the *Multilingual Illustrated Dictionary of Aquatic Animals and Plants* was published in cooperation with the European Commission and member States of the European Communities for the purposes of, *inter alia*, improving market transparency. We note that the electronic publication, *Fish Base*, was also produced with the support of the European Commission. In making our finding, not only did we consider carefully dictionaries referred to by both parties but also considered other evidence such as the regulations of several member States of the European Communities, statements made by the Consumers' Association and the trade description used by Canadian exporters of *Clupea harengus harengus* to the Netherlands and the United Kingdom. In our weighing and balancing of the totality of evidence before us, including the examination of the *Oxford Dictionary* referred to by Peru and Canada as well as the *Grand Dictionnaire Encyclopédique Larousse* and *Diccionario de*

²¹⁶ European Communities' appellant's submission, paras. 216–219.

²¹⁷ *Ibid.*, paras. 220–223.

²¹⁸ *Ibid.*, paras. 224–226.

²¹⁹ *Ibid.*, para. 227.

la lengua espanola referred to by the European Communities, we were persuaded, on balance, that the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name in the European Communities and that the consumers in the European Communities do not associate the term "sardines" exclusively with *Sardina pilchardus*.²²⁰ (original emphasis; footnotes omitted)

295. On the letter from the United Kingdom Consumers' Association, the Panel replied:

We are ... mindful that we are not "required to accord to factual evidence of the parties the same meaning and weight as do the parties".⁴⁰ We did consider the Consumers' Association letter in determining whether the European consumers associate the term "sardines" exclusively with *Sardina pilchardus* but, as stated above, this was not the sole basis on which we made the determination as other evidence was considered in the overall weighing and balancing process. We therefore do not agree with the European Communities' argument that our approach was partial.

⁴⁰ Appellate Body Report, *Australia – Measures Affecting the Importation of Salmon* ("Australia – Salmon"), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, para. 267.²²¹

296. With respect to the letters from other European consumers' associations submitted by the European Communities at the interim review stage, the Panel made the following statement:

The European Communities submitted additional evidence, i.e., letters it had received lately from other European consumers' associations on the same issue. In a letter dated 11 April 2002, Peru requested that the new evidence submitted by the European Communities not be considered. In this regard, Peru referred to Article 12 of the Panel's Working Procedures which did not provide for the submission of new evidence at this stage of the Panel proceedings. Article 12 of the Panel's Working Procedures reads as follows: "Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, answers to questions or comments on answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate". We are obliged to point

²²⁰ Panel Report, para. 6.12.

²²¹ *Ibid.*, para. 6.15 and footnote 40 thereto.

out that Peru submitted the letter from Consumers' Association as a part of its rebuttal submission. In light of this, it is our view that the European Communities should have submitted the evidence at the second substantive meeting or at least not later than at the time it submitted answers to the questions posed by the Panel. Further, the European Communities did not request an extension of time-period to rebut the letter from Consumers' Association. Nor did the European Communities demonstrate the requisite "good cause" which must be shown by the party submitting the new evidence. We do not consider that the interim review stage is the appropriate time to introduce new evidence. Therefore, we decline to consider the new evidence submitted by the European Communities.²²²

297. Regarding the third point—the evidence regarding tins, supermarket receipts, and labels—the Panel stated:

[T]he European Communities claimed that in paragraph 7.132 we "completely ignor[ed] the evidence submitted by the European Communities on the range and diversity of preserved fish products that the European consumers could find in any European supermarket and that responds to their expectations that each fish be called by and marketed under its own name". Again, we did not ignore any evidence and we took note of the fact that there is diverse range of fish products that are available in European supermarkets. However, we were not persuaded that the existence of diverse preserved fish products in the European market suggested that the European consumers associate the term "sardines" exclusively with *Sardina pilchardus*. We therefore reject the European Communities' argument that we "completely ignored" the evidence it submitted.²²³

298. Finally, the Panel commented on its decision not to seek information from the Codex Commission:

We recall the European Communities' statement at the Second Substantive Meeting that "[i]f the Panel should have any doubt that the interpretation of Article 6.1.1(ii) [of] Codex Stan 94 advanced by the European Communities is correct and considers that it will reach the question of the meaning of Article 6.1.1(ii) of Codex Stan 94, the European Communities invites the Panel to ask the Codex Alimentarius to provide its view of the meaning of this text". This request is reflected in paragraph 4.49 of the descriptive part. In accordance with Article 13 of the DSU, it is the right of the panel to seek or refuse to seek information.³² In this regard, in *EC — Hormones*, the Appellate Body stated that Article 13 of the DSU "enable[s] panels to seek information and advice as they

²²² Panel Report, para. 6.16.

²²³ *Ibid.*, para. 6.18.

deem appropriate in a particular case".³³ Also, in *US — Shrimp*, the Appellate Body considered that "a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case...".³⁴ In this case, we determined that there was no need to seek information from the Codex Alimentarius Commission.

³² "Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter".

³³ *European Communities — Measures Concerning Meat and Meat Products ("EC — Hormones")*, WT/DS26/AB/R and WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, para. 147.

³⁴ *United States — Import Prohibition of Certain Shrimp and Shrimp Products ("US — Shrimp")*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, para. 104.²²⁴ (original emphasis and underlining)

299. The first three points raised by the European Communities relate to the task—which we have discussed earlier—of evaluating evidence adduced in connection with the Panel's inquiry into whether consumers in the European Communities associate the term "sardines" exclusively with *Sardina pilchardus*. As we have stated in several previous appeals, panels enjoy a discretion as the trier of facts²²⁵; they enjoy "a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence."²²⁶ We have also said that we will not "interfere lightly" with the Panel's appreciation of the evidence: we will not intervene solely because we might have reached a different factual finding from the one the panel reached; we will intervene only if we are "satisfied

²²⁴ Panel Report, para. 6.8 and footnotes 32–34 thereto.

²²⁵ Appellate Body Report, *Korea — Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:1, 3, paras. 161–162; Appellate Body Report, *EC — Hormones*, *supra*, footnote 17, para. 132; Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities ("US — Wheat Gluten")*, WT/DS166/AB/R, adopted 19 January 2001, para. 151. See also, Appellate Body Report, *European Communities — Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031, paras. 131–136; Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, paras. 262–267; Appellate Body Report, *Japan — Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277, paras. 140–142; Appellate Body Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763, paras. 149 and 151; and Appellate Body Report, *Korea — Dairy*, *supra*, footnote 203, paras. 137–138.

²²⁶ Appellate Body Report, *EC — Asbestos*, *supra*, footnote 15, para. 161.

that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence".²²⁷

300. In particular, we stated, in *EC – Hormones*, that:

Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.²²⁸

Furthermore, in *Australia – Measures Affecting Importation of Salmon*, we indicated that:

Panels ... are not required to accord to factual evidence of the parties the same meaning and weight as do the parties.²²⁹

Moreover, in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, we ruled that:

... under Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof. ... The determination of the significance and weight properly pertaining to the evidence presented by one party is a function of a panel's appreciation of the probative value of all the evidence submitted by both parties considered together.²³⁰

In the light of the comments made by the Panel at the interim review stage, we have no reason to believe, nor has the European Communities been able to persuade us, that the Panel did not examine and consider all the evidence properly put before it, or that the Panel did not evaluate the relevance and probative value of each piece of evidence. In particular, the Panel manifestly did not ignore the evidence in the form of tins, supermarket receipts, and labels relating to various preserved fish submitted by the European Communities, for it addressed that evidence specifically in paragraph 6.18 of the Panel Report. In addition, the Panel specifically stated that its factual finding that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus*"²³¹ was the result of an "overall weighing and balancing process"²³² bearing upon a plurality of pieces of evidence. On the other points raised by the European Communities, we reiterate: the Panel enjoyed a margin of discretion, as the trier of facts, to assess the value of each piece of evidence and the weight to be

²²⁷ Appellate Body Report, *US – Wheat Gluten*, *supra*, footnote 225, para. 151.

²²⁸ Appellate Body Report, *supra*, footnote 17, para. 132.

²²⁹ Appellate Body Report, *supra*, footnote 225, para. 267.

²³⁰ Appellate Body Report, *supra*, footnote 203, para. 137.

²³¹ Panel Report, para. 7.137.

²³² *Ibid.*, para. 6.15.

ascribed to them. In our view, the Panel did not exceed the bounds of this discretion by giving some weight to dictionary definitions, and to an extract of a letter from a United Kingdom Consumers' Association.²³³

301. We also reject the European Communities' contention relating to the letters it submitted at the interim review stage. The interim review stage is not an appropriate time to introduce new evidence. We recall that Article 15 of the DSU governs the interim review. Article 15 permits parties, during that stage of the proceedings, to submit comments on the draft report issued by the panel²³⁴, and to make requests "for the panel to review precise aspects of the interim report".²³⁵ At that time, the panel process is all but completed; it is only—in the words of Article 15—"precise aspects" of the report that must be verified during the interim review. And this, in our view, cannot properly include an assessment of new and unanswered evidence. Therefore, we are of the view that the Panel acted properly in refusing to take into account the new evidence during the interim review, and did not thereby act inconsistently with Article 11 of the DSU.

302. We also reject the European Communities' claim regarding the fourth instance of supposed impropriety, which relates to the decision of the Panel not to seek information from the Codex Commission. Article 13.2 of the DSU provides that "[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter." This provision is clearly phrased in a manner that attributes discretion to panels, and we have interpreted it in this vein. Our statements in *EC – Hormones, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items ("Argentina – Textiles and Apparel")*²³⁶, and *US – Shrimp*, all support the conclusion that, under Article 13.2 of the DSU, panels enjoy discretion as to *whether or*

²³³ The extract of the letter from a United Kingdom Consumers' Association cited in the Panel Report is the following:

[A] wide array of sardines were made available to European consumers for many decades prior to the imposition of this restrictive Regulation.

(*Ibid.*, para. 7.132, referring to Exhibit Peru-16, submitted by Peru to the Panel, p. 8)

²³⁴ Article 15.1 of the DSU provides:

Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing.

²³⁵ Article 15.2 of the DSU provides:

Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members. (emphasis added)

²³⁶ Appellate Body Report, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003.

not to seek information from external sources.²³⁷ In this case, the Panel evidently concluded that it did not need to request information from the Codex Commission, and conducted itself accordingly. We believe that, in doing so, the Panel acted within the limits of Article 13.2 of the DSU. A contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the due exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2 of the DSU.

303. In the light of this, we reject the claim of the European Communities that the Panel did not conduct "an objective assessment of the facts of the case", as required by Article 11 of the DSU.

XI. THE REFERENCES IN THE PANEL REPORT TO TRADE-RESTRICTIVENESS

304. We now turn to the issue whether the Panel made a determination that the EC Regulation is trade-restrictive, and, if so, whether the Panel erred in making such a determination, as contended by the European Communities.

305. The Panel stated:

The European Communities acknowledged that it is the Regulation which in certain member States "created" the consumer expectations which it now considers require the maintenance of that same Regulation. Thus, through regulatory intervention, the European Communities consciously would have "created" consumer expectations which now are claimed to affect the competitive conditions of imports. *If we were to accept that a WTO Member can "create" consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations, we would be endorsing the permissibility of "self-justifying" regulatory trade barriers.* Indeed, the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of the governmentally created consumer expectations. Mindful of this concern, we will proceed to examine whether the evidence and legal arguments before us demonstrate that consumers in most member

²³⁷ In *EC – Hormones*, we stated that Article 13 of the DSU "enable[s] panels to seek information and advice as they deem appropriate in a particular case". (Appellate Body Report, *supra*, footnote 17, para. 147) In *Argentina – Textiles and Apparel*, we stated that, pursuant to Article 13.2 of the DSU, "just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all". (Appellate Body Report, *supra*, footnote 236, para. 84) In *US – Shrimp*, we considered that "a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case". (Appellate Body Report, *supra*, footnote 50, para. 104) (original emphasis)

States of the European Communities have always associated the common name "sardines" exclusively with *Sardina pilchardus* and that the use of "sardines" in conjunction with "Pacific", "Peruvian" or "*Sardinops sagax*" would therefore not enable European consumers to distinguish between products made from *Sardinops sagax* and *Sardina pilchardus*.²³⁸ (emphasis added)

At the interim review in the Panel proceedings, the European Communities asked the Panel to delete the term "trade-restrictive" in the sixth line of paragraph 7.127 of the Panel Report.²³⁹

306. The Panel dismissed this request in the following terms:

The European Communities argued that the question of whether the measure at issue was trade-restrictive was an issue on which we had exercised judicial economy and therefore should "refrain from gratuitously qualifying the EC measure as 'trade-restrictive'". We used the expression "trade-restrictive" as part of the legal reasoning to state that if Members can create consumer expectations and then justify the trade restrictive measure, we would be endorsing the permissibility of self-justifying regulatory trade barriers. Therefore, we were justified in using the term "trade-restrictive". Moreover, in our examination of the EC Regulation, we were of the view that the EC Regulation was more trade-restrictive than the relevant international standard, i.e., Codex Stan 94. Our characterization of the EC Regulation as such is based on the fact that the EC Regulation prohibited the use of the term "sardines" for species other than *Sardina pilchardus* whereas Codex Stan 94 would permit the use of the term "sardines" in a qualified manner for species other than *Sardina pilchardus*.³⁵

³⁵ In addition, we took note of the context provided by Article 2.5 of the TBT Agreement which states that if a technical regulation is in accordance with relevant international standards, "it shall be rebuttably presumed not to create an unnecessary obstacle to international trade." Because the EC Regulation was not in accordance with Codex Stan 94, we considered that it created an "unnecessary obstacle to trade", which, in our view, can be construed to mean more trade-restrictive than necessary.²⁴⁰

307. On appeal, the European Communities contends that—in paragraphs 7.127 and 6.11, as well as in footnote 35, of the Panel Report—the Panel characterized the EC Regulation as trade-restrictive. The European Communities considers "the findings of the Panel (if such they are) in paragraphs [7.127] and 6.11 of the Panel Report to the effect that the Regulation is 'trade restrictive' or 'more

²³⁸ Panel Report, para. 7.127.

²³⁹ Panel Report, para. 6.11.

²⁴⁰ *Ibid.* and footnote 35 thereto.

trade restrictive than the relevant international standard' should be reversed or considered moot and without legal effect."²⁴¹

308. In our view, the argument of the European Communities is flawed regarding paragraph 7.127. We do not agree that the Panel characterized the EC Regulation as trade-restrictive in paragraph 7.127 of the Panel Report. In that paragraph, the Panel stated:

If we were to accept that a WTO Member can "create" consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations, we would be endorsing the permissibility of "self-justifying" regulatory trade barriers. (emphasis added)

This statement by the Panel is made *in abstracto*; the Panel is not making a definitive finding here about the EC Regulation. Moreover, this statement is relevant only for the purposes of Article 2.4 of the *TBT Agreement*, as it was part of the Panel's examination whether consumers in the European Communities associate the term "sardines" exclusively with *Sardina pilchardus*. We are, therefore, of the view that, in paragraph 7.127 of the Panel Report, the Panel did not make a determination that the EC Regulation itself is trade-restrictive *per se* as that term is used in Article 2.2 of the *TBT Agreement*. Accordingly, we reject the claim of the European Communities insofar as it relates to paragraph 7.127 of the Panel Report.

309. The Panel's statements in paragraph 6.11 and in footnote 35 of the Panel Report, however, are of a different nature. The relevant excerpt is as follows:

Moreover, in our examination of the EC Regulation, we were of the view that *the EC Regulation was more trade-restrictive than the relevant international standard, i.e., Codex Stan 94*. Our characterization of the EC Regulation as such is based on the fact that the EC Regulation prohibited the use of the term "sardines" for species other than *Sardina pilchardus* whereas Codex Stan 94 would permit the use of the term "sardines" in a qualified manner for species other than *Sardina pilchardus*.³⁵

³⁵In addition, we took note of the context provided by Article 2.5 of the *TBT Agreement* which states that if a technical regulation is in accordance with relevant international standards, "it shall be rebuttably presumed not to create an unnecessary obstacle to international trade." Because the EC Regulation was not in accordance with Codex Stan 94, we considered that it created an "unnecessary obstacle to trade", *which, in our view, can be construed to mean more trade-restrictive than necessary*. (emphasis added)

²⁴¹ European Communities' appellant's submission, para. 234.

In this paragraph, the Panel stated that the "the EC Regulation was more trade-restrictive than the relevant international standard, *i.e.*, Codex Stan 94." Also, in footnote 35, the Panel stated that the EC Regulation "created an 'unnecessary obstacle to trade', which, in [its] view, can be construed to mean more trade-restrictive than necessary." These two statements do contain determinations of the trade-restrictive nature of the EC Regulation.

310. The only provision of the WTO Treaty on which the Panel made a ruling was Article 2.4 of the *TBT Agreement*. We agree with the European Communities that the question whether the EC Regulation is trade-restrictive is not relevant for the purposes of making a finding under Article 2.4. The Panel exercised judicial economy with respect to other claims where the trade-restrictive character of the EC Regulation might have been relevant.²⁴² As a consequence, the Panel should have refrained from making the statements quoted from paragraph 6.11 and footnote 35 of the Panel Report.²⁴³

311. The question whether the EC Regulation is trade-restrictive in nature could have been relevant to a legal analysis under Article 2.2 of the *TBT Agreement*. For this reason, the Panel's statements in paragraph 6.11 and in footnote 35 of the Panel Report on the trade-restrictive character of the EC Regulation, *to the extent that they could relate to the legal analysis under Article 2.2 of the TBT Agreement*, constitute legal interpretations within the meaning of Article 17.6 of the DSU. Because the Panel had determined *not* to make legal findings under Article 2.2, we declare the two statements in paragraph 6.11 and in footnote 35 of the Panel Report on the trade-restrictive character of the EC Regulation moot and without legal effect.

²⁴² The claims where such a finding would have been relevant related to Article 2.2 of the *TBT Agreement*.

²⁴³ This approach is along the lines of that which we followed in *United States – Import Measures on Certain Products from the European Communities*:

Having found that the 3 March Measure is the measure at issue in this dispute, and that the 19 April action is outside its terms of reference, the Panel should have limited its reasoning to issues that were relevant and pertinent to the 3 March Measure. *By making statements on an issue that is only relevant to the 19 April action, the Panel failed to follow the logic of, and thus acted inconsistently with, its own finding on the measure at issue in this dispute.* The Panel, therefore, erroneously made statements that relate to a measure which it had *itself* previously determined to be outside its terms of reference.

For these reasons, we conclude that the Panel erred by making the statements in paragraphs 6.121 to 6.126 of the Panel Report on the mandate of arbitrators appointed under Article 22.6 of the DSU. Therefore, these statements by the Panel have no legal effect. (original emphasis; underlining added)

(Appellate Body Report, WT/DS165/AB/R, adopted 10 January 2001, paras. 89–90)

In that case, the irrelevance of the statements of the panel resulted from the limits of the terms of reference, rather than from judicial economy. Nevertheless, our views to the effect that a panel should limit its reasoning to relevant and pertinent issues, and that irrelevant statements may have no legal effect, are also pertinent to the case before us.

XII. COMPLETING THE LEGAL ANALYSIS

312. Peru submits that, if we conclude that the EC Regulation is consistent with Article 2.4, it would be appropriate for us to complete the Panel's analysis and resolve the dispute by making findings on those provisions of Article 2 of the *TBT Agreement* on which the Panel did not make any findings, namely Articles 2.2 and 2.1 of the *TBT Agreement*.²⁴⁴ Although Peru made a claim before the Panel under Article III:4 of the GATT 1994, Peru does not ask us to complete the analysis by addressing that provision. The European Communities objects to the completion of the analysis, expressing the view that there are not sufficient undisputed facts in the record to do so.²⁴⁵

313. Because we have found that the EC Regulation is *not* consistent with Article 2.4 of the *TBT Agreement*, the conditions to Peru's request have not been met, and, therefore, we do not think it is necessary for us to make a finding under Articles 2.2 and 2.1 of the *TBT Agreement* in order to resolve this dispute. Equally, we do not think it is necessary to make a finding under Article III:4 of the GATT 1994 in order to resolve this dispute. Therefore, we decline to make findings on Articles 2.2 and 2.1 of the *TBT Agreement*, or on Article III:4 of the GATT 1994.

314. We indicated earlier in this Report that we would return to the question whether Morocco's *amicus curiae* brief assists us in this appeal when considering the issue of completing the legal analysis under Article 2.1 of the *TBT Agreement* and the GATT 1994.²⁴⁶ In the light of our decision not to complete the analysis by making findings on these provisions, we find that the legal arguments submitted by Morocco in its *amicus curiae* brief on Article 2.1 of the *TBT Agreement* and on the GATT 1994 do not assist us in this appeal.

XIII. FINDINGS AND CONCLUSIONS

315. For the reasons set out in this Report, the Appellate Body:

- (a) finds that the condition attached to the withdrawal of the Notice of Appeal of 25 June 2002 is permissible, and that the appeal of the European Communities, commenced by the Notice of Appeal of 28 June 2002, is admissible;
- (b) finds that the *amicus curiae* briefs submitted in this appeal are admissible but their contents do not assist us in deciding this appeal;
- (c) upholds the Panel's finding, in paragraph 7.35 of the Panel Report, that the EC Regulation is a "technical regulation" under the *TBT Agreement*;

²⁴⁴ Peru's appellee's submission, para. 181.

²⁴⁵ European Communities' response to questioning at the oral hearing.

²⁴⁶ *Supra*, paras. 169–170.

- (d) upholds the Panel's findings, in paragraph 7.60 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to measures that were adopted before 1 January 1995 but which have not "ceased to exist", and, in paragraph 7.83 of the Panel Report, that Article 2.4 of the *TBT Agreement* applies to existing technical regulations, including the EC Regulation;
- (e) upholds the Panel's finding, in paragraph 7.70 of the Panel Report, that Codex Stan 94 is a "relevant international standard" under Article 2.4 of the *TBT Agreement*;
- (f) upholds the Panel's finding, in paragraph 7.112 of the Panel Report, that Codex Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2.4 of the *TBT Agreement*;
- (g) reverses the Panel's finding, in paragraph 7.52 of the Panel Report, that, under the second part of Article 2.4 of the *TBT Agreement*, the burden of proof rests with the European Communities to demonstrate that Codex Stan 94 is an "ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued" by the European Communities through the EC Regulation, and finds, instead, that the burden of proof rests with Peru to demonstrate that Codex Stan 94 is an effective and appropriate means to fulfil those "legitimate objectives", and, upholds the Panel's finding, in paragraph 7.138 of the Panel Report, that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfil the "legitimate objectives" of the EC Regulation;
- (h) rejects the claim of the European Communities that the Panel did not conduct "an objective assessment of the facts of the case", as required by Article 11 of the DSU;
- (i) rejects the claim of the European Communities that the Panel made a determination, in paragraph 7.127 of the Panel Report, that the EC Regulation is trade-restrictive, and, declares moot and without legal effect the two statements, in paragraph 6.11 and in footnote 35 of the Panel Report, on the trade-restrictive character of the EC Regulation; and
- (j) finds it unnecessary to complete the analysis under Article 2.2 of the *TBT Agreement*, Article 2.1 of the *TBT Agreement*, or Article III:4 of the GATT 1994.

Therefore, the Appellate Body *upholds* the Panel's finding, in paragraph 8.1 of the Panel Report, that the EC Regulation is inconsistent with Article 2.4 of the *TBT Agreement*.

316. The Appellate Body *recommends* that the DSB request the European Communities to bring the EC Regulation, as found in this Report and in the

Panel Report, as modified by this Report, to be inconsistent with Article 2.4 of the *TBT Agreement*, into conformity with its obligations under that Agreement.

**EUROPEAN COMMUNITIES –
TRADE DESCRIPTION OF SARDINES**

**Report of the Panel
WT/DS231/R***

*Adopted by the Dispute Settlement Body
on 23 October 2002,
as Modified by the Appellate Body Report*

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I. INTRODUCTION

1.1 In a communication dated 20 March 2001, Peru requested consultations with the European Communities pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), and Article 14 of the Agreement on Technical Barriers to Trade (the "TBT Agreement"), with respect to Council Regulation (EEC) No. 2136/89 (the "EC Regulation" or "Regulation") laying down common marketing standards for preserved sardines.¹

1.2 On 31 May 2001, Peru and the European Communities held the requested consultations but failed to reach a mutually satisfactory solution.

1.3 In a communication dated 7 June 2001,² Peru requested the establishment of a panel to examine the EC Regulation, with the standard terms of reference set out in Article 7 of the DSU. Peru made its request in accordance with Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 14 of the TBT Agreement. In its communication, Peru stated that it considered the EC Regulation to constitute an unnecessary obstacle to international trade which is inconsistent with Articles 2 and 12 of the TBT Agreement, Article XI:1 of the GATT 1994 and the principle of non-discrimination under Articles I and III of the GATT 1994.

1.4 At its meeting on 24 July 2001, the Dispute Settlement Body ("DSB") established a panel pursuant to Peru's request in accordance with Article 6 of the DSU. Canada, Chile, Colombia, Ecuador, the United States and Venezuela reserved their rights to participate in the Panel proceedings as third parties in accordance with Article 10 of the DSU.

1.5 At the meeting of the DSB on 24 July 2001, the parties to the dispute agreed that the Panel should have standard terms of reference provided in Article 2.1 of the DSU. The terms of reference of the Panel are as follows:

To examine, in the light of the relevant provisions of the covered agreements cited by Peru in document WT/DS231/6, the matter referred to the DSB by Peru 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.

¹ WT/DS231/1; G/L/449; G/TBT/D/22, 23 April 2001.

² WT/DS231/6, 8 June 2001.

1.6 On 31 August 2001, Peru requested the Director-General of the World Trade Organization ("WTO") to determine the composition of the Panel pursuant to paragraph 7 of Article 8 of the DSU:

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 covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.7 On 11 September 2001, the Director-General accordingly composed the Panel as follows:

Chairperson: Ms. Margaret Liang
 Members: Ms. Merit Janow
 Mr. Mohan Kumar

1.8 The Panel met with the parties on 27, 28 November 2001 and 23 January 2002. The Panel met with the third parties on 28 November 2001.

1.9 The Panel submitted its interim report to the parties on 28 March 2002. On 3 May 2002, the parties requested the Panel to suspend its proceedings in accordance with Article 12.12 of the DSU until 21 May 2002 so as to enable the parties to find a mutually satisfactory solution to the dispute. The Panel agreed to this request.³ As the parties were unable to reach a mutually satisfactory solution within the requested period of time, the Panel issued its final report to the parties on 22 May 2002.

II. FACTUAL ASPECTS

A. *Basic Characteristics of *Sardina Pilchardus Walbaum and Sardinops Sagax Sagax**

2.1 This dispute concerns *Sardina pilchardus Walbaum* ("*Sardina pilchardus*") and *Sardinops sagax sagax* ("*Sardinops sagax*"), two small fish species which belong, respectively, to genus *Sardina* and *Sardinops* of the *Clupeinae* subfamily of the *Clupeidae* family; fish of the *Clupeidae* family populate almost all oceans.

2.2 *Sardina pilchardus* is found mainly around the coasts of the Eastern North Atlantic, in the Mediterranean Sea and in the Black Sea, and *Sardinops*

³ WT/DS231/9, 8 May 2002.

sagax is found mainly in the Eastern Pacific along the coasts of Peru and Chile. Despite the various morphological differences that can be observed between them, such as those concerning the head and length, the type and number of gill-rakes or bone striae and size and weight, *Sardina pilchardus* and *Sardinops sagax* display similar characteristics: they live in a coastal pelagic environment, form schools, engage in vertical migration, feed on plankton and have similar breeding seasons.

2.3 The taxonomic classification of *Sardina pilchardus* and *Sardinops sagax* is as follows:

"Sardina pilchardus Walbaum"
"Sardinops sagax sagax"

Phylum	Chordata	Chordata
Subphylum	Vertebrata	Vertebrata
Superclass	Gnathostomata	Gnathostomata
Class	Osteichthyes	Osteichthyes
Order	Clupeiformes	Clupeiformes
Suborder	Clupeoidei	Clupeoidei
Family	Clupeidae	Clupeidae
Subfamily	Clupeinae	Clupeinae
Genus	<i>Sardina</i>	<i>Sardinops</i>
Species	<i>Sardina pilchardus Walbaum</i>	<i>Sardinops sagax sagax</i>

2.4 Both fish, as well as other species of the *Clupeidae* family, are used in the preparation of preserved and canned fish products, packed in water, oil or other suitable medium.

B. The Council Regulation (EEC) 2136/89 of 21 June 1989 Laying Down Common Marketing Standards for Preserved Sardines

2.5 Council Regulation (EEC) No. 2136/89 laying down common marketing standards for preserved sardines (the "EC Regulation") was adopted on 21 June 1989.⁴ The EC Regulation defines the standards governing the marketing of preserved sardines in the European Communities.

2.6 Article 2 of the EC Regulation provides that only products prepared from fish of the species *Sardina pilchardus* may be marketed as preserved sardines. Article 2 reads as follows:

Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:

- they must be covered by CN codes 1604 13 10 and ex 1604 20 50;

⁴ The EC Regulation in its entirety is attached as Annex 1.

- they must be prepared exclusively from the fish of the species "*Sardina pilchardus* Walbaum";
- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
- they must be sterilized by appropriate treatment.

C. *The Codex Alimentarius Commission Standard for Canned Sardines and Sardine-Type Products (Codex Stan 94 –1981 Rev.1 – 1995)*

2.7 The Codex Alimentarius Commission of the United Nations Food and Agriculture Organization ("FAO") and the World Health Organisation ("WHO") (the "Codex Alimentarius Commission") adopted in 1978 a standard ("Codex Stan 94") for canned sardines and sardine-type products.⁵ Article 1 of Codex Stan 94 states that this standard applies to "canned sardines and sardine-type products packed in water or oil or other suitable packing medium" and that it does not apply to speciality products where fish content constitutes less than 50% m/m of the net contents of the can.

2.8 Article 2.1 of Codex Stan 94 provides that canned sardines or sardine-type products are prepared from fresh or frozen fish from a list of 21 species, amongst them *Sardina pilchardus* and *Sardinops sagax*.⁶

2.9 Article 6 of Codex Stan 94 reads as follows:

"6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following specific provisions shall apply:

6.1 NAME OF THE FOOD

The name of the products shall be:

- 6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or
- (ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the

⁵ Codex Stan 94 is attached in its entirety as Annex 2.

⁶ Article 2.1.1 lists the following species:

- *Sardina pilchardus*
- *Sardinops melanostictus*, *S. neopilchardus*, *S. ocellatus*, *S. sagax* *S. caeruleus*
- *Sardinella aurita*, *S. brasiliensis*, *S. maderensis*, *S. longiceps*, *S. gibbosa*
- *Clupea harengus*
- *Sprattus sprattus*
- *Hyperlophus vittatus*
- *Nematalosa vlaminghi*
- *Etrumeus teres*
- *Ethmidium maculatum*
- *Engraulis anchoita*, *E. mordax*, *E. ringens*
- *Opisthonema oglinum*

law and custom of the country in which the product is sold, and in a manner not to mislead the consumer".

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

3.1 Peru makes the following requests:

- (a) Peru requests the Panel to find that the measure at issue, the EC Regulation, prohibiting the use of the term "sardines" combined with the name of the country of origin ("Peruvian Sardines"); the geographical area in which the species is found ("Pacific Sardines"); the species ("Sardines — *Sardinops sagax*"); or the common name of the species *Sardinops sagax* customarily used in the language of the member State of the European Communities in which the product is sold ("Peruvian Sardines" in English or "Südamerikanische Sardinen" in German), is inconsistent with Article 2.4 of the TBT Agreement because the European Communities did not use the naming standard set out in paragraph 6.1.1(ii) of Codex Stan 94 as a basis for its Regulation even though that standard would be an effective and appropriate means to fulfil the legitimate objectives pursued by the Regulation.
- (b) If the Panel were to find that the EC Regulation is consistent with Article 2.4 of the TBT Agreement, Peru requests the Panel to find that the EC Regulation is inconsistent with Article 2.2 of the TBT Agreement because it is more trade-restrictive than necessary to fulfil the legitimate objective of market transparency that the European Communities claims to pursue.
- (c) If the Panel were to find that the EC Regulation is consistent with Articles 2.2 and 2.4 of the TBT Agreement, Peru requests the Panel to find that the measure is inconsistent with Article 2.1 of the TBT Agreement because it is a technical regulation that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus*.
- (d) If the Panel were to find that the measure at issue is consistent with the TBT Agreement, Peru requests the Panel to find that it is inconsistent with Article III:4 of the GATT 1994 because it is a requirement affecting the offering for sale of imported sardines that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus*.

3.2 Peru requests the Panel to recommend that the DSB request the European Communities to bring its measure into conformity with the TBT Agreement. Peru further requests the Panel to suggest that the European Communities permit Peru, without any further delay, to market its sardines in accordance with a naming standard consistent with the TBT Agreement.

3.3 The European Communities requests the Panel to reject Peru's claims that the EC Regulation is inconsistent with Articles 2.4, 2.2 and 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

IV. ARGUMENTS OF THE PARTIES

A. *Allocation of the Burden of Proof*

4.1 Peru contends that in the case of Article 2.4 of the TBT Agreement, the elements of the *prima facie* case to be presented by the complainant party include the presentation of evidence demonstrating the existence of a technical regulation; a relevant international standard; and the failure of the European Communities to base the Regulation at issue on the international standard, Codex Stan 94. Peru claims that in the case of Article 2.2 of the TBT Agreement, the elements of the *prima facie* case presented by the complainant party must show evidence of the existence of a technical regulation and of the trade-restrictive consequences of that regulation. Peru argues that it is then for the European Communities, as the Member imposing the technical regulation, to justify in terms of its own legitimate objectives the failure to base its technical regulation on the international standard in the case of Article 2.4 of the TBT Agreement, and the need to impose a trade-restrictive technical regulation in the case of Article 2.2 of the TBT Agreement.

4.2 Peru also submits that in allocating the evidentiary burden on the specific elements of Articles 2.2 and 2.4 of the TBT Agreement, the provisions of Article 2.5, as well as the object and purpose of the TBT Agreement, need to be taken into account. In Peru's view, Article 2.5 of the TBT Agreement reflects the fact that if a Member adversely affected by a technical regulation had to explain and demonstrate that the deviation from an international standard is not necessary to fulfil a legitimate objective, it would have to prove the negative, which is impossible. Peru argues that the terms of Article 2.5 relate to a pre-dispute settlement situation and therefore do not establish a rule for the allocation of the burden of proof. However, Peru considers that Article 2.5 of the TBT Agreement does reflect a principle that also applies during the dispute settlement stage, namely the principle that a party to a dispute cannot be asked to prove the negative. Article 2.5 establishes not only a right for the Members adversely affected by a technical regulation; it establishes also an important right for the Member that has prepared, adopted or applied the regulation. This is the right to indicate which legitimate objective it is pursuing with a regulation challenged under Article 2.4 of the

TBT Agreement and why it could not use the relevant international standard as a basis. This right is important because it means that it is that Member which may determine the policy objectives and constraints against which a challenged regulation is evaluated. It is important that this right be respected also in panel proceedings. Prior to the exercise of that right, the complainant may, depending on the circumstances of the case, only be able to guess what the objectives and constraints of the defendant might be. It is only after the defendant has exercised its right that the complainant is in the position to present evidence demonstrating that the objective identified can be achieved by using international standards as a basis. Article 2.5 therefore distributes the "burden of explanation" in the pre-dispute settlement situation in the same manner as the burden of proof should be distributed during dispute settlement proceedings. Peru concludes that it is for the European Communities to present evidence explaining why the monopolization of the name sardines for *Sardina pilchardus* is necessary to achieve the declared objective of market transparency.

4.3 Peru subsequently argues that in light of the extensive evidence submitted by both parties and Canada, it is no longer necessary for the Panel to decide the question of whether there is an allocation of the burden of proof specific to Articles 2.2 and 2.4 of the TBT Agreement. Noting the Appellate Body's statement in *EC — Hormones* that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case", Peru argues that it established a *prima facie* case of violation of Articles 2.4, 2.2 and 2.1 of the TBT Agreement. Thus, Peru claims that whether the burden of proof is allocated on the basis of the specific provisions and objectives of the TBT Agreement or on the basis of the generally applicable principles followed by the Appellate Body, the result would be the same.

4.4 The **European Communities** agrees with Peru that it is for the party asserting a particular claim or a defence to prove such a claim or defence, but rejects Peru's interpretation of Article 2.5 of the TBT Agreement. The European Communities submits that the scope of Article 2.5 is to enhance the transparency that a central government body has to follow when preparing, adopting and applying a technical regulation; therefore, Article 2.5 of the TBT Agreement is not intended, as Peru alleges, to establish a higher threshold of explanation.

4.5 The European Communities argues that the Appellate Body in *EC — Hormones* dealt with a provision in the Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement") that is parallel to Article 2.5 of the TBT Agreement:

Article 5.8 of the SPS Agreement does not purport to address burden of proof problems; it does not deal with a dispute settlement

situation. To the contrary, a Member seeking to exercise its right to receive information under Article 5.8 would, most likely, be in a pre-dispute situation, and the information or explanation it receives may well make it possible for that Member to proceed to dispute settlement proceedings and to carry out the burden of proving on a prima face basis that the measure involved is not consistent with the SPS Agreement.

4.6 The European Communities contends that the burden of proving that Article 2 of the EC Regulation is not in conformity with paragraphs 4, 2 and 1 of Article 2 of the TBT Agreement and with Article III:4 of GATT 1994 rests entirely with Peru. Accordingly, all the elements of Article 2.4 of the TBT Agreement that must be demonstrated to establish a *prima facie* case are: that a technical regulation has been prepared; that "a relevant international standard" was in existence or imminent; that the Member did not use the standard or the relevant part of it as a basis for the technical regulation; and that the use of the standard was ineffective or inappropriate for the fulfilment of the legitimate objectives pursued.

4.7 The European Communities further argues that, according to Article 2.2 of the TBT Agreement, Peru has to demonstrate trade-restrictive effects; identify correctly the legitimate objectives pursued; and finally, establish that these restrictive effects are more trade-restrictive than necessary.

4.8 With regard to Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, concerning which the European Communities asserts that Peru has indicated no criterion to allocate the burden of the proof, the European Communities claims that, in line with the consolidated WTO jurisprudence on the matter, Peru must present evidence and argument sufficient to establish a presumption that Article 2 of the EC Regulation is inconsistent with its obligations under these Articles. The European Communities argues that Peru must prove that (1) it is a law, regulation or requirement affecting the internal sale, offering for sale, purchase, distribution or use; (2) the imported and domestic products affected by it are "like"; and (3) the treatment accorded to the imported products is less favourable.

B. Whether the EC Regulation is a Technical Regulation

4.9 **Peru** notes that paragraph 1 of Annex 1 of the TBT Agreement defines the term "technical regulation" as a document which lays down product characteristics with which compliance is mandatory and submits that the EC Regulation, according to its title, lays down "common marketing standards for preserved sardines". Peru argues that the EC Regulation constitutes a technical regulation within the meaning of Annex 1 of the TBT Agreement because it lays down characteristics preserved sardines must possess if they are to be marketed under the name sardines in the European Communities. In particular, Peru submits that Article 2 of the EC Regulation states which characteristics preserved sardines must possess in order to market them in the European Communities

under the name "sardines" and notes that one such characteristic is that the product in question must be prepared from the fish of species *Sardina pilchardus*. Peru also argues that the language of Article 9 of the EC Regulation which provides that the EC Regulation "shall be binding in its entirety and directly applicable in all Member States" makes compliance with the measure mandatory.

4.10 The **European Communities** accepts that its Regulation is a technical regulation for the purposes of the TBT Agreement and that it lays down marketing standards for preserved *Sardina pilchardus*. The European Communities submits that, in 1989, it notified the Regulation at issue under the Tokyo Round Agreement on Technical Barriers to Trade (the "Tokyo Round Standards Code"). Referring to the Appellate Body's statement in *EC — Asbestos* that "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole", the European Communities, therefore does not accept that Article 2 of the EC Regulation, taken in isolation, is a technical regulation as Peru claims. The European Communities argues that Article 2 can only be interpreted in the context of the entire Regulation.

4.11 The European Communities submits that its Regulation provides that the name specified for preserved *Sardina pilchardus* cannot be used for other products. However, this does not mean that it lays down mandatory labelling requirements for products other than preserved *Sardina pilchardus* and therefore it is not considered a technical regulation for preserved *Sardinops sagax*, preserved herrings or any other product except *Sardina pilchardus*. The system of rules concerning the labelling of foodstuffs in the European Communities is established by Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the member States relating to the labelling, presentation and advertising of foodstuffs (the "EC Directive 2000/13").⁷ EC Directive 2000/13 sets out the basic framework and is designed to be complemented by more detailed European Communities rules or, in their absence, more detailed member States rules.

4.12 The European Communities further submits that Article 2 of its Regulation is not a technical regulation because the definition of a technical regulation in the TBT Agreement refers only to labelling, not naming. The names of the products of interest to Peru and the third parties are set out in various measures of the member States of the European Communities which have not been identified by Peru. It is EC Directive 2000/13, in conjunction with the various measures of the member States of the European Communities that constitute the technical regulation for the products identified by Peru and the third parties.

4.13 In response to the European Communities' arguments, **Peru** claims that it considers the whole of the EC Regulation to be a technical regulation because it lays down the characteristics of the product that may be marketed as preserved sardines. Peru, however, argues that it is only challenging in this dispute the WTO-consistency of the requirement set out in Article 2 of the EC Regulation which reserves the use of the term "sardines" exclusively for *Sardina pilchardus*.

⁷ OJ L 109 of 6.5.2000, pp. 29-42.

Peru argues that the other elements contained in the EC Regulation are nevertheless relevant in determining whether this requirement is consistent with Articles 2.1, 2.2 and 2.4 of the TBT Agreement.

4.14 In respect of the European Communities' argument that the Regulation at issue is not a technical regulation for preserved *Sardinops sagax* or any other product except preserved *Sardina pilchardus*, Peru argues that it never claimed that the EC Regulation indicates the name under which *Sardinops sagax* must be marketed and that it is not challenging the European Communities' regulations governing the naming of products made from *Sardina pilchardus*. Peru argues, on the contrary, that it is challenging the prohibition of the use of the word "sardines" as a trade name for *Sardinops sagax*.

4.15 Peru explains that the reason for initially referring to the EC Regulation as a labelling requirement⁸ is based on the fact that paragraph 6 of the Codex Standard for Canned Sardines and Sardine-Type Products is entitled "LABELLING" and sub-paragraph 6.1 is entitled "NAME OF THE FOOD". Peru argues that for the drafters of the Codex standard, the rule on the naming of sardines constituted a labelling requirement and Peru therefore considered it appropriate to describe the EC Regulation as a labelling requirement. Peru further submits that EC Directive 2000/13, to which the European Communities refers to in its arguments, unlike the Codex Stan 94, makes a distinction between rules setting out which characteristics must be indicated on the packages in which foodstuffs are sold (labelling requirements) and rules prescribing the name under which a product must be sold (naming requirement). Peru argues that Article 2 of the EC Regulation neither states which characteristics must be indicated on the packages containing products made from *Sardinops sagax* nor prescribes the name under which such products must be sold. According to Peru, the prohibition on the use of the term "sardines" in the trade description of products made from *Sardinops sagax* therefore appears to be neither a labelling requirement nor a naming requirement within the meaning of EC Directive 2000/13.

4.16 Peru claims that the European Communities' argument that Article 2 of its Regulation is not covered by the TBT Agreement because the definition of a technical regulation refers only to labelling but not to naming is incorrect. Peru, however, claims that whether the EC Regulation should be called a "labelling" requirement, a "naming" requirement or simply a "terminology" requirement is a question that the Panel need not address. Peru argues that a technical regulation covers any "document which lays down product characteristics" and the EC Regulation is indisputably part of such a document. Peru concludes that the prohibition of the use of the term "sardines" in the trade name for products that do not conform to the product characteristics set out in the EC Regulation comes within the ambit of the definition of technical regulations.

⁸ Peru initially argues that the EC Regulation constitutes a technical regulation in the form of a labelling requirement. Subsequently, in response to a question posed by the Panel, Peru states that "at issue in this dispute is not a labelling requirement *per se* but a technical regulation laying down the characteristics of the products that may be marketed as preserved sardines".

C. *Application of the TBT Agreement to Measures Adopted before 1 January 1995*

4.17 The **European Communities** argues that Article 2.4 of the TBT Agreement is not applicable to measures that were drawn up before its entry into force. Article 2.4 of the TBT Agreement requires WTO Members to *use* existing relevant international standards *as a basis for* drawing up their technical regulations when they decide that these are required. The European Communities therefore submits that the obligation exists prior to the adoption of the measure, not afterwards.

4.18 The European Communities argues that the language of Article 2.4 of the TBT Agreement makes clear that it does not apply to the *existence or maintenance* of technical regulations. In support of this argument, it submits that Article 2.4 is different from the provision of the SPS Agreement considered by the Appellate Body in *EC — Hormones*. According to the European Communities, in that case, the Appellate Body based its view on the wording of Articles 2.2, 3.3 and 5.6 of the SPS Agreement, all of which include the word "maintain" and is absent from Article 2.4 of the TBT Agreement.

4.19 The European Communities argues that Article 2.4 of the TBT Agreement, by its clear terms, only applies to the *preparation and adoption* of technical regulations. It argues that the preparation and adoption of the Regulation, in contrast to its maintenance, are "acts or facts which took place, or situations which ceased to exist, before the date of [the] entry into force" of the TBT Agreement within the meaning of Article 28 of the Vienna Convention on the Law of Treaties (the "Vienna Convention"), entitled "Non-Retroactivity of Treaties".⁹

4.20 The European Communities further argues that it is only possible to use relevant international standards as a basis for the technical regulation when the technical regulation is being drafted or when it is amended. However, this particular question is not before the Panel because the EC Regulation has not been amended. In its view, the question is whether Members are under an obligation after the WTO Agreement entered into force to revise their existing technical regulations to ensure that they could be considered to have used international standards "as a basis". It is clear from the text of Article 2.4 of the TBT Agreement, especially the words "where technical regulations are required", that such an obligation has not been created by Article 2.4.

4.21 With regard to Article XVI:4 of the Marrakesh Agreement Establishing the WTO (the "WTO Agreement"), the European Communities argues that this provision creates an obligation to ensure that WTO obligations are complied with, but the precise scope of the obligations depends on the language of each

⁹ Article 28 reads as follows:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

specific provision under the covered agreements. In the European Communities' view, Article XVI:4 does not render WTO obligations applicable to acts performed before the entry into force of the WTO Agreement where this does not result from the terms of the provision itself. The European Communities argues that there must be an obligation somewhere in the covered agreements before Article XVI:4 can have effect and the wording of Article 2.4 of the TBT Agreement makes clear that there is no obligation to revise existing technical regulations to bring them into conformity with international standards.

4.22 **Peru** submits that Article 2.4 of the TBT Agreement does not oblige WTO Members to use international standards as a basis for drawing up their technical regulations when Members decide that these are required but "where technical regulations are required". Accordingly, Peru argues that Article 2.4 applies to situations in which technical regulations are required and not merely at the time when the decision to adopt them is taken. In Peru's view, an international standard can be "used" both in drafting a new technical regulation and in amending an existing regulation. Therefore, Peru contends that the temporal element the European Communities claims to see in the wording of Article 2.4 of the TBT Agreement simply does not exist.

4.23 Peru contends that the European Communities' argument cannot be reconciled with the principle of non-retroactivity of treaties enshrined in Article 28 of the Vienna Convention. Peru points out that, in the instant case, both the international standard and the EC Regulation continued to exist after the entry into force of the TBT Agreement. Accordingly, Peru claims that the European Communities has been, since 1 January 1995, under the obligation to use Codex Stan 94 as a basis for its Regulation. Moreover, Peru submits that the European Communities' argument has no basis in fact because the naming standard incorporated in Codex Stan 94 did exist when the European Communities adopted the Regulation at issue. Peru notes that the current version of this standard was adopted in 1978, 11 years prior to the adoption of the EC Regulation in 1989.

4.24 Peru further submits that the text of Article 2.4 of the TBT Agreement does not distinguish between regulations adopted after the standard was prepared and regulations adopted before the standard was prepared. Peru argues that the European Communities' proposition cannot be reconciled with Article XVI:4 of the WTO Agreement, according to which "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided for in the annexed Agreements".

4.25 Furthermore, Peru recalls that the Appellate Body rejected a similar claim by the European Communities in *EC — Hormones* where it stated that "if the negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 ... it appears reasonable to us to expect that they would have said so explicitly". Peru concludes that given the general principle enshrined in Article XVI:4 of the WTO Agreement, existing legislation can be deemed to be exempted from WTO law only if a provision in one of the agree-

ments annexed to the WTO Agreement specifically provides for such an exemption; however there is no such exemption in the TBT Agreement.

D. Article 2.4 of the TBT Agreement

1. Whether Codex Stan 94 is a Relevant International Standard

4.26 **Peru** argues that Codex Stan 94 is a relevant international standard. Peru argues that the Codex Alimentarius Commission, established by the FAO and WHO, is an internationally recognized standard setting body that develops standards for food products. The Codex Alimentarius contains more than 200 standards for foods or groups of foods, of which 28 are standards for fish and fishery products; these standards are an internationally agreed reference point for consumers, food producers and processors, national food control agencies and the international food trade.

4.27 Referring to Canada's third party submission, Peru agrees with Canada's statement that:

The Codex Standard is an "international standard". The TBT Agreement defines "standard" but not "international standard". A standard is defined in Annex 1 as a:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.

The Codex Commission is an internationally recognized standard setting body. Codex standards are the internationally agreed global reference point for consumers, food producers and processors, national food control agencies and the international food trade. The Codex Standard in issue is not mandatory.

4.28 Peru argues that Codex Stan 94 is not only an international standard but is also a relevant international standard and that Members are obliged to use relevant international standards as a basis for their technical regulations. Peru notes that the Codex Stan 94, a standard for canned sardines and sardine-type products, was adopted by the Codex Alimentarius Commission in 1978 and revised in 1995. Peru submits that the products to which Codex Stan 94 applies are sardines and sardine-type products that are prepared from fresh or frozen fish of 21 different species, including *Sardina pilchardus* and *Sardinops sagax*. Peru further notes that paragraph 6.1.1 of Codex Stan 94 states:

The name of the product shall be:

6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or

(ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the

law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

4.29 The **European Communities** does not contest the status of the Codex Alimentarius Commission as an international standardizing body for the purposes of the TBT Agreement. It is also of the opinion that only standards of international bodies with international treaty status that respect the same principles of membership and due process that form the basis for WTO membership should be recognized as international standards.

4.30 The European Communities makes the general observation that Codex Stan 94 contains 20 "sardine-type" species belonging to 11 genera. The underlying rationale for including these 20 species in the list is not apparent as it includes very different species; it is not the fact that they are from a same family, as some of these genera belong to a family other than *Clupeidae*, e.g., *Engaulis anchoita*, *E. mordax* and *E. ringens* (anchovies) which belong to the family *Engraulidae*. The European Communities notes that the common name for some of these species are not sardines and that other species that are called "sardines" in other parts of the world are not included in Codex Stan 94. In its view, the objection of Codex members to include *Clupea bentinckti* at the 24th Session of the Codex Alimentarius Commission illustrates the concern that the list set out in Codex Stan 94 would end up including all *Clupeidae*, and potentially *Engraulidae*, species. The consequence would be that the Codex standard would include so many "sardine-type" species that it would be more misleading than informative for the consumer. To illustrate the difficulties involved in determining the coverage of the species under Codex Stan 94, the European Communities refers to the fact that Peru is exporting *Sardinops sagax* to more than 20 countries under the trade description of "sardines" rather than "Pacific sardines" even though Codex Stan 94 does not permit *Sardinops sagax* to be called "sardines" without any qualification.

4.31 The European Communities claims that Codex Stan 94 cannot be considered a *relevant* international standard. The obligation contained in Article 2.4 is to *use* relevant international standards, where they *exist* or their completion is *imminent*, as a basis for the technical regulation. However, the European Communities claims that Codex Stan 94 is not a relevant international standard within the meaning of Article 2.4 of the TBT Agreement because it did not exist and its adoption was not "imminent" when the EC Regulation was adopted.

4.32 The European Communities further argues that there is no obligation to have used a draft international standard as a basis for a technical regulation if its adoption was not "imminent"; therefore, it cannot have been intended that an already existing technical regulation could become inconsistent with Article 2.4 of the TBT Agreement when the adoption of the draft international standard becomes "imminent" or when it is actually adopted and becomes "existing". The European Communities submits that Peru would have had to invoke non-conformity with the predecessor standard in order to make its case and it has not done so. In any case, the European Communities points out that it did comply with the requirements of the Tokyo Round Standards Code when it adopted its

Regulation and notified it to the GATT. In its view, it is obvious that a 1994 standard cannot be a "relevant standard" for a Regulation adopted in 1989.

4.33 According to the European Communities, another reason for not considering Codex Stan 94 as a relevant international standard is that it was not adopted in accordance with the principle of consensus set out by the TBT Committee in the Decision of the Committee on Principles for the Development of the International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement (the "Decision"). In support of its claim, the European Communities submits the following: (a) According to Rule VI:2 of the Rules of Procedure of the Codex Alimentarius Commission, decisions can be taken by a majority of the votes cast; even if it is not recorded whether Codex Stan 94 was elaborated and adopted by means of a formal vote, it is clear that it was adopted in circumstances in which dissenting members could have been outvoted and, therefore, may have decided not to express their disagreement, i.e., by not insisting on a vote. This is especially so, since the General Principles of the Codex Alimentarius make clear that Codex standards are recommendations that need to be accepted by governments and that their acceptance can be unconditional, conditional or with deviations. (b) Codex Stan 94 has been accepted by only 18 countries, of which only four accepted it fully. None of the member States of the European Communities, or Peru, has accepted the standard. (c) The available records of the discussions relating to Codex Stan 94 demonstrate that Members held diverging views on the appropriate names for preserved sardines and sardine-type products.

4.34 With regard to the elaboration procedure of Codex Stan 94, the European Communities submits that an editorial change, and not a substantive change, was made at step 8 of the procedure. If a substantive amendment had been made at this stage, it would have been necessary to refer the text back to the relevant committee for comments before its adoption. However, if a substantive change had nevertheless been made at step 8 of the Codex elaboration procedure, the European Communities claims that Codex Stan 94 would, in this case, be rendered invalid and could not, therefore, be considered a relevant international standard within the meaning of Article 2.4 of the TBT Agreement.

4.35 Finally, European Communities contends that paragraph 6.1.1(ii) of Codex Stan 94 is not "relevant" for the EC Regulation since the EC Regulation does not regulate products other than preserved *Sardina Pilchardus*, and the relevant part of Codex Stan 94 for the name of this product is paragraph 6.1.1(i).

4.36 **Peru** notes Canada's argument that Codex Stan 94 meets the principles and procedures set out by the TBT Committee in the Decision. Peru agrees with Canada's argument that Codex Stan 94 was developed in a manner consistent with the principles of the Decision, including the resort to the multilateral consensus based approach in establishing the relevant international standard.

4.37 However, Peru claims that the issue of whether or not Codex Stan 94 was in effect adopted by consensus is not an issue that the Panel needs to decide and that the Decision is not a covered agreement for the purposes of the DSU. Peru argues that the Decision is not an authoritative interpretation of the TBT Agree-

ment. In Peru's view, the Decision merely articulates principles and procedures which, in the view of the TBT Committee, should be followed in developing international standards. Peru asserts that it does not define the term "international standard" in Article 2.4 of the TBT Agreement.

4.38 In addition, Peru submits that it is clear from the relevant report of the Codex Alimentarius Commission that Codex Stan 94 was adopted without a vote and that it can reasonably be assumed that when the TBT Committee used the term "consensus" it referred to a decision-making process similar to the one stipulated in the WTO Agreement where Article IX:1 states that "where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting". Therefore, the issue is whether the procedures and practices of the decision-making by consensus followed by the Codex Alimentarius Commission resemble those followed by the WTO.

4.39 For the above reasons, Peru considers that there can be no doubt that Codex standards are adopted in accordance with the principle of consensus as it is understood in the WTO. Furthermore, Peru recalls that in the TBT Committee, the European Communities stated that only the standards of international bodies with international treaty status that respect the same principles of membership and due process that form the basis for WTO membership should be recognized as international standards in the WTO context. According to Peru, the European Communities also stated in the TBT Committee that the Codex Alimentarius Commission could therefore be considered as developing international standards within the meaning of the TBT Agreement.¹⁰ Hence, Peru maintains that the European Communities' argument presented in this dispute cannot be reconciled with the position taken in the TBT Committee. Peru also submits that it is perfectly normal that international standards are adopted after a reconciliation of divergent views, otherwise there would probably be no Codex standard that could be considered to have been adopted by consensus.

4.40 In response to a question posed by the Panel in relation to the meaning of the explanatory note contained in Annex 1 of the TBT Agreement which reads "[t]his Agreement covers also documents that are not based on consensus", Peru argues that "relevant international standards" within the meaning of Article 2.4 of the TBT Agreement include standards that were not adopted by consensus.

4.41 Finally, Peru disputes the European Communities' argument that Codex Stan 94 is not a relevant international standard because the Codex Alimentarius Commission would have violated its procedural rules according to which substantive changes to proposed standards can only be made under certain circumstances. Peru is of the view that it is for the members of the Codex Alimentarius Commission to examine whether the procedural requirements for the adoption of standards have been observed and, if necessary, to request corrective action in accordance with the rules and procedures of the Commission. Peru claims that the Panel is not competent to make findings on such issues.

¹⁰ Committee on Technical Barriers to Trade, Minutes of the Meeting Held on 21 July 2000, G/TBT/M/20, para. 90.

2. *Whether Codex Stan 94 Was Used "as a basis" for the EC Regulation*

4.42 **Peru** argues that Article 2.4 of the TBT Agreement requires Members to use international standards as a basis for their technical regulations except when they are an ineffective or inappropriate means for the fulfilment of their objectives. Peru notes that the ordinary meaning of the word "basis" is "foundation", "main constituent" or "a determining principle". Peru argues that "shall use as a basis" therefore means "shall use as a foundation, main constituent or determining principle".

4.43 Peru claims that a measure would be consistent with paragraph 6.1.1(i) if it requires the term "sardines", when used without any qualification, be reserved for *Sardina pilchardus*. However, Peru contends that all other species referred to in Codex Stan 94 may be marketed, pursuant to sub-paragraph (ii), as "X sardines" where "X" is either a country, a geographic area, the species or the common name of the species. According to Peru, its sardines should therefore be marketable as "Peruvian sardines", "Pacific sardines", or just "sardines" combined with the name of the species or the common name in the European Communities' member State in which the sardines are sold, such as "Südamerikanische Sardinen" in Germany. Peru contends that in each of the four alternatives set out in this labelling standard, the term "sardines" is part of the trade description and a total prohibition on the use of the term "sardines" in the labelling of canned sardines is not foreseen.

4.44 Peru argues that it is therefore inconsistent with sub-paragraph (ii) of paragraph 6.1.1 of Codex Stan 94 if sardines of the species *Sardinops sagax* may not be marketed under the name "sardines" qualified by the name of a country, name of a geographic area of origin, name of the species or the common name. Peru argues that the EC Regulation could only be deemed consistent with Article 2.4 of the TBT Agreement if it had used Codex Stan 94 as a main ingredient, foundation or determining principle in formulating its labelling regulation. Peru claims that no element of the standard contained in paragraph 6.1.1(ii) of Codex Stan 94 is reflected in the EC Regulation. Peru concludes that the EC Regulation is not based on the Codex Stan 94, the relevant international standard, and is therefore inconsistent with Article 2.4 of the TBT Agreement.

4.45 The **European Communities** argues that, under paragraph 6.1.1(ii) of Codex Stan 94, each country has the option of choosing between "X sardines" and the common name of the species. It argues that "the common name of the species in accordance with the law and customs of the country in which the product is sold" is intended to be a self-standing option independent of the formula "X sardines" and that this interpretation is evidenced by the fact that the phrase "the common name of the species in accordance with the law and customs of the country in which the product is sold" is found between commas; there is no comma between "species" and "in accordance with"; and there is a comma before "and in a manner not to mislead the consumer". The Euro-

pean Communities is of the view that the French¹¹ and Spanish¹² versions of Codex Stan 94 make it clear that there is no choice to be made but that there is an express indication that, irrespective of the formula used, it should be in accordance with the law and custom of the importing country and in a way that does not mislead the consumer.

4.46 It is the European Communities' view that under paragraph 6.1.1(ii) of Codex Stan 94, importing Members can choose between "X sardines" or the common name of the species. The fact that the name for products other than *Sardina pilchardus* could not be harmonized and had to defer to each country is reflected in the language "in accordance with the law and customs of the country in which the product is sold". The European Communities notes that there is an additional element contained in Codex Stan 94 that is not applicable to *Sardina pilchardus* but applicable to other species, namely that the trade description of the latter group of species must not mislead the consumer in the country in which the product is sold.

4.47 The European Communities argues that the use of the word "sardines" for products other than preserved *Sardina pilchardus* would not be in accordance with the law and customs of the member States of the European Communities and would mislead the European consumers. The term "sardines" has historically been known as referring to *Sardina pilchardus*. In light of the confusion created by sales of other species, such as sprats as "brisling sardines", the European Communities has constantly attempted to clarify the situation. There is now a uniform consumer expectation throughout the European Communities that the term "sardines" refers only to preserved *Sardina pilchardus*. The names for preserved *Sardinops sagax* that are in accordance with the law and custom of the United Kingdom and Germany are Pacific pilchard and Sardinops or pilchard, respectively. Based on these reasons, the European Communities argues that Article 2 of its Regulation follows the guidance provided by Codex Stan 94.

4.48 In support of its interpretation that Codex Stan 94 allows Members to choose between "X sardines" and the common name of the species in accordance with the law and custom the country in which the product is sold, the European Communities refers to the negotiating history of Codex Stan 94, where the text of paragraph 6.1.1 submitted to the Codex Alimentarius Commission by the technical Committee was divided into three paragraphs, with "the common name of the species" being a third and separate option, and also with the phrase "in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer" separate from the three paragraphs.¹³ The European Communities also argues that the minutes of the meeting

¹¹ The French text reads: 6.1.1 (ii) "Sardines X", "X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce en conformité des lois et usages du pays où le produit est vendu, de manière à ne pas induire le consommateur en erreur.

¹² The Spanish text reads: 6.1.1(ii) "Sardina X" de un país o una zona geográfica, con indicación de la especie o el nombre común de la misma, en conformidad con la legislación y la costumbre del país en que se venda el producto, expresado de manera que no induzca a engaño al consumidor.

¹³ The text of paragraph 6.1.1 submitted to the Commission by the technical Committee reads:

of the Codex Alimentarius Commission at which Codex Stan 94 was definitively adopted show that the text of paragraph 6.1.1, prepared and discussed in steps 1 to 7 of the elaboration procedure, was amended editorially at the meeting. It recalls that this change is described in the minutes as "editorial"; thus, for the reasons explained in paragraph 4.34 above, the European Communities claims that it was not intended to change the substance of the provision but to reconcile the fact that the word "sardines" by itself was reserved exclusively for *Sardina pilchardus* with the last paragraph requiring that any name must be in accordance with the law and custom of the country in which the product is sold. For this reason, the European Communities concludes that the text as proposed to the Codex Alimentarius Commission is a good guide to the intended meaning of the standard.

4.49 The European Communities contends that the Vienna Convention is not applicable to the interpretation of Codex standards. The relatively low importance attached to preparatory documents under the Vienna Convention is due to the fact that treaties are legal texts which are considered and adopted by formal ratification procedures and preparatory documents are not. The European Communities is of the opinion that this rationale does not apply to Codex standards and suggests that if the Panel has any doubt on the interpretation of paragraph 6.1.1(ii) of the Codex Stan 94, the Panel should ask the Codex Alimentarius Commission to provide its view of the meaning of this text.

4.50 The European Communities argues that even if Peru's interpretation were valid in that the term "sardines" must be used with a qualification for species other than *Sardina pilchardus*, Article 2.4 of the TBT Agreement would still not require that such name be used. The European Communities contends that Article 2.4 requires a relevant international standard to be used as a basis for the technical regulation and claims that Article 2.4 requires WTO Members to use an existing relevant international standard as *a* basis for drawing up their technical regulations when they decide that these are required and not as *the* basis for the technical regulation. Article 2.4 does not require Members to follow these standards or comply with them. Furthermore, the European Communities argues that Article 2.4 expressly states that a Member may only use the relevant parts of the international standard — that is the parts that are related to the objective pursued by the required technical regulation.

4.51 The European Communities recalls that the Appellate Body has already ruled, in the context of the SPS Agreement, that "based on" cannot be interpreted as meaning "conform to" and therefore reversed a panel ruling that was based on such an interpretation and that found that a European Communities' measure was

The name of the product shall be:

- (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or
 - (ii) "X sardines", where "X" is the name of a country, a geographic area, or the species; or
 - (iii) the common name of the species;
- in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

not "based on" a Codex standard because it did not conform to it. The Appellate Body reasoned in particular that "specific and compelling language" would be needed to demonstrate that sovereign countries had intended to vest Codex standards, which were "recommendatory in form and language", with obligatory force. According to the European Communities, there is no such intention expressed in Article 2.4 of the TBT Agreement. In fact, the text of this provision indicates an even weaker requirement to take a standard into account than was the case with the SPS Agreement.

4.52 Therefore, the European Communities claims that it has "complied with" the text of the Codex Stan 94, because Article 2 of the EC Regulation follows the guidance it provided. Article 2.4 of the TBT Agreement allows WTO Members flexibility and requiring preserved sardine-type products to use the names under which they are known in the European Communities' member States falls within this margin of flexibility.

4.53 **Peru** disagrees with the European Communities' interpretation of paragraph 6.1.1(ii) of the Codex Stan 94. Peru is of the view that this provision clearly states that the name of the sardines other than *Sardina pilchardus* shall be "X sardines". Peru argues that both sub-paragraphs of paragraph 6.1.1 indicate the name to be given to sardines in inverted commas. Peru contends that it would therefore not be valid to conclude from the comma before the words "or the common name of the species" that "X" does not apply to this alternative.

4.54 Peru argues that the official languages of the FAO and WHO are English, French and Spanish and that the French text makes it absolutely clear that the Codex Stan 94 was not meant to permit countries to choose between "X Sardines" and the common name of the species. Translated word for word, Peru states that the French text would read in English: "'X sardines', 'X' designating a country, a geographic area, the species or the common name of the species". Peru claims that the French text thus leaves no doubt that the common name is not an option separate from the "X Sardines" option but is one of the four designators defined by "X". According to Peru, the Spanish text is also clear on this point; translated word for word, the Spanish text would read in English: "Sardines X" from a country or a geographic area, with an indication of the species or the common name of the species. Peru asserts that the Spanish text thus clarifies that the drafters of the Codex Stan 94 meant to create the option of adding the common name to the word "sardines", not the option of replacing the word "sardines" with a common name.

4.55 Contrary to the assertion of the European Communities, Peru argues that the drafting history of the Codex Stan 94 confirms that its final version was not meant to give countries the choice between "X Sardines" and the common name of the species. Concerning the separate third option of the text as submitted to the Codex Alimentarius Commission, Peru argues that this option was explicitly deleted at the session during which the current standard was adopted. This therefore confirms the drafters' intention.

4.56 With reference to the European Communities' argument that the change in draft was editorial in nature, Peru submits that since the drafters of the final ver-

sion of Codex Stan 94 described the change from the earlier version as "editorial", rather than substantive, they were obviously of the view that the earlier version had already expressed what they intended to state in the final version, albeit imperfectly. Peru submits that the reference to the editorial nature of the change therefore clearly implies that, in the view of the drafters, both versions were meant to express the same idea but that the final version expressed it more clearly. The European Communities' suggestion that the Panel rely on the earlier version as a better expression of the meaning of the final version therefore lacks a logical basis.

4.57 Peru recalls that according to Article 32 of the Vienna Convention, the meaning of a treaty may be determined by having recourse to the preparatory work if, and only if, an interpretation based on the text leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. Peru argues that while Article 32 of the Vienna Convention is not directly applicable to Codex standards because they are not treaties, the basic legal principle reflected in this provision is nevertheless relevant to the interpretation of those standards as well. Peru argues that Governments must be able to rely on the Codex standards as drafted. Only if their meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, can they be expected to have recourse to supplementary means of interpretation. According to Peru, Codex standards could simply not fulfil their function if governments always had to examine their drafting history in order to determine their meaning. Peru therefore argues that the reference to "international standards" in Article 2.4 of the TBT Agreement can therefore only be understood to be a reference to those standards as drafted, except in the situations referred to in Article 32 of the Vienna Convention.

4.58 Peru contends that the terms "in accordance with the law and custom" qualify the immediately preceding terms "of a country, a geographic area, the species, or the common name of the species". This means that selection of the country, area, species or common name may be made in accordance with the domestic law and custom. However, there is nothing in the wording of paragraph 6.1.1(ii) to suggest that the whole of the standard set out in this provision applies only if, and as long as, there is no contrary law and custom. The provision gives four options as to the designator (the "X") with which the term "sardines" may be combined (country, area, species, common name) and leaves it to each country to choose among those options in accordance with its laws and customs. Peru argues that there is no logic in the European Communities' claim that, because it may apply Codex Stan 94 in accordance with its law and custom, it may not apply it at all. In Peru's view, an internationally agreed technical standard would be meaningless if domestic laws and customs could be invoked to justify a deviation. Peru argues that it would be absurd, and hence contrary to the established principles of interpretation, to impute that intention to the drafters of paragraph 6.1.1(ii).

3. *Whether Codex Stan 94 is Ineffective or Inappropriate to Fulfil the Legitimate Objectives Pursued by the EC Regulation*

(a) *Whether the EC Regulation Fulfils a Legitimate Objective*

4.59 **Peru** submits that the purpose of the TBT Agreement is to prevent unnecessary obstacles to international trade and to further the objectives of the GATT 1994. Peru argues that the objectives of creating obstacles to trade and of affording protection to domestic producers are therefore clearly not "legitimate" objectives within the meaning of Article 2.2 of the TBT Agreement. Beyond this, Peru argues that the TBT Agreement contains no normative guidance as to the range of policy objectives that WTO Members may pursue with technical regulations. Peru claims that the TBT Agreement is essentially an agreement regulating *how* Members should pursue their policy objectives, not *which* policy objectives they should pursue.

4.60 The **European Communities** argues that the objectives pursued by Article 2 of the EC Regulation are consumer protection, market transparency and fair competition and that these are separate but interdependent objectives. It further explains that the legitimate objectives of the entire EC Regulation are the following: (a) to keep products of unsatisfactory quality off the market; (b) to facilitate trade relations based on fair competition; (c) to ensure transparency of the market; (d) to ensure good market presentation of the product; and (e) to provide appropriate information to consumers. According to the European Communities, the first objective only relates to preserved *Sardina pilchardus*. This is pursued through the prohibition of the marketing of products of substandard quality. The European Communities further argues that the third objective pursues consumer protection and the promotion of fair competition, and that the promotion of fair competition is in the interest of consumers but also serves wider economic objectives.

4.61 The European Communities argues that all objectives of WTO Members can be presumed to be legitimate and that this is a corollary of the principle that States must be presumed to act in good faith. In its view, if the objective is legitimate, WTO Members have the right to choose the level of protection they consider appropriate, as it is recognized in the preamble to the TBT Agreement. The European Communities also notes that the Appellate Body has confirmed that the WTO Agreements do not restrict the right of Members to fix the level of protection for their legitimate objectives. Quoting a passage in the preamble to the SPS Agreement similar to that in the TBT Agreement, the European Communities notes for example that the Appellate Body in *EC — Hormones* held that: "this right of a Member to establish its own level of sanitary protection under Article 3.3 of the SPS Agreement is an autonomous right". The European Communities notes that the Appellate Body made similar statements in *EC — Asbestos*, *Korea — Various Measures on Beef*, and *Australia — Salmon*.

4.62 The European Communities argues that its Regulation must be examined in the framework of the system of rules concerning labelling of foodstuffs in the European Communities. The objectives of EC Directive 2000/13 are to protect consumers and prevent distortions of competition. These objectives are fulfilled by laying down detailed and precise requirements as to how products should be labelled. The European Communities points out that EC Directive 2000/13 states that labelling must not mislead purchasers and establishes the principle that there should be a single correct name for a given foodstuff. The hierarchy of rules for determining the correct name for a foodstuff is: the name laid down in European Communities legislation; the name provided for in the laws, regulations and administrative provisions applicable in the member States in which the product is sold; the name customary in the member State in which the product is sold; and a description of the foodstuff, and if necessary, of its use which is clear enough to let the purchaser know its true nature and distinguish it from other products with which it might be confused.

4.63 In response to a question of the Panel, the European Communities submits that Article 7(c) of its Regulation refers to "preparations using homogenized sardine flesh" and that those products are "pastes", "pâtés" and "mousses". It argues that the consumers are informed about the content of the above products because: as stated in the first paragraph of article 7(c), "the trade description must indicate the specific nature of the culinary preparation"; and according to article 3.1.2 and 3.1.3 of EC Directive 2000/13, the list of ingredients and the quantity of certain ingredients or categories of ingredients must be indicated on the labelling.

4.64 The European Communities further submits that, according to Article 7(c) of the Regulation at issue, a can containing at least 25% of homogenised *Sardina pilchardus* flesh and the remainder containing "the flesh of other fish which have undergone the same treatment" can be marketed as "sardine paste", "sardine pâté", or "sardine mousse" only if the content of the flesh of any other fish is less than 25%. The European Communities explains that Article 7(c) does not derogate from Article 2, first indent, of the EC Regulation, which means that such a preparation must still be covered by CN code ex 1604 20 50. The European Communities therefore submits that according to Note 2 to the introduction of chapter 16 of the European Communities Combined Nomenclature, in cases where "the preparation contains two or more of the products mentioned above, it is classified within the heading of chapter 16 corresponding to the component or components which predominate by weight".

4.65 Therefore, the European Communities submits that if the predominant weight is, for instance, mackerel, the corresponding heading would be that corresponding to mackerel and not to *Sardina pilchardus*. The European Communities argues that such a product could not be marketed under the trade description "sardines" but would have to be marketed under the name provided for in the laws, regulations and administrative provisions applicable in the member State in which the product is sold, in accordance with Directive 2000/13. The European Communities also submits that the term "other fish" in Article 7(c), second para-

graph, refers to any other fish species, including but not limited to both *Sardinops sagax* and any other non-sardine-type fish species.

4.66 **Peru** notes that there is no disagreement with the European Communities that the objectives that it claims to pursue with its Regulation are legitimate objectives within the meaning of both Article 2.2 and 2.4 of the TBT Agreement. However, Peru submits that the objective to "improve the profitability of sardine production in the Community" as stated in the preambular part of the EC Regulation is not a "legitimate" objective within the meaning of the TBT Agreement. Peru argues that even though the TBT Agreement does not define the term "legitimate", its purpose is to further the objectives of the GATT 1994 and to avoid restrictions on international trade disguised as technical regulations. Peru argues that the TBT Agreement regulates how Members should pursue their policy objectives, not which policy objectives they should pursue.

4.67 Peru submits that when the European Communities notified its Regulation in 1989 to the Parties of the Tokyo Round Standards Code, it indicated that the objective and rationale of the EC Regulation was "consumer protection". However, Peru observes that the EC Regulation lays down minimum quality standards only for products made from *Sardina pilchardus*. Peru contends that if the concerns of consumers had been at the origin of the EC Regulation, the European Communities would not have limited its application to the species of sardines that populates European waters but would have adopted a regulation which also covers like products made from sardines harvested in the waters of other WTO Members.

4.68 In support of its reasoning, Peru first submits an opinion on the quality and the appropriate commercial name of Peruvian sardines prepared by a German food inspection institute, the Nehring Institute, and by the Federal Research Centre for Fisheries, Institute of Biochemistry and Technology of Germany which states that "the characteristics in taste and smell [of the product made from *Sardinops sagax*] are very similar to the products of *Clupea pilchardus* which come from Europe and North-Africa". Peru also submits that according to an open letter addressed by the Consumers' Association to the Advisory Centre on WTO Law, and whose facts and arguments Peru requests to be considered as part of its submission to the Panel, the EC Regulation "does nothing to promote the interests of European consumers".

4.69 Peru also argues that, according to Article 7(c) of the EC Regulation, fish processors could market fish paste using the name "sardines" provided that they add flesh from *Sardina pilchardus* to the flesh from *Sardinops sagax*. Therefore Peru contends that this part of the EC Regulation promotes the market opportunities of European sardine producers. Peru also notes the European Communities' argument that, in spite of the permission to use the term "sardines" for products of which up to one half is not prepared from *Sardina pilchardus*, the consumer would be adequately informed because the list of ingredients would have to indicate the quantities of each of the ingredients used. Peru contends that this argument cannot be reconciled with the European Communities' claim that the use of the term "sardines" for a product made from *Sardinops sagax* must be prohibited

to protect the European consumer even if the list of ingredients indicates that it was made from *Sardinops sagax*.

4.70 Concerning the objective of maintaining market transparency, Peru argues that there is no rational connection between the objective of ensuring market transparency and the monopolization of the name "sardines" for fish of a species found mainly off the coasts of the European Communities and Morocco. Peru claims that the effect of monopolizing the name "sardines" for one species of sardines is that importers of Peruvian sardines are prevented from informing the European consumers in commonly understood terms of the content of hermetically sealed containers. As a result, market transparency is reduced. Peru argues that if cans with products prepared from Peruvian sardines were labelled as "Pacific Sardines" market transparency would be ensured.

4.71 The **European Communities** argues that the provisions of its Regulation laying down minimum quality standards, harmonizing the ways in which the product may be presented and regulating the indications to be contained on the label, all serve to facilitate comparisons between competing products. It further submits that some of these objectives are pursued by the Regulation at issue in conjunction with EC Directive 2000/13. The European Communities argues that this is particularly true of the name; accurate and precise names allow products to be compared with their true equivalents rather than with substitutes and imitations whereas inaccurate and imprecise names reduce transparency, cause confusion, mislead the consumer, allow products to benefit from the reputation of other different products, give rise to unfair competition and reduce the quality and variety of products available in trade and ultimately for the consumer.

4.72 The European Communities submits that Peru and some third parties misinterpret the second recital of the preamble to its Regulation. It argues that while the objectives of its Regulation are expressed in clear terms by using the expression "in order to ...", the second recital simply indicates what the legislator thought could be one of the consequences of the Regulation ("...is likely to..."). In the view of the European Communities, it seems obvious that, as regards preserved sardine products, a law that ensures market transparency and fair competition, that guarantees the quality of the products and that appropriately informs the consumer of this, will most likely result in an improvement of the profitability of sardine production in the European Communities.

4.73 Concerning the Nehring Institute, the European Communities contends that its opinion is not reliable as regards the name of the product. The Nehring Institute is a private company and its opinion was not based on any kind of consumer research. It relied on a wrong interpretation of the EC Regulation and indirectly reported oral statements from government officials (which the Nehring Institute cautioned needed to be confirmed). With respect to the letter from the Consumers' Association, the European Communities argues that it provides no evidence of what consumer expectations are and that all the facts referred to in the letter are incorrect. Concerning the objective of market transparency, the European Communities contends that contrary to Peru's argument, it is obvious that there is a "rational connection" between the legitimate objective of

market transparency (and that of consumer protection) and the need to ensure that products are sold under their correct trade descriptions.

(b) Whether Codex Stan 94 is Ineffective or Inappropriate to Fulfil the Legitimate Objectives Pursued by the EC Regulation

4.74 The **European Communities** argues that, in this case, the use of Codex Stan 94, even if deemed relevant, would be inappropriate to fulfil the legitimate objectives pursued by its Regulation. The prohibition on the use of the term "sardines" is necessary to allow different products to be distinguished. The European Communities notes that one of the legitimate objectives recognized by Article 2.2 of the TBT Agreement is the prevention of deceptive practices. It also argues that the use of the term "X Sardines" where the "X" indicates the name of a country or geographic area would not achieve these objectives in the European Communities since the use of the word "sardines" would suggest to the consumer that the products are the same but originate from different countries or geographic areas. Furthermore, the need to prevent deceptive practices is also a requirement of the Codex Stan 94, which requires that whichever formula is used for sardine-type products, it has to be drafted in such a way so as not to mislead the consumer.

4.75 The European Communities submits that the wording of Codex Stan 94 clearly makes a distinction throughout its text between sardine and sardine-type products and expressly reserves the term "sardines" exclusively for *Sardina pilchardus* without any qualification. In most parts of the European Communities, especially in the producer countries, the term "sardines" has historically made reference only to *Sardina pilchardus*. Therefore, the European Communities claims that the use of the term "sardine-type" demonstrates that "sardines" is not considered a generic term.

4.76 The European Communities argues that the various publications referred to by Peru prove nothing about European consumers' understanding of the term "sardines". These publications list the dozens of common names existing for each fish in different languages in order to identify the proper scientific name of each one (as is the case of FishBase) or provide literal translation of all fish names even if these are not known in the country where the language is spoken (as in the case of the European Communities Multilingual Dictionary).

4.77 The European Communities contends that the Regulation at issue does not exist in a vacuum, but is part of its legitimate policy to ensure precision in the names of foodstuffs and in doing so to preserve quality, product diversity and consumer protection. It points out that it has a system in which each food product must bear a precise trade description on which the consumer can rely as a guarantee of the nature and characteristics of the product. It argues further that one result of its legitimate policy is to prevent the names of foodstuffs becoming generic; that is why "sardines" is not a generic term in the European Communities. This situation has now created uniform consumer expectations throughout the European market, the term "sardines" referring only to a preserved product pre-

pared from *Sardina pilchardus*. Therefore, the European Communities argues that an unrestricted use of the term "sardines" even within a country will certainly create confusion as to the exact nature of the product being sold.

4.78 According to the European Communities, this system allows consumers to rely on the name of the product as providing reliable information about the nature and identity of a foodstuff and serves the objective of consumer protection, market transparency. Furthermore, the system allows for competition between manufacturers and producers based on the quality and price of their products and not on attempting to make consumers believe that they are buying something they are not. The European Communities contends that requiring precise names for foodstuffs also ensures that certain reputation can be associated with each particular name and that this is an important element for maintaining high quality and product diversity. Therefore, the European Communities is of the opinion that under a system where names are more flexible and a greater range of foodstuffs can be sold under each name, there is a natural tendency for all producers to use the cheapest ingredients that qualify for the name and allow the associated reputation to be exploited. This would lead to a smaller range of products being made available on the market and a lowering of quality and choice – often referred to as "levelling down".

4.79 The European Communities further argues that consumers in most of its member States have always associated the word "sardines" exclusively with *Sardina pilchardus*. They have also come to know canned *Sardinops sagax* under trade descriptions such as "Pacific pilchards" in the United Kingdom or "Sardinops Pilchard" in Belgium. The European Communities disputes Peru's assertion that European consumers associate *Sardinops sagax* with the trade description "sardines" and claims, to the contrary, that its consumers associate *Sardinops sagax* with trade descriptions such as "Pacific pilchards" and changing these trade descriptions would cause disruption and confusion. This would not be an effective or appropriate means for the fulfilment of the three legitimate objectives mentioned above.

4.80 The European Communities also recalls that, even before the EC Regulation entered into force, European Communities law required the products to be sold under the trade names determined by the laws of the relevant member States, and these laws did not allow the use of the trade description "prepared sardines" to be used for what Peru terms "all species of sardines". The European Communities refers to Council Directive 79/112/EEC of 18 December 1978, the predecessor to EC Directive 2000/13 which states:

The name under which a foodstuff is sold shall be the name laid down by whatever laws, regulations or administrative provisions apply to the foodstuff in question or, in the absence of any such name, the name customary in the member state where the product is sold to the ultimate consumer, or a description of the foodstuff and, if necessary, of its use, that is sufficiently precise to inform the purchaser of its true nature and to enable it to be distinguished from products with which it could be confused.

4.81 The European Communities submits that, in France for instance, Article 1 of "Arrêté Ministériel du 16 mars 1982 pour les poissons marins" prescribed the name "Sardine commune" for the *Sardina pilchardus*, and the name "Sardinops du Chili" or "Sardinops" for the *Sardinops sagax*. Similarly, in Spain, the name "Sardina" has been reserved for *Sardina pilchardus* since at least 1964. In 1984, Article 30.1 of "Real Decreto 1521/1984" of 1 August 1984, in combination with its Annex I, reiterates the attribution of the name "Sardina" to the *Sardina pilchardus*. Moreover, the European Communities notes that United Kingdom's regulations have required the name "Pacific pilchards" for *Sardinops sagax* since at least 1980, well before the adoption of the EC Regulation.

4.82 In conclusion, the European Communities argues that any name for what are considered "sardine-type products" that contains the word "sardines" would not be in accordance with the law and the custom of its member States and would mislead the European consumers.

4.83 **Peru** claims that the European Communities has failed to substantiate its assertion that Codex Stan 94 is an ineffective or inappropriate means for the fulfilment of its legitimate objectives. According to Peru, paragraph 6.1.1(i) of Codex Stan 94 takes into account the legitimate objective pursued by the European Communities, consumer protection, because the term "sardines" without any qualification is reserved for *Sardina pilchardus*. Peru notes that paragraph 6.1.1(ii) of Codex Stan 94 prescribes that products prepared from fish of the species not found in Europe are to be labelled as sardines from a country or geographic area or of a species or their common name. Therefore, even assuming that the European consumers indeed associate the word "sardines" exclusively with *Sardina pilchardus*, they would not be misled if sardines of the species *Sardinops sagax* were marketed as Pacific sardines. Peru argues that the European consumer offered a can labelled "Pacific sardines" or "Peruvian sardines" is not misled because the consumer is clearly informed that the product is not prepared from sardines caught in European waters. It is the use of a term without the word "sardines", such as the term "pilchard", to describe products made from sardines of the species *Sardinops sagax* that would confuse consumers. In this regard, Peru notes that the word "pilchard" is one of the common names for fish of the species *Sardina pilchardus*.

4.84 Peru claims that the name "sardines" is a generic term used to describe fish belonging to a large group of clupeid marine fish sharing the characteristics of young pilchards, and that until the adoption of the EC Regulation in 1989, all species of sardines could be marketed under European Communities law as sardines. Peru submits that the common names of *Sardinops sagax* in European countries are identical to the names to be used for that species according to Codex Stan 94 and argues that the European Communities cannot claim convincingly that the naming of a product, in accordance with linguistic conventions that the European Communities' authorities themselves found to exist in Europe, could mislead the European consumer.

4.85 In support of this claim, Peru argues that various publications prepared by the European Communities, international organizations and specialised institu-

tions confirm that in all European countries at least one of the common names for fish of the species *Sardinops sagax* consists of the word "sardines" (or its equivalent in the national language) qualified by one of the countries or the geographic area in which this species is found, such as "Peruvian sardine" in English; "Sardine du Pacifique" in French; "Sardinha" in Portuguese. Amongst those publications, Peru mentions the "Multilingual Illustrated Dictionary of Aquatic Animals and Plants" - produced by the European Commission in co-operation with the member States of the European Communities and national fishery institutes; the electronic publication known as "FishBase", a publication which was prepared with the support of, *inter alia*, the European Commission, which lists about 110,000 common names for fish; and the Multilingual Dictionary of Fish and Fish Products prepared by the Organisation for Economic Cooperation and Development (OECD).

4.86 Peru claims that the Codex Stan 94 enhances market transparency and that the alternative suggestions of the European Communities have exactly the opposite effect. In the view of Peru, this demonstrates that the European Communities is ready to sacrifice market transparency in order to confer upon its producers the privilege of using the generic term "sardines". It is not apparent to Peru how the European Communities could possibly justify the deviation from the standard set out in paragraph 6.1.1(ii) of Codex Stan 94 in terms of market transparency when the very purpose of the labelling regulations set out in Codex Stan 94 for sardines of species other than *Sardina pilchardus* is to ensure market transparency.

4.87 Peru argues that it is legitimate for a government to adopt regulations giving each food product a precise and specific trade description that does not mislead the consumer. However, Peru argues that it is not legitimate to reserve the use of a generic term for a locally produced product and that the EC Regulation does not implement the legitimate policy of preserving specific and precise trade descriptions for food; it establishes minimum quality standards for products prepared from *Sardina pilchardus* and reserves the commercial benefit of this guarantee to products prepared from sardines originating from European waters. As explicitly recognised in the Preamble to the EC Regulation and further explained in the European Communities' first submission, Peru argues that this is meant to "improve the profitability of sardine production in the Community". According to Peru, it is not meant to ensure that products made from *Sardina pilchardus* are marketed only under one trade name. Peru argues that there are also no other European Communities regulations that establish specific and precise trade descriptions for the other species of sardines covered by the Codex Stan 94.

4.88 Peru argues that Codex Stan 94 does not prevent the European Communities from requiring that each product made from sardines bear a precise trade description on which the consumer can rely. Peru argues that if, for instance, canned fish of the species *Sardina pilchardus* are labelled "sardines" and canned fish of the *Sardinops sagax* are marketed as "Pacific sardines", each of the two

products has a precise trade description and the consumers' expectations are protected and Codex Stan 94 is met.

4.89 Peru contends that it is possible that European consumers, when offered a can labelled "sardines" without any qualification expect to buy a product made from sardines of the species that populate European waters. Peru argues, however, that paragraph 6.1.1(i) of Codex Stan 94 takes this element into account because the term "sardines" without any qualification may be reserved for that species. Peru argues that when European consumers are offered a can labelled "Pacific sardines", they are not misled because they are clearly informed that the product is not prepared from sardines caught in European waters. Therefore, even assuming that European consumers do associate the word "sardines" exclusively with *Sardina pilchardus*, they would not be misled if sardines of the species *Sardinops sagax* are marketed as Pacific sardines. Based on these reasons, Peru concludes that the European Communities did not substantiate its assertion that the Codex Stan 94 is an ineffective or inappropriate means for the fulfilment of its legitimate objectives.

4.90 Peru notes that paragraph 6.1.1(i) of Codex Stan 94 accords the European Communities a privilege enjoyed by no other WTO Members in that it permits an unqualified use of the term "sardines" to the particular species of sardines found off the European coasts. Peru notes that it would be inconsistent with Codex Stan 94 if Peru were to reserve the unqualified use of the term "sardines" for products prepared from *Sardinops sagax* but it must ensure that its domestic food labelling regulation permits the marketing of *Sardina pilchardus* as sardines without any qualification as to their origin. In Peru's view, the European Communities cannot claim that an international standard that was drafted with European Communities' particular situation and interest in mind and accords such a privilege is an ineffective or inappropriate means for the fulfilment of its legitimate objectives.

E. Article 2.2 of the TBT Agreement

1. Whether the EC Regulation is "more trade restrictive than necessary"

(a) Trade-Restrictive Effects

4.91 The **European Communities** argues that neither Peru, nor the third parties, have attempted to show that there is a barrier to trade at all – let alone an "unnecessary" one. It considers that Peru is obviously of the view that it could sell more of its *Sardinops sagax* products – or perhaps get a better price for them – if they could be called "sardines" rather than use their proper names of *Pilchards* or *Sardinops*. The European Communities contends that Peru's belief is not proof.

4.92 The European Communities submits that, in order to establish that Article 2 of the EC Regulation violates Article 2.2 of the TBT Agreement, both Peru and Canada limit themselves to analysing one of the many recitals of the EC Regula-

tion and to asserting that this Regulation, having a clear protectionist intent, constitutes an obstacle to trade. It contends that Peru's and Canada's arguments constitute a tautology, unacceptable in legal proceedings where the complainant has the burden of proving a *prima facie* case. It argues that, Peru, in order to establish that Article 2 of the EC Regulation is applied "with a view to or with the effect of creating unnecessary obstacles to international trade", would have to demonstrate trade-restrictive effects; identify correctly the legitimate objectives pursued; and finally, establish that these restrictive effects are more trade-restrictive than necessary, taking into account the benefits to be expected from the realisation of the legitimate objectives. The European Communities claims that Peru fails to establish any of these requirements for a violation of Article 2.2 of the TBT Agreement.

4.93 Peru argues that under Article 2.2 of the TBT Agreement, it does not have to demonstrate that the EC Regulation has trade-restrictive effects. Peru submits that the drafters of the TBT Agreement proceeded on the assumption that all technical regulations, including those imposed for legitimate reasons, inevitably have trade-restrictive effects. Peru contends that each regulation prescribing the characteristics that an imported product (or process or production method related to that product) must meet imposes burdens that producers and distributors have to comply with and therefore inevitably has trade-restrictive effects. This is reflected in the wording "more trade-restrictive than necessary" in the text of Article 2.2.

4.94 Peru considers that it would not be consistent with established GATT and WTO jurisprudence if Peru were found to be legally required to provide statistical or other evidence demonstrating that the EC Regulation adversely affected its exports. Peru refers to the Appellate Body report on *India — Patents (US)* in support of this view.¹⁴ Peru contends that the TBT Agreement obliges the European Communities to maintain certain conditions of competition for imported products; it is therefore sufficient for Peru to demonstrate that its products are not accorded those conditions of competition. Peru further submits that in interpreting the term "trade-restrictive" in Article 2.2 of the TBT Agreement, the Panel should take into account (a) that the basic provisions of the GATT on restrictive trade measures have been interpreted both in GATT and WTO jurisprudence as provisions establishing conditions of competition and (b) that one of the purposes of the TBT Agreement is to further the objectives of the GATT 1994.

4.95 In support of the above, Peru recalls that the GATT panel on *EC — Oilseeds I* states:

The CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition. Thus they decided that an import quota constitutes an import re-

¹⁴ Appellate Body Report, *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products ("India — Patents (US)")*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, para. 40.

striction within the meaning of Article XI:1 whether or not it actually impeded imports and that a tax on imported products does not meet the national treatment requirement of Article III whether or not the tax is actually applied to imports.¹⁵

4.96 Peru also recalls that the Appellate Body noted this jurisprudence approvingly in *Japan — Alcoholic Beverages II* and ruled that "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products" and that "it is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent".¹⁶

4.97 Peru argues that, according to the above-mentioned panels, the rationale for interpreting Articles III and XI of the GATT 1994 as provisions prescribing the establishment of conditions of competition is obvious: the basic provisions of the GATT 1994 on restrictive trade measures are not only to protect current trade but also to create the predictability needed to plan future trade. They must therefore be interpreted to apply to the regulatory framework governing both current and future trade. Furthermore, Peru submits that it is generally not possible to foresee or control with precision the impact of trade policy measures on import volumes; if the WTO-consistency of a restrictive trade measure were to depend on its actual trade impact, the question of whether a WTO Member is violating its obligations would depend on factors it can neither foresee nor control. Peru further points out that if that were the case, adversely affected WTO Members could only bring a complaint against such a measure after it has been proven to cause damage. Moreover, Peru submits that changes in trade volumes result not only from government policies but also other factors and, in most circumstances, it is therefore not possible to establish with certainty that a decline in imports following a change in policies is attributable to that change.

4.98 Peru contends that the above considerations apply also to the interpretation of the term "trade-restrictive" in Article 2.2 of the TBT Agreement and concludes that any measure adversely affecting the conditions of competition for imported products must be deemed to be "trade-restrictive" within the meaning of Article 2.2, irrespective of its actual trade impact.

4.99 According to the **European Communities**, Peru interprets Article 2.2 of the TBT Agreement to incorporate concepts from Article III:4 of the GATT 1994. It notes that Peru claims that Article 2.2 is concerned with conditions of competition rather than unnecessary restrictions on trade. The European Communities argues that, contrary to Peru's contention, it is not possible to derive from the decisions of the Appellate Body a principle "under GATT and WTO

¹⁵ GATT Panel Report, *European Economic Community — Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins ("EEC — Oilseeds I")*, adopted 25 January 1990, BISD 37S/130, para. 150.

¹⁶ Appellate Body Report, *Japan — Taxes on Alcoholic Beverages ("Japan — Alcoholic Beverages II")* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 110.

jurisprudence that the basic provisions governing international trade protect expectations on conditions of competition, not on export volumes".

4.100 The European Communities submits that the Appellate Body, in the case cited by Peru in support of its original contention, *India — Patents (US)*, chided the panel for pronouncing a "general interpretative principle" according to which "legitimate expectations" concerning in particular the protection of conditions of competition must be taken into account in interpreting the TRIPS Agreement. The European Communities refers to the Appellate Body's statement that "[t]he legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself" and notes that just as in the case of the TRIPS Agreement considered in *India — Patents (US)*, there is no basis for importing into the TBT Agreement concepts that are not there. It argues that the TBT Agreement expressly recognises the right of WTO Members to adopt the standards they consider appropriate to protect, for example, human, animal or plant life or health, the environment, or to meet other consumer interests. The European Communities argues that all technical regulations inevitably affect conditions of competition and claims that if such an effect were sufficient to establish an "obstacle to trade" contrary to Article 2.2 of the TBT Agreement, there would have been no need for the Members to refer, in the TBT Agreement, to *unnecessary* obstacles to trade.

4.101 **Peru** argues that contrary to the assertion of the European Communities, the Appellate Body did *not* chide the panel in *India — Patents (US)* for having endorsed the principle of conditions of competition. In the view of Peru, what the Appellate Body did was to chide the panel for having merged and therefore confused the concepts of "reasonable expectations" and "conditions of competition". Peru respectfully submits that the European Communities does the same in its argumentation.

(b) More Trade-Restrictive than Necessary

4.102 **Peru** recalls that one of the purposes of the TBT Agreement is to further the objectives of the GATT 1994, and argues that according to consistent GATT and WTO jurisprudence, a measure cannot be justified as "necessary" under Article XX(b) and (d) of the GATT 1994 if an alternative measure is reasonably available that is not inconsistent with, or is less inconsistent with, other GATT provisions. Peru argues that the jurisprudence of the GATT and the WTO on the term "necessary" in Article XX(b) and (d) of the GATT 1994 is therefore relevant to the interpretation of the terms "more trade-restrictive than necessary" in Article 2.2 of the TBT Agreement. In Peru's view, a measure should therefore be deemed to be more trade restrictive than necessary within the meaning of Article 2.2, if there is a reasonably available, less trade-restrictive alternative measure that fulfils the Member's legitimate objective and that is consistent with, or less inconsistent with, the TBT Agreement.

4.103 In Peru's view, the considerations on the basis of which the Appellate Body determined in *Korea — Various Measures on Beef* the meaning of the term "necessary" in Article XX(d) of the GATT 1994 are of general application and

should therefore guide the Panel in determining the meaning of the term "necessary" in Article 2.2 of the TBT Agreement, it being understood that the different context in which the term appears in the two provisions would need to be taken into account.

4.104 According to Peru, this means that the Panel should begin by examining whether the measure at issue makes a contribution to the realisation of the two ends that the European Communities claims to pursue (specific trade names and consumer protection). If the Panel reaches the conclusion that the measure does so, it must weigh the importance of the common interests or values realised by the measure against its impact on trade. On the other hand, If the Panel reaches the conclusion that the measure fails to make a contribution to the ends the European Communities claims to pursue, the question of weighing the common interests or values realised against its impact on trade will not arise.

4.105 Peru submits that the prohibition of the term "sardines" for *Sardinops sagax* in combination with the name of a country, geographical area or species or the common name does not make any contribution to the ends that the European Communities claims to pursue. Peru is therefore of the view that the Panel need not engage in a process of weighing up the three elements as conducted by the Appellate Body in *Korea — Various Measures on Beef*.

4.106 According to Peru, in the context of Article XX of the GATT 1994 the term "necessary" qualifies the term "measures", and the necessity test must consequently be applied by the panel to the measure it previously found to be inconsistent with another provision of the GATT 1994 and therefore requires justification under Article XX. However, in the context of Article 2.2 of the TBT Agreement, the term "necessary" qualifies the terms "not more trade-restrictive than", and what must thus essentially be determined to be "necessary" is the obstacle to trade created by the measure challenged by the complainant.

4.107 In the view of Peru, the EC Regulation is more trade restrictive than necessary because there is a less trade-restrictive alternative, namely Codex Stan 94, that is reasonably available, that is consistent with the TBT Agreement and that would fulfil the European Communities' objective. Peru argues that the objective of consumer protection that the European Communities claims to pursue with its Regulation can be met in a less trade-restrictive manner by allowing species other than *Sardina pilchardus* to be marketed as preserved sardines in accordance with the Codex Stan 94; that is, by including designations that inform consumers of the "country, geographic area, the species or the common name of the species in accordance with the law and custom of the country in which the product is sold," for example "Pacific Sardines" or "Peruvian Sardines". By adopting such a measure, Peru contends that the European Communities could provide European consumers with the most precise information possible and reserve the use of the term "sardines" without any descriptor for products made from *Sardina pilchardus*. Peru argues that this alternative is reasonably available, consistent with the TBT Agreement and would permit the European Communities to fulfil its stated objectives while at the same time being less restrictive of trade in preserved sardines.

4.108 Peru also submits, quoting a letter from the Consumers' Association whose arguments Peru presents as part of its submission to the Panel, that

...[t]here is no good reason to restrict sardines marketed within the [European Communities] to the specie *Sardina pilchardus* Walbaum. The equivalent Regulation for common marketing standards for tuna and bonito is not similarly restrictive, but permits, inter alia, Atlantic or Pacific bonito, Atlantic little tuna, Eastern little tuna, black skipjack "and other species of the genus *Euthynnus*". If a permissive and wide range of tuna or bonito species can be marketed in the Community under a common standards regime designed "to improve the profitability of tuna production in the Community" and to protect "consumers as regards the contents of packages" of tuna, it is difficult to understand why sardines should be marked out for a particularly restrictive regulatory regime.

4.109 The **European Communities** argues that even if Peru were to demonstrate that the EC Regulation is trade restrictive, it would still have to show that it is more trade restrictive than necessary in the light of the risks addressed by Article 2 of the EC Regulation.

4.110 With regard to the word "necessary" in Article 2.2 of the TBT Agreement and in Article XX(d) of GATT 1994, the European Communities argues that it is not used in the same context. First, it argues that Article XX(d) of GATT 1994 defines an exception and Article 2.2 of the TBT Agreement an obligation, and, second, Article XX(d) of GATT 1994 requires the measure to be "necessary to secure compliance" and Article 2.2 of the TBT Agreement, on the other hand, provides that the effects of the measure shall be "not more trade-restrictive than necessary". According to the European Communities, Article 2.2 does not strictly require that the measure is "necessary" to fulfil the legitimate objective – only that its effects not be more trade restrictive than necessary. Such a measure could be merely a helpful measure that, alone or perhaps together with other measures, helps in achieving the objective that the government pursues, even if possibly this objective could as well be accomplished in other ways than through the technical regulation in question. Accordingly, the only requirement in its view is that the measure should not be more trade restrictive than necessary, meaning that among two equally effective measures, the less trade restrictive should be chosen.

4.111 The European Communities consequently submits that the first criterion of the Appellate Body in *Korea — Various Measures on Beef* for Article XX(d) (the contribution made by the measure to the realisation of the end pursued) is not relevant for the analysis under Article 2.2 of the TBT Agreement, except that, if one measure is more effective in achieving the objective than another measure, it can be chosen, even if the less effective measure is less trade-restrictive.

4.112 The European Communities argues that the second criterion of the Appellate Body in *Korea — Various Measures on Beef* for Article XX(d) (importance of the common interest) suggests that the degree of permissible trade restriction

would vary according to the importance of the objective pursued. According to the European Communities, however, this criterion is used by the Appellate Body to determine whether the measure is "indispensable" to fulfil the objective or whether it is simply "making a contribution". The European Communities considers that this does not seem relevant for an analysis under Article 2.2 since this provision simply requires a comparison of the trade effect of one measure with that of an alternative that also achieves the same objective, at least at the same level of protection. In providing a non-exhaustive list of legitimate objectives, the TBT Agreement deliberately refrains from setting out any choices as to the relative importance of one objective compared to another.

4.113 The European Communities argues that it is only the third criterion of the Appellate Body in *Korea — Various Measures on Beef* (impact of the measure on imports or exports) that is in one sense relevant to the analysis under Article 2.2. In its view, this follows from the very concept of "not more trade restrictive than necessary". However, the Appellate Body uses this criterion for a purpose that it is not relevant under Article 2.2 for the reasons seen above. The European Communities argues that under Article 2.2, one has to compare the trade effects of two measures, not the necessity of one measure.

4.114 The European Communities disagrees with Peru's assertion that a less restrictive measure would be to provide that preserved *Sardinops sagax* be called Peruvian or South American sardines. The European Communities finds that there is no answer to its argument that such a provision would not achieve its legitimate objective at the level of protection that it seeks and that the EC Regulation, including its rules on names, does not create an obstacle to trade, but promotes it. Moreover, the European Communities contends that the quote from the Consumers' Association does not advance a single new element of fact but simply repeats facts that the European Communities had demonstrated to be wrong.

2. *Taking Account of the Risks Non-Fulfilment would Create*

4.115 According to **Peru**, the phrase "taking account of the risks non-fulfilment would create" is preceded by a comma and therefore refers not only to the term "necessary" but to the whole of the obligation set out in the preceding phrase. Peru contends that if the phrase were to be interpreted to refer to the adverse consequences of a failure to apply the technical regulation, it would add nothing to the necessity test because these consequences would have to be taken into account in any case to determine whether the regulation meets that test. In Peru's view, the phrase was probably added to make clear that a technical regulation merely preventing risks (rather than predictable outcomes) may be both "legitimate" and "necessary", hence making explicit what is implicit in the necessity test set out in Article XX(b) and (d). According to Peru, this issue does not arise in the case before the Panel because neither party claimed that the EC Regulation serves to prevent risks.

4.116 The **European Communities** considers that the words "taking account of the risks non-fulfilment would create" make clear that the question of whether measures are alternatives or not can only be assessed once it has been established whether the alternative, allegedly less trade-restrictive measure, achieves the legitimate objectives of a level of protection at least as high as that achieved by the contested measure. In its view, the "downside" of not meeting the chosen level of protection is clearly an essential element in this consideration. According to the European Communities, it is the "mirror image" of the positive evaluation of whether the measure is capable of meeting the chosen level of protection, and it is only by looking at both sides of the picture that it is possible to compare properly the effectiveness of the two measures. It argues that the quoted words are thus an integral part of the test set out in Article 2.2 of the TBT Agreement (which it considers to be more a "comparison test" than a "necessity test") and that they were intended to preserve, not reduce, the right of WTO Members to determine their appropriate level of protection. The European Communities submits that the reason why these words do not occur in Article XX(b) or (d) of the GATT 1994 is the fact that the tests to be applied in Article XX(b) or (d) of the GATT 1994 are not the same as in Article 2.2 of the TBT Agreement.

4.117 According to the European Communities, the non-fulfilment of the objectives in this case would lead to the marketing of lower quality products, the use of disparate and confusing presentations, labelling and names, unfair competition, the elimination of higher cost and higher quality products from the market, the reduction in the quality and range of products available to the consumer and finally reduction in the reputation and consumption of preserved fish products in the European Communities, to the detriment of all economic operators in the sector and consumers.

F. Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994

1. The Relationship Between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994

4.118 **Peru** argues that the national-treatment requirements set out in Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 are identically worded and have the same objective, i.e., to ensure that internal regulations are not applied so as to afford protection to domestic production. Peru considers that Article 2.1 of the TBT Agreement introduces into the TBT Agreement the national-treatment and the most-favoured-nation principles set out in Articles I:1 and III:4 of the GATT 1994. Peru is of the opinion that the two provisions differ only in their scope: while Article III:4 of the GATT 1994 is broadly worded to cover all regulations affecting the internal sale, offering for sale, purchase, transportation, distribution or use of imported products, Article 2.1 of the TBT Agreement is limited to technical regulations as defined in Annex 1 of the TBT Agreement; in Peru's view, the regulations covered by Article 2.1 at issue are therefore a sub-set of the regulations covered by Article III:4 of the GATT 1994.

For this reason, Peru argues that the jurisprudence developed by the Appellate Body for Article III:4 should be taken into account when interpreting Article 2.1 of the TBT Agreement.

4.119 In Peru's view, its arguments under Article 2.1 of the TBT Agreement on the less favourable treatment of Peruvian sardines and on the likeness of the species *Sardinops sagax* and *Sardina pilchardus* therefore apply equally to Article III:4 of the GATT 1994. Peru is consequently of the view that the EC Regulation is also inconsistent with this provision.

4.120 The **European Communities** contends that Peru's arguments under Article 2.1 of the TBT Agreement refer to its arguments under Article III:4 of the GATT 1994. It explains that it will therefore deal with them in its discussion of Peru's claim under Article III:4 of the GATT 1994.

4.121 Neither the European Communities nor Peru contests that the EC Regulation is a "a law, regulation or requirement affecting the internal sale, offering for sale, purchase, distribution or use" within the meaning of Article III:4 of the GATT 1994.

2. *Whether Domestic Products Prepared from Sardina Pilchardus and Imported Products Prepared from Sardinops Sagax are "like" Products*

4.122 Both **Peru** and the **European Communities** submit that the Appellate Body, in its rulings on *EC — Asbestos*, explained how a treaty interpreter should proceed in determining whether products are "like" under Article III:4 and that it also pointed out that the determination has to be made on a case-by-case basis, employing four criteria in analyzing "likeness":

... (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products. We note that these four criteria comprise four categories of "characteristics" that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes. These general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the "likeness" of particular products on a case-by-case basis.

4.123 **Peru** claims that imported products prepared from fish of the species *Sardinops sagax* and the domestic products prepared from fish of the species *Sardina pilchardus* are "like". In support of its claim, Peru argues that the report it submitted - "*La Sardina Peruana (Sardinops sagax sagax) y la Sardina Europea*

(*Sardina pilchardus*)" - demonstrates that the two species of fish are physically very similar and that there is no scientific or technical reason that would justify a commercial distinction. Peru further submits that according to the opinion of the Nehring Institute and the Federal Research Centre for Fisheries, Institute of Biochemistry and Technology, the characteristics in taste and smell of the product from *Sardinops sagax* are very similar to the products of *Clupea pilchardus* which originate from Europe and North Africa.

4.124 Peru also argues that the process of inclusion of new fish species in Codex Stan 94, as described by Canada in its third party submission, confirms that products made from *Sardina pilchardus* and those made from *Sardinops sagax* are "like", because for the proposed fish species to be included in Codex Stan 94, reports must be submitted from at least three independent laboratories stating that the organoleptic properties, such as texture, taste and smell of the proposed species, after processing, conform with those characteristics of the species already included in the standard. Once a species has been found to meet these criteria, the Codex Alimentarius Commission takes its decision. Therefore, Peru submits that this process ensures that only species that are like from the consumers' perspective are included in Codex Stan 94. Thus, Peru claims that the two products at issue must be considered to be "like" products within the meaning of Article 2.1 of the TBT Agreement.

4.125 Peru thus argues that the physical properties of these products are very similar, and as a result of these similarities, they are capable of serving the same or similar end-uses, and that consumers perceive and treat the products as alternative means to satisfy the demand for preserved sea food. Peru refers in this respect to the Appellate Body's statement in *EC — Asbestos*, where it emphasised that:

Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace.

4.126 According to Peru, a comparison of the physical properties of the two products at issue cannot but lead to the conclusion that the differences between them are of interest to biologists but not to the consumer and therefore do not influence the competitive relationship between them in the market place. The two products therefore must therefore be considered to be "like" products within the meaning of Article 2.1 of the TBT Agreement.

4.127 As to the fourth criterion that has been used for determining likeness – the international classification of the products for tariff purposes – Peru does not consider that this fourth criterion can provide useful guidance in this case. Nevertheless, Peru points out that the Harmonized System does not distinguish between sardines of different species and that WTO Members generally distinguish in their customs tariffs between fresh, frozen and canned sardines but not between sardines of different species.

4.128 Peru notes that the European Communities submitted extensive evidence on the biological differences between *Sardinops sagax* and *Sardina pilchardus*, but argues that it did not submit any evidence to the Panel demonstrating that the differences in physical properties of the two products at issue are such as to influence the competitive relationship between products in the marketplace. Peru further submits that the objection of the European Communities that any products which are in a competitive relationship would have to bear the same name if Peru's argument were to be accepted, would only be valid if all products found to be "like" products had to be treated identically under the national-treatment provisions of the TBT Agreement and the GATT 1994. However, national treatment does not mean identical treatment. It means no less favourable treatment. A GATT panel therefore correctly found that:

The mere fact that imported products are subject ... to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment.¹⁷

The same panel noted that:

there may be cases where application of formally identical provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded to them is in fact no less favourable.¹⁸

These rulings make clear that the national-treatment provisions are not violated if two like products are subject to different naming regulations. In such cases, it has to be assessed whether the different regulations accord imported products less favourable treatment than that accorded to the like domestic product.

4.129 The **European Communities** submits that with regard to living organisms, different species cannot be regarded as "like" for the purposes of being granted the same name because species represent the basic units of biological classifications outside which organisms cannot interbreed and produce viable offspring. European consumers do not consider different species to be so "like" that they should bear the same name. It also submits that from a scientific and biological point of view there is currently only one species of the genus *Sardina*, which is *Sardina pilchardus*, and *Sardinops sagax* belongs to another genus, the genus *Sardinops*. According to the European Communities, both genera belong to the same family *Clupeidae* as do other genera such as *Sardinella*, *Clupea*, *Sprattus*. Therefore, sardines (*Sardina pilchardus*), sardinops (*Sardinops sagax*), round sardinella (*Sardinella aurita*), herring (*Clupea harengus*) and sprat (*Sprattus sprattus*) belong to the same family but to different genera.

¹⁷ BISD 36S/386.

¹⁸ *Ibid.*

4.130 The European Communities also contests Peru's argument that consumers' tastes and habits can be inferred from the fact that two products are "similar". If this were the case, it argues that the Appellate Body would not have considered this as a separate criterion. Consumers' tastes and habits need to be proved with reference to the market concerned, namely the European market. The European Communities is of the opinion that, although not bearing the burden of proof, it has provided the Panel with evidence that European consumers do have the habit of choosing among different, although similar products to satisfy their varied tastes.

4.131 The European Communities also argues that the *Clupeidae* family is composed of 216 species of fish distributed in 66 genera and that if the extension of the use of the denomination "sardines" to *sardinops* was admitted, any of the other 216 species of the same family could be given the same name. In other words, the European Communities considers that if Peru's logic was adopted, namely that two fish can be considered "like" on the basis that they are "physically very similar"; and that they are capable of serving the same or similar end-uses, then, not only the 216 fish belonging to the family *Clupeidae* could be called sardines, but also all preserved sea food.

4.132 In light of the above, the European Communities considers that the "likeness" required of products for the purposes of naming them is much more stringent than it would be for the same products for the purposes of, for example, taxation. For the purposes of naming a product, not all products which are in a competitive relationship are "like" under Article III of the GATT 1994. It argues that if vodka and shochu can be considered "directly competitive or substitutable" for the purpose of internal taxation, it would be hard to say that their "likeness" goes as far as imposing that they be referred to in the same way. If this was the case, apples and oranges, or chicken and turkeys, because they are in a competitive relationship, should bear the same name. According to the European Communities, identical products can have the same name; like products must not.

4.133 The European Communities rejects the opinion of the Nehring Institute and the Federal Research Centre for Fisheries, Institute of Biochemistry and Technology, that Peru put forward to support the organoleptic similarities of products prepared with *Sardina pilchardus* and *Sardinops sagax*.

3. *Whether the Prohibition to Market Products Prepared from Sardinops Sagax under the Name "sardines" Accords a Less Favourable Treatment*

4.134 **Peru** reiterates its argument that the effect of monopolizing the name "sardines" for products made from fish of the species *Sardina pilchardus* is that European consumers of Peruvian preserved sardines cannot be informed that the hermetically sealed containers in which these products are marketed contain sardines, whereas the consumers of products made from *Sardina pilchardus* may be given this information. Peru argues that if the *Sardina pilchardus* is better

known in a particular member State of the European Communities under a name other than "sardines" (for instance, under the name "pilchard") and products made from *Sardina pilchardus* could therefore be marketed more successfully under that name, the seller would be permitted to choose that name. By contrast, Peru argues, the seller of products made from *Sardinops sagax* is not given that choice. Peru therefore claims that the monopolization of the term "sardines" for products prepared from *Sardina pilchardus* accords competitive conditions to those products that are more favourable than those accorded to products prepared from *Sardinops sagax*. Consequently, in Peru's view, the "treatment" that the EC Regulation accords to Peruvian sardines is "less favourable" than that accorded to European sardine products.

4.135 In contrast, Peru contends that it would not be inconsistent with the national treatment requirement if the trade description for Peruvian sardines was "Pacific sardines" and the trade description "sardines" was reserved for European sardines, because this difference would not accord Peruvian sardines less favourable treatment. Peru submits that what renders the EC Regulation inconsistent with the national treatment requirement is not that it treats imported products differently but that the difference in treatment entails less favourable conditions of competition for imported products.

4.136 The **European Communities** argues that within its member States, each different fish of the family *Clupeidae* is sold under its proper correct name, thus benefiting from the specific market and reputation that each of them has developed. It states that it does not understand how this can amount to a measure that "accords to the group of 'like imported products' 'less favourable treatment' than the one it accords to the group of 'like domestic products'". The European Communities submits that the product canned sardines has to meet the standards contained in the EC Regulation whether imported or domestically prepared. Similarly, all other prepared fishes are subject to the same rule whether imported or domestically produced.

4.137 The European Communities argues that "according national treatment" means according a product its correct name, not granting to a different product a competitive opportunity represented by the use of another product's name. It further submits that Peru merely assumes that calling a product "sardines" is an advantage. The European Communities does not see why any of the names used for preserved *Sardinops sagax* should be considered less favourable than the use of the term "preserved sardines" for preserved *Sardina pilchardus*.

4.138 The European Communities contends that the reason why Peru appears not to be selling its product in the member States of the European Communities is not due to the non-existence of a market for *sardinops* or that *sardinops* are treated less favourably. It argues that Peru should have more confidence in the high level of quality of its preserved sardinops and should be devoting its energies to improving the reputation of its products for reliability and quality, rather than seeking to exploit the reputation of another product.

G. Judicial Economy

4.139 Peru requests the Panel to address its subsidiary claims on Articles 2.1 and 2.2 of the TBT Agreement only if it were to reach the conclusion that the EC Regulation is consistent with Article 2.4 of the TBT Agreement; and to examine the consistency of the EC Regulation with Article III:4 of the GATT 1994 only if it were to conclude that it is consistent with the TBT Agreement. Peru requests that the Panel avoid developing interpretation of the TBT Agreement that are not required to resolve the dispute.

4.140 Peru notes that, with respect to the principle of judicial economy, the Appellate Body stated:

The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and to 'secure a positive solution to a dispute'. To provide only a partial resolution of the dispute would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members".¹⁹

4.141 Peru argues that the Panel would complete its task if it resolves the dispute as defined by the claims that Peru has submitted and refers to *US — Cotton Yarn* in which the Appellate Body refused to make a finding on an issue on the grounds that the findings it had already made "resolve[d] the dispute as defined by Pakistan's claims before the Panel".

4.142 The **European Communities** makes no arguments on the issue of judicial economy.

H. European Communities' Argument that Peru Reformulated its Claims

4.143 The European Communities also contends that Peru's "reformulation" of its claims as reproduced in paragraph 3.1 (a) above constitutes a widening of the claims presented in its first written submission and is therefore inadmissible. The European Communities argues that Peru is claiming in its second written submission that the European Communities and its member States cannot use a common name of the species *Sardinops sagax* according to the relevant law and customs to designate the preserved product unless it is accompanied by the word "sardines". The European Communities argues that since Peru has limited its complaint to Article 2 of the EC Regulation, the Panel's mandate only relates to the compatibility of that provision with the provisions of the covered agreements that have been invoked.

¹⁹ *Australia — Measures Affecting the Importation of Salmon* ("Australia — Salmon"), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, para. 223.

4.144 The European Communities further contends that Peru's formulation of its request for findings seeks to obtain a declaratory judgment that would require the European Communities to take certain specific action rather than simply remove any inconsistency and this would request the Panel to go beyond its mandate and is inadmissible. The European Communities also argues that Peru's reformulation of its claim is a consequence of the fact that Peru failed to properly research the common names of *Sardinops sagax* in the European Communities prior to commencing this dispute.

V. ARGUMENTS OF THIRD PARTIES

A. Canada

1. Introduction

5.1 Canada submits that it has a substantial trade interest in the dispute with respect to its export of Canadian preserved sardines of the species *Clupea harengus harengus* to the **European Communities**, and a systemic interest in the interpretation of the TBT Agreement and the GATT 1994.

5.2 Canada argues that the EC Regulation permits only fish of the species *Sardina pilchardus* to be marketed in the European Communities as "sardines", impairing therefore the marketability of imported preserved sardines of species other than *Sardina pilchardus*. Canada further argues that the EC Regulation laying down common marketing standards for preserved sardines is a technical regulation within the meaning of the TBT Agreement and that it is inconsistent with the European Communities' obligations under Articles 2.4, 2.2 and 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.

2. Retroactive Application of the TBT Agreement

5.3 Canada disagrees with the European Communities' contention that Articles 2.2 and 2.4 of the TBT Agreement are not applicable to measures that were imposed before the entry into force of the TBT Agreement and notes that this contention is inconsistent with both the case law and Article XVI:4 of the WTO Agreement. Canada points out that the Appellate Body in *EC — Hormones* made clear that, regardless of when a measure came into force, as long as it remains in force after 1 January 1995, it is subject to the disciplines of the SPS Agreement. In the view of Canada, the Appellate Body's reasoning is equally applicable in this case. If the negotiators had wanted to exempt the numerous technical regulations in existence on 1 January 1995 from the disciplines of the TBT Agreement, they would have explicitly done so. Thus, Canada claims that if the Panel were to accept the European Communities' argument, a situation would arise in which it would be impossible to ensure the conformity with WTO obligations of technical regulations enacted prior to 1 January 1995, and which continue to be in force.

5.4 Canada also notes that the issue of the application of a WTO Agreement to a measure that was imposed before the entry into force of the Agreement was addressed by the Appellate Body in *Brazil — Measures Affecting Desiccated Coconut*. Canada notes that the Appellate Body stated with reference to Article 28 of the Vienna Convention:

Absent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force.

5.5 Canada asserts that after the entry into force of the TBT Agreement, the EC Regulation at issue did not "cease to exist", and that the TBT Agreement, including Articles 2.2 and 2.4, applies to measures that were enacted before 1 January 1995 and which continue to be in force.

5.6 With regard to this matter, Canada makes the final point that while the TBT Agreement was not in force at the time of the enactment of the EC Regulation, the Tokyo Round Standards Code, to which the European Communities was a party, was in force and its Article 2.2 contained provisions substantially similar to Article 2.4 of the TBT Agreement. Thus, even at the time the EC Regulation was enacted, the European Communities was under an obligation to use relevant international standards, such as the Codex Standard, as the basis for the Regulation at issue.

3. *Article 2.4 of the TBT Agreement*

5.7 Canada submits that it is well established that it is for the party asserting the fact, claim or defence, to bear the burden of providing proof thereof. Thus, in Canada's view and with respect to Article 2.4 of the TBT Agreement, Peru has to demonstrate that a relevant international standard exists or that its completion is imminent; and that the measure in question is not based on this standard. Canada argues that the burden then shifts to the defending party to refute the claimed inconsistency or to prove why the standard is ineffective or inappropriate to meet its legitimate objective.

5.8 Canada considers that for the purposes of the TBT Agreement, Codex Stan 94 is a relevant international standard, in that it applies to the same product category as the EC Regulation, namely, preserved sardines and, like the EC Regulation, relates to the marketing of that product. Canada also affirms that the European Communities is incorrect when it states that Codex Stan 94 is not relevant because "it did not exist and its adoption was not 'imminent' when the EC Regulation was adopted". In any event, whether or not Codex Stan 94 was in existence at the time the EC Regulation was adopted is irrelevant to the European Communities' obligation under Article XVI:4 of the WTO Agreement, to ensure that the EC Regulation is consistent with Article 2.4 of the TBT Agreement.

5.9 Furthermore, Canada is of the view that standards adopted by the Codex Alimentarius Commission are the internationally agreed global reference point for consumers, food producers and processors, national food control agencies

and the international food trade. Moreover, Canada is of the view that Codex Stan 94 complies with the six principles (e.g., principles of transparency, openness, impartiality and consensus) and procedures set out by the Decision of the TBT Committee.

5.10 With regard to the development and adoption of Codex Stan 94, Canada notes that member States of the European Communities were actively involved in this process and that the European Communities acted as an observer. Canada further recalls that a multilateral consensus-based approach was applied in this process. In addition, Canada argues that the inclusion of species in the Codex Stan 94 is made pursuant to a two-step process: first, a proposed species must meet the rigorous, scientific criteria set out by the Codex Alimentarius Commission; then, once a species has been found to meet these criteria, the Codex members make the final decision on its inclusion. According to Canada's submission under the Codex process, the scientific criteria require that members proposing the inclusion of an additional species communicate to the Commission all relevant information on taxonomy, resources, marketing, processing technology and analysis. Canada points out that this information must include reports from at least three independent laboratories stating that the organoleptic properties, such as texture, taste and smell, of the proposed species after processing conform with those of the species currently included in the Codex Stan 94.

5.11 Canada submits that, in accordance with Article 31(1) of the Vienna Convention, the ordinary meaning of the term "as a basis for" in Article 2.4 of the TBT Agreement is synonymous with "based on", and that the Appellate Body has stated that "[a] thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter." In this context, Canada argues that the EC Regulation is not "founded", "built" upon or "supported by" Codex Stan 94. Canada notes that paragraph 6.1.1 of the Codex Stan 94 permits preserved sardines of 20 species other than *Sardina pilchardus* to use the name "sardines" along with a designation indicating the country, geographical area, species or the common name of the species. Therefore, Canada affirms that Codex Stan 94 is sufficiently flexible to allow the country of sale to choose the appropriate listed designator to accompany the name "sardines" and that the European Communities is incorrect when it argues that a measure that prohibits the use of the word "sardines" in conjunction with the designator for the 20 listed species other than *Sardina pilchardus* is based on Codex Stan 94.

5.12 Canada also submits that the European Communities misinterprets the meaning of "in a manner not to mislead the consumer" in paragraph 6.1.1 of Codex Stan 94. Canada argues that, read in context, this phrase refers back to "X sardines" and more specifically, prescribes that the designator "X" must not be presented in a manner that misleads the consumer. Canada contends that the European Communities' argument that consumers would be confused by the use of the word "sardines" along with the appropriate designator is refuted by the research conducted by the Codex Committee in the development of Codex Stan 94. Canada submits that the Codex Committee researched the common names of

the species listed in paragraph 2.1.1 of Codex Stan 94 and in examining the results of this research came to a consensus that allowing species other than *Sardina pilchardus* to be labelled as "sardines" with the appropriate designator does not confuse consumers. Canada therefore agrees with Peru that the EC Regulation at issue is inconsistent with Article 2.4 of the TBT Agreement because it is not based on Codex Stan 94.

5.13 Canada argues that the European Communities failed to prove that Codex Stan 94 is ineffective or inappropriate for the fulfilment of its objective. Canada submits that "sardines" is a generic term²⁰, widely recognized, including under the Codex Stan 94, as applying to many different species of pelagic, saltwater fish that are prepared and packed in a certain way. In addition, Canada maintains that the fact that species other than *Sardina pilchardus* have been successfully marketed as "sardines" in the European Communities for some time indicates that European consumers recognize and accept that the term "sardines" does not apply exclusively to *Sardina pilchardus* and therefore it indicates that Codex Stan 94 is not inappropriate or ineffective. For example, the Canadian sardines, *Clupea harengus harengus* had, in 1990, been successfully marketed as "sardines" in the United Kingdom for over forty years and in the Netherlands for over thirty years. Furthermore, Canada states that throughout this period, Canada exported, and continues to export, products made of the species *Clupea harengus harengus*: preserved small juvenile *Clupea harengus harengus*, and preserved adult *Clupea harengus harengus*. Canada argues that until the adoption of the EC Regulation, the juvenile product was marketed as "sardines" in the European Communities - as provided for in Codex Stan 94 - while the adult product was marketed as herring. According to Canada, it continues to market preserved small juvenile *Clupea harengus harengus* as "sardines" in markets other than the European Communities.

4. Article 2.2 of the TBT Agreement

5.14 Concerning Article 2.2 of the TBT Agreement, Canada argues that the wording of this provision contains two separate and independent obligations which indicate that a Member cannot prepare, adopt or apply a technical regulation *with a view to* and *with the effect of* creating an unnecessary obstacle to trade. Canada submits that the preamble to the EC Regulation at issue states that it is "likely to improve the profitability of sardine production in the Community, and the market outlets therefor...". Canada claims that such language reveals that the EC Regulation has been adopted with a view to creating an unnecessary obstacle to international trade and that it is therefore inconsistent with Article 2.2 of the TBT Agreement.

5.15 Moreover, Canada claims that the EC Regulation has been adopted with the effect of creating an unnecessary obstacle to international trade. In support of

²⁰ *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford, 1993, defines "sardine" as "a young pilchard or similar small usu. clupeid marine fish, esp. when cured, preserved, and packed for use as food".

this claim, Canada argues that it can be inferred from the text of Article 2.2 of the TBT Agreement that in order for a measure to be consistent with that provision, the following should occur:

- (a) The objective of the technical regulation must fall within the range of legitimate objectives set out in Article 2.2 of the TBT Agreement;
- (b) the technical regulation must fulfil the objective; and
- (c) the technical regulation must not be more trade restrictive than necessary, taking account of the risks non-fulfilment would create.

5.16 With regard to the two first elements mentioned above, Canada notes that according to the European Communities, the labelling requirement in Article 2 of its Regulation has the objective of "ensuring consumer protection through market transparency and fair competition". Canada further notes that the European Communities argues that the Regulation at issue intends to protect consumers' expectations that in purchasing sardines they are purchasing *Sardina pilchardus*, as they associate sardines with this particular species. In reply to this last argument, Canada contends that there is no evidence that this is the expectation of European consumers. Canada claims that, to the contrary, preserved sardines other than *Sardina pilchardus* have been successfully marketed as "sardines" in the European Communities market for over fifty years until the adoption of the EC Regulation. Canada considers this as evidence that in their perceptions and behaviour, European consumers have recognized these products as sardines and that they expect the term "sardines" to include species other than *Sardina pilchardus*.

5.17 Canada also asserts that consumers' expectations relate to the culinary and nutritional characteristics of the processed products. They are concerned with the organoleptic properties of the canned products such as flesh quality, taste and smell as well as nutritional content and its suitability for particular uses. Canada argues that in all relevant attributes, the product of various species, including *Clupea harengus harengus* and *Sardinops sagax*, is indistinguishable from *Sardina pilchardus*, as confirmed independently by their inclusion as "sardines" under the Codex Stan 94.

5.18 Moreover, Canada argues that market transparency is normally associated with the provision of accurate information that is relevant to consumers to assist them in making informed purchasing decisions and that the generic term "sardines" is understood by European consumers to refer to a range of species that are prepared and packed in a certain way and when preserved, are similar as to flavour, texture and end use. In Canada's view, the word "sardines" conveys meaningful information that allows consumers to identify these products and, by forcing products that had previously been identified by European consumers as sardines to use a different trade description, the EC Regulation itself misleads and confuses consumers.

5.19 Canada further submits that while the European Communities does not explicitly define the term "fair competition", it indicates that the Regulation at

issue is intended to prevent producers of one product from unfairly benefiting from the reputation associated with another product. Canada argues that the European Communities' rationale is based on the false premise that the term "sardines" is only associated with the species *Sardina pilchardus* and that the European Communities has also failed to offer any evidence that the reputation associated with *Sardina pilchardus* is better than that associated with other species commonly known as sardines.

5.20 Thus, Canada asserts that the EC Regulation not only fails to fulfil any credible objective of consumer protection through market transparency and fair competition, but also actively undermines it.

5.21 With regard to the last element mentioned above, Canada argues that, even if the EC Regulation did fulfil the objective of consumer protection through market transparency and fair competition, the EC Regulation is more trade restrictive than necessary, taking account of the risks non-fulfilment would create. The language and jurisprudence of the GATT offer guidance to the interpretation of the TBT Agreement, including Article 2.2. Under Article 2.2, a measure will be more trade restrictive than necessary if there is a reasonably available, less trade restrictive alternative measure that fulfils the Member's legitimate objective and is consistent with the TBT Agreement. The European Communities' objective can be met in a less trade restrictive manner by allowing species other than *Sardina pilchardus* to be marketed as preserved sardines in accordance with the Codex Standard; that is, by including designations that inform consumers of the "country, geographic area, the species or the common name of the species in accordance with the law and custom of the country in which the product is sold" (for example "Pacific Sardines", "Peruvian Sardines" or "Canadian Sardines"). Canada recalls that the Appellate Body stated that one aspect of the determination of whether a WTO-consistent alternative measure is reasonably available is the extent to which it "contributes to the realization of the end pursued"; that is, the fulfilment of the stated objective. Canada argues that the Appellate Body also found that the more vital or important the common interests or values pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends. In Canada's view, the exercise of "taking account of the risks non-fulfilment [of a legitimate objective] would create" when assessing the necessity of a measure under Article 2.2 of the TBT Agreement can be seen as similar to evaluating the necessity of a measure under Article XX(b) or (d) of the GATT 1994 in part by considering the importance of the objective being pursued. Canada argues that the greater the importance of the objective, the greater the risks non-fulfilment would create.

5.22 Canada claims that in the present case, the EC Regulation is more trade restrictive than necessary because there is a less trade restrictive alternative, namely Codex Stan 94, that is reasonably available, consistent with the TBT Agreement and that would fulfil the European Communities' objective. Canada argues that a less trade restrictive alternative would be to allow species other than *Sardina pilchardus* to be marketed as preserved sardines in accordance with Codex Stan 94; that is, by including designations that inform consumers of

the "country, geographic area, the species or the common name of the species in accordance with the law and custom of the country in which the product is sold"(for example "Pacific Sardines", "Peruvian Sardines" or "Canadian Sardines").

5.23 Canada concludes that, whether or not the stated objective of consumer protection is a legitimate objective, the EC Regulation does not fulfil its objective and is, therefore, an unnecessary obstacle to trade, contrary to Article 2.2 of the TBT Agreement. Further, the EC Regulation is inconsistent with Article 2.2 in that it is more trade restrictive than necessary to fulfill a legitimate objective and has the effect of creating an unnecessary obstacle to international trade.

5. Article 2.1 of the TBT Agreement

5.24 Canada submits that the EC Regulation violates Article 2.1 of the TBT Agreement by according less favourable treatment to Peruvian preserved sardines of the species *Sardinops sagax*, and other like products, than that accorded to domestic and imported preserved sardines of the species *Sardina pilchardus*.

5.25 In this connection, Canada considers that Peruvian preserved sardines of the species *Sardinops sagax*, and Canadian preserved sardines of the species *Clupea harengus harengus* are "like" domestic and imported preserved sardines of the species *Sardina pilchardus*:

- They are saltwater, pelagic fish belonging to the taxonomic family *Clupeidae* and when preserved, are of similar size, weight, texture, flavour and nutritional value;
- They share the same end-use; they are prepared, served and consumed interchangeably; and
- Peruvian preserved sardines of the species *Sardinops sagax*, and Canadian preserved sardines of the species *Clupea harengus harengus* have, for some time, been successfully marketed in the European Communities as "sardines".

5.26 In the view of Canada, the different and discriminatory marketing requirement imposed by the EC Regulation disrupts the conditions of competition between these like products in favour of domestic and imported preserved sardines of the species *Sardina pilchardus*. Canada argues that exporters have identified their products as sardines in the European Communities for some time and have developed customer loyalty for their products; thus, by forcing these products to be marketed under a different description, the EC Regulation denies them the traditional identity and image associated with the term "sardines" and causes confusion among consumers. In addition, Canada argues that by prohibiting the use of the term "sardines" for all species other than *Sardina pilchardus*, the European Communities market has altered the conditions of competition in the European Communities market for preserved sardines and created a monopoly under that name for its own domestic species and that of a few other countries, such as

Morocco, where the European Communities has made a significant investment in sardine production.

6. *Articles I:1 and III:4 of the GATT 1994*

5.27 Canada claims that if the Panel finds that the EC Regulation is not a "technical regulation" for the purposes of the TBT Agreement, and thus does not violate Article 2.1 of that Agreement, the EC Regulation is nevertheless inconsistent with Articles I:1 and III:4 of the GATT 1994 because it accords less favourable treatment to Peruvian preserved sardines of the species *Sardinops sagax* and other like products such as Canadian preserved sardines of the species *Clupea harengus harengus*, than that accorded to like sardines of European Communities origin and those of certain other countries such as Morocco. Canada argues that the foregoing analysis of "like product" and "less favourable treatment" under the TBT Agreement applies equally to an analysis under Articles I:1 and III:4 of the GATT 1994.

7. *Remarks on Implementation*

5.28 Finally, Canada contends that if the Panel agrees and finds that the EC Regulation violates the European Communities' obligations under the TBT Agreement or the GATT 1994, the Panel should not accept Peru's request that, pursuant to Article 19.1 of the DSU, it suggests that the European Communities implements its recommendation by extending the use of the term "sardines" only to *Sardinops sagax*. According to Canada, panels in other disputes have consistently declined to suggest ways in which Members found to be acting inconsistently could implement their recommendations and have deferred instead to the discretion of Members to decide how best to bring themselves into conformity. Canada claims that there is no reason in this case why the Panel should be any less deferential.

5.29 Moreover, Canada argues that even if the Panel did decide to make a suggestion regarding implementation, any such suggestion would have to be consistent with the WTO Agreement. A recommendation that the European Communities extends the use of the term "sardines" to *Sardinops sagax* alone would be inconsistent with Articles 2.4, 2.2 and 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. If the Panel did choose to suggest ways in which the European Communities should bring the Regulation into conformity with the WTO Agreement, Canada contends that the suggestion would have to be based on the Codex Standard and sufficiently broad to encompass all like products, including the Canadian sardines of the species *Clupea harengus harengus*.

B. *Chile*

1. *Introduction*

5.30 Chile submits that it has a direct trade interest in the dispute as a sardine producer and exporter of marine products to the European Communities, and that

it has a systemic interest in the proper interpretation and implementation of the WTO Agreements, in particular the TBT Agreement.

5.31 Chile further submits that its request to join the consultations was rejected by the European Communities, which contended that Chilean exports of *Sardinops sagax* were equivalent to only 0.3 per cent of total European Communities' imports over the last three years. However, Chile notes with considerable concern that, in one of its written submissions, the European Communities points out that FAO figures show that Chilean catches of *Sardinops sagax* were the largest in the world, even larger than those of Peru. Chile recalls that Article 4.11 of the DSU indicates that "Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held ... such Member may notify the consulting Members and the DSB...". This provision adds further that "Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded". Thus, Chile considers that it has a trade interest in the case brought by Peru before the DSB, given that, were Peru's arguments to be upheld, part of the Chilean production could gain access to the European market in conditions which are presently denied. Moreover, Chile considers that this interest is, in practice, related to the fact that it is one of the main producers of one species of sardines, as recognized by the European Communities. In Chile's view, a Member has a substantial trade interest when its exports are affected, whether positively or negatively, by the measure at issue. In most cases, such a measure results in the absence of exports, which is neither equivalent to nor the same as having no trade interest. To the contrary, the European Communities seems to consider that, to have a substantial trade interest in this matter, a Member must be marketing its sardines on the European market, i.e., not be affected by the ban established by the regulation at issue. On this premise, all Members which, as a result of the EC Regulation, are prevented from marketing their sardines on the European market would be excluded from the consultations.

5.32 Chile argues that the EC Regulation is inconsistent with Articles 2.4, 2.2 and 2.1 of the TBT Agreement, as well as with Articles I and III of the GATT 1994.

2. *Retroactive Application of the TBT Agreement*

5.33 With regard to whether a Member is required to bring its technical regulations into conformity with international standards where they exist, Chile argues that the harmonization commitment must clearly be fulfilled in respect not only of future technical regulations but also of those that Members "have ... adopted". Moreover, Article 2.4 of the TBT Agreement covers both the case in which a relevant international standard exists and that in which its completion is imminent. Although certain changes were not in force at the time the EC Regulation came into effect, Article 2.3 of the TBT Agreement indicates that a regulation shall not be maintained if the objective "can be addressed in a less trade-restrictive manner".

5.34 With regard to the European Communities' argument that the TBT Agreement, and in particular Article 2, does not apply to the EC Regulation inasmuch as the latter predates the entry into force of the WTO Agreements, including the TBT Agreement, Chile refers to the content of Article XVI:4 of the WTO Agreement. Chile also submits that nothing restricts this provision to laws, regulations and administrative procedures passed subsequent to the entry into force of the WTO Agreement.

5.35 In addition, Chile submits that member States of the European Communities, by consenting to the development of Codex Stan 94, must have been aware of the existence of the EC Regulation at issue, which should have been brought into conformity with the Codex Stan 94. Therefore, Chile considers that following the logic of Article 2.4 of the TBT Agreement, the EC Regulation must be based on relevant international standards, namely those adopted by member States of the European Communities in the Codex Alimentarius Commission. Interpreting Article 2.4 of the TBT Agreement in any other way would render Article XVI:4 of the WTO Agreement ineffective and redundant. As a final point on this particular issue, Chile argues that Article 2 of the TBT Agreement is based on the previous Tokyo Round Standards Code, which contained similar obligations.

3. *Article 2.4 of the TBT Agreement*

5.36 Chile contends that the international nature of the Codex Alimentarius Commission cannot be questioned, especially since it is an entity attached to the FAO and the WHO, both of which are international organizations par excellence. Furthermore, the standards developed by the Codex Alimentarius Commission comply with the principles of transparency, openness, impartiality, relevance and consensus set out in the Decision of the TBT Committee. Chile also argues that all the member States of the European Communities (which are also members of the Codex Alimentarius Commission) contributed, by way of consensus, to the development of Codex Stan 94.

5.37 Chile states that Codex Stan 94 applies to around 20 types of sardines, including *Sardinops sagax*. Chile argues that, pursuant to paragraph 6.1.1 of this internationally accepted standard, it can market its sardines on the European market under the following names:

- *Sardina chilena* (Chilean sardine)
- *Sardina de Chile* (Sardine from Chile)
- *Sardina del Pacífico* (Pacific sardine)
- *Sardina Sardinops sagax* (*Sardinops sagax* sardine)

5.38 Chile disagrees with the interpretation of the European Communities of Article 2.4 of the TBT Agreement and argues that the reference in Article 2.4 to "as a basis for" affords each Member the possibility of adapting an international standard to its own reality or specific individual circumstances, without altering the objectives of that international standard, unless it (or its components) is an

ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, and in such case the Member should justify why this is so. The question that arises here is whether Codex Stan 94 is an effective and appropriate means for the fulfilment of the objectives pursued by the European Communities. Chile notes that the aim of the EC Regulation at issue is "to keep products of unsatisfactory quality off the market" and to ensure the "correct information and protection of the consumer". Chile argues that these are also the objectives of the Codex Stan 94 which is an effective and appropriate means to fulfil the objectives set out in the EC Regulation.

4. Article 2.2 of the TBT Agreement

5.39 Chile also claims that the EC Regulation is an unnecessary obstacle to trade. Chile argues that reserving a trade name exclusively for one particular species gives it a competitive advantage over other like products because it imposes the use of names with negative connotations, thus bringing down their prices and triggering an adverse reaction on the part of the consumers.

C. Colombia

1. Introduction

5.40 Colombia submits that it has a systemic interest in important issues of principle and in the legal debate introduced by Peru with regard to the TBT Agreement.

5.41 Colombia agrees with Peru that the limits of competence of any Panel are its terms of reference pursuant to Article 7 of the DSU. However, Colombia argues that these terms of reference should be understood in the light of Articles 10 and 11 of the DSU, which require the Panel to determine the applicability of the covered agreements, a function which should be fulfilled on the basis of the arguments put forward by all parties to the dispute, including those put forward by third parties. In this respect, any attempt to restrict the rights of third parties to a dispute would not only be inappropriate for the multilateral trading system but also contrary to the DSU.

2. Retroactive Application of the TBT Agreement

5.42 Concerning the European Communities' argument that in pursuance of Article 28 of the Vienna Convention, Codex Stan 94 would not be a relevant international standard because Codex Stan 94 did not exist at the time the EC Regulation was enacted, Colombia submits that such an argument lacks any real legal basis and would have serious implications for the fulfilment of multilateral commitments. In this connection, Colombia supports Canada's submission concerning the retroactive application of the TBT Agreement and asserts that, if the interpretation put forward by the European Communities were to be accepted, the scope of WTO commitments would be arbitrarily restricted.

5.43 Moreover, Colombia submits that the adoption of Codex Stan 94 subsequent to the date of entry into force of the EC Regulation does not affect its status as an international standard given that the obligation established in the TBT Agreement does not provide for any form of exemption from which a differentiation of Members' obligations, as of the time when a national technical regulation comes into effect, can be inferred.

3. *Article 2.4 of the TBT Agreement*

5.44 In Colombia's opinion, the EC Regulation is inconsistent with Article 2.4 of the TBT Agreement. Colombia further submits that the Codex Alimentarius Commission is a competent international standardizing body within the meaning of Articles 1.1 and 2.6 of the TBT Agreement and that Codex Stan 94 is an international standard.

5.45 Colombia considers that the identification of the elements which would exempt a country from implementing an international standard because it is an ineffective or inappropriate means to fulfill a legitimate objective must be drawn upon the examples set out in Article 2.4 of the TBT Agreement. It is Colombia's view that Article 2.4, by mentioning climatic or geographical factors, clearly restricts such exemption from the implementation of an international standard to objective elements.

5.46 Colombia contends that under Article 2.4 of, and the preamble to, the TBT Agreement, WTO Members are not authorized to hinder the market entry of a product by arguing that its quality characteristics are not identical to those of the products to which its consumers are accustomed. Colombia recognizes the right of WTO Members to take appropriate measures to prevent consumers from being misled. However, Colombia argues that the possibility of enacting a regulation to address such a concern is limited by the TBT Agreement which states that a regulation should not be discriminatory and should not constitute a disguised restriction on trade.

4. *Article 2.2 of the TBT Agreement*

5.47 With respect to Article 2.2 of the TBT Agreement and the elements that must be established for there to be a violation, Colombia argues that the determination of whether a technical regulation is more trade-restrictive than necessary should not be contingent upon a demonstration of trade-restrictive effects, such as the absence of the product on a given market. In the view of Colombia, the reading of Article 2.2 of the TBT Agreement in conjunction with Article 2.4 covers cases where no international standards exist or where they exist but prove to be ineffective or inappropriate.

5. *Remarks on Implementation*

5.48 Colombia notes that a particularly significant aspect of the dispute will be the recommendation on the way in which the decision is to be implemented. If

the arguments advanced by Peru on the inconsistency of the measure with the TBT Agreement prove successful, it is Colombia's understanding that the Panel report will have to be implemented through a measure consistent with the multi-lateral agreements.

D. Ecuador

1. Introduction

5.49 Ecuador has trade and systemic interests in this dispute because its sardine exports are adversely affected by the EC Regulation and because it considers that this case offers an opportunity to clarify important aspects of the proper application of the TBT Agreement.

5.50 Ecuador argues that the fundamental incompatibility of the EC Regulation with Article 2.4 of the TBT Agreement leads to additional discrimination that in turn is inconsistent with Article 2.2 and 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.

2. Retroactive Application of the TBT Agreement

5.51 Ecuador disagrees with the European Communities' argument that Codex Stan 94 is not relevant because the measure set forth in the Regulation at issue predates the entry into force of Codex Stan 94. Ecuador argues that on the strength of such an argument, any WTO Member could be exempted from countless obligations on the grounds that WTO-incompatible measures predating the entry into force of international rules or the WTO Agreements themselves need not be amended or adjusted to new international commitments. Ecuador contends that if the EC Regulation was not compatible at the time the TBT Agreement came into force, the European Communities was under the obligation to bring it in line with all WTO Agreements, in pursuance of Article XVI of the WTO Agreement.

3. Article 2.4 of the TBT Agreement

5.52 Ecuador argues that WTO Members have the obligation to comply with Article 2.4 of the TBT Agreement and are therefore required to bring their technical regulations into conformity with international standards where they exist and are relevant.

5.53 With regard to the burden of proof, Ecuador submits that the initial burden of proof lies with the complaining party to establish if the measure which is challenged presents a case of inconsistency with Articles 2.4 and 2.2 of the TBT Agreement. Ecuador submits that Peru has demonstrated that an international standard exists (the Codex Stan 94), that it is relevant and that the European Communities is not using this standard. Therefore, the European Communities has the obligation to base the application of its technical regulation on Codex Stan 94. Ecuador contends that the European Communities has, in turn, to re-

spond to Peru's arguments and justify why the international standard has not been used. Ecuador notes that the European Communities has provided no evidence that the standard in question was irrelevant. Hence, Ecuador sees no justification for the European Communities' failure to apply a relevant international standard.

5.54 Ecuador further argues that Codex Stan 94 is adequate to fulfil the legitimate objectives pursued by the EC Regulation, because it does not mislead the consumers. Ecuador notes that Codex Stan 94 clearly stipulates that sardines of species other than *Sardina pilchardus* shall be described as "X" sardines; this would be the case of the name "Pacific sardine" used for sardines of the species *Sardinops sagax*. Moreover, Ecuador asserts that the text of the Codex Stan 94 in Spanish is quite clear in that countries can choose to use the denomination "sardines X", where "X" is the country of origin or a geographical area, with the name of the species or the common name.

4. Article 2.2 of the TBT Agreement

5.55 Ecuador argues that the EC Regulation creates an unnecessary obstacle to trade, contrary to Article 2.2 of the TBT Agreement.

5.56 In Ecuador's view, the EC Regulation serves protectionist purposes with trade-distorting effects beyond those already affecting the sector as a result of fisheries subsidies in the form of Community aid to offset marketing costs for products such as sardines. Ecuador notes the European Communities' argument that its Regulation has the "aim of ensuring consumer protection through market transparency and fair competition". In practice, Ecuador argues, this aim is not being met; indeed, the EC Regulation allows no competition in that it excludes from the market other types of sardines that would be able to compete effectively under an "X" trade description affording the consumer freedom of choice and the transparency that a label based on a relevant international standard such as the Codex Stan 94 could provide.

5. Article 2.1 of the TBT Agreement

5.57 With regard to Article 2.1 of the TBT Agreement, Ecuador argues that the EC Regulation is inconsistent with the national-treatment principle because sardines of a trade description other than *Sardina pilchardus* are accorded less favourable treatment by differentiating between the species of fish and between the origin of the product. According to Ecuador, Peru is correct in arguing that these are "like" products, primarily because canned sardines of the species *pilchardus* and of the species *sagax sagax* are identical products in terms of their physical characteristics – especially flavour, texture and nutritional value – and because they are interchangeable in terms of use and consumption. In Ecuador's view, this is borne out by the fact that sardines of species other than *Sardina pilchardus* were successfully marketed in the European Communities prior to the entry into force of the EC Regulation, as demonstrated by both Peru and Canada and also by the statistics provided by the European Communities.

6. *Articles I:1 and III:4 of the GATT 1994*

5.58 Finally, Ecuador considers that the foregoing analysis proving discrimination by the European Communities within the context of the TBT Agreement is also applicable for the determination of inconsistency of the EC Regulation with Articles I:1 and III:4 of the GATT 1994.

7. *Final Remarks*

5.59 In the light of the above considerations, Ecuador submits that the Panel must find that the EC Regulation is in violation of the European Communities' obligations under WTO Agreements and recommend that the European Communities bring its measure into conformity with those obligations.

E. *United States*

1. *Introduction*

5.60 The United States indicates that there are a number of sardine species that are harvested in the United States, but that are not exported to the European Communities because of the restrictive labeling requirements in the European Communities. They are, however, sold to many parts of the rest of the world. These species include *Clupea Harengus*, *Sardinops caeruleus*, *Sardinops Sagax*, *Harengula jaguana*, *Sardinella* and *Sardinella longiceps*. The United States has no regulations requiring the use of specific names for these fish species. There is, however, a general requirement that labels should not be false or misleading. All of these fish either can be, or actually are, marketed in the United States under the name "sardines", among other names.

5.61 The United States endorses Peru's request that the Panel exercise judicial restraint upon finding that the EC Regulation breaches Article 2.4 of the TBT Agreement, and not reach Peru's other claims. According to the United States, panels should address those claims necessary to resolve the dispute, and, as Peru recognizes, that can be accomplished through consideration of Article 2.4 alone.

5.62 Concerning the burden of proof, the United States submits that, as recognized by the Appellate Body in *US — Wool Shirts and Blouses*, *EC — Hormones* and other reports, the complaining party has the burden of presenting evidence and arguments sufficient to make a *prima facie* demonstration of each claim that the measure at issue is inconsistent with a provision of a covered agreement.²¹ This burden is not shifted to the responding party simply because the obligation identified is characterized as an "exception".²² However, the responding party would have the burden with respect to an "affirmative defense" that a breach of an obligation is justified by a separate provision that would excuse the breach.²³

²¹ *European Communities – Measures Concerning Meat and Meat Products ("EC – Hormones")*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, paras. 104 - 109.

²² Appellate Body Report, *EC – Hormones*, para. 104.

²³ Appellate Body Report, *EC – Hormones*, para. 109.

2. *Application of the TBT Agreement*

5.63 The United States argues that the TBT Agreement applies in full to technical regulations in place on or after 1 January 1995, regardless of whether the regulation was put in place before that date. It further argues that labeling requirements that are "mandatory" and "apply to a product, process or production method" constitute "technical regulations."

3. *Article 2.4 of the TBT Agreement*

5.64 The United States argues that the EC Regulation is inconsistent with Article 2.4 of the TBT Agreement and that it is not based on the Codex Stan 94, an international standard for purposes of the TBT Agreement. It notes that although Codex Stan 94 specifically provides for the label "X sardines", the EC Regulation specifically prohibits that label, with no plausible justification for contradicting the standard.

5.65 Concerning the question of whether Codex Stan 94 is a relevant international standard, the United States notes that relevancy does not refer to the timing of the international standard, but only to its subject matter - i.e., whether an international standard is apposite, pertinent or germane to the issue for which the technical regulation is required. The United States argues that the reference to "their completion is imminent" in Article 2.4 of the TBT Agreement in relation to "relevant international standards" makes clear that the question of relevance is separate from the question of the date on which the international standard came into existence.

5.66 Concerning the requirement of Article 2.4 of the TBT Agreement, that Members "shall use [relevant international standards] as a basis for" their technical regulations, the United States recalls Canada's argument that the phrase "as a basis for" should be construed consistently with "based on". The United States submits that the Appellate Body defined the term as "[a] thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter."²⁴ It argues that this statement by the Appellate Body does not mean that the technical regulation must "conform" to the terms of the relevant international standard, but it does mean that a Member's technical regulation must be founded upon or supported by the standard, insofar as the standard is "relevant," not "ineffective" and not "inappropriate."

5.67 The United States further argues that there is no reason why the application of Codex Stan 94, in particular permitting other species to be marketed as "X" sardines, would be an ineffective or inappropriate means for meeting the European Communities' stated objectives of consumer protection, transparency and fair competition. To the contrary, according to the United States there is ample evidence indicating that the Regulation at issue undermines the European Communities' objectives, since European consumers have in fact come to know the Peruvian product as a form of sardines and are likely to be confused by

²⁴ Appellate Body Report, *EC – Hormones*, para. 163.

the use of other names. Indeed, the use of a proper descriptor prior to the term "sardines," as provided for in the international standard, appears to be a very effective means to assure transparency and protect the consumer.

5.68 In the view of the United States, Codex Stan 94 does not anticipate a country choosing between "X Sardines" and the common name of the species. Rather, under the standard, a country permits the named sardine species to be sold as "X Sardines", where "X" is a country, a geographic area, a species, or the common name of the species. The United States argues that under the standard, the product could be labelled, for example, "Peruvian sardines", "Pacific sardines", or "Atlantic herring sardines". The standard does not envision the "common name" as an alternative to "X sardines", only as an option for "X" in the name "X Sardines." This interpretation is clear in the English version of Codex Stan 94, but is even more clear in the French version, which states that species other than *Sardina Pichardus* shall be called "'X Sardines', 'X' designating a country, a geographic area, a species, or the common name".²⁵

4. Article 2.2 of the TBT Agreement

5.69 Concerning Article 2.2 of the TBT Agreement, the United States argues that in order for a Member to show that a government's technical regulation is more trade-restrictive than necessary to fulfill a legitimate objective, it would need to show that there is another measure that is reasonably available, that would fulfill the regulating Member's legitimate objectives, and that is significantly less restrictive to trade.

5.70 The United States considers that in this case there are clear alternatives which meet these requirements. In addition to simply removing the technical regulation, allowing other species to be marketed as "X sardines" would fulfill the European Communities' objectives of consumer protection, transparency and fair competition. The alternative is reasonably available, since there are no impediments to such a change, nor would there be any disruption to markets where consumers are already accustomed to seeing the products at issue referred to as "sardines." Finally, the alternative would be significantly less trade restrictive, inasmuch as there is now a complete ban on the marketing of several species as "sardines," with or without a qualifier. Further, the United States argues that there is no requirement under Article 2.2 to demonstrate a trade restrictive effect as such; the only requirement is to show that a measure is more trade restrictive than necessary. With respect to this dispute, there is no doubt that a measure prohibiting the use of the term "sardines" in connection with sardine products is trade restrictive.

²⁵ "Sardines X", "X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce ...".

5. *Remarks on Implementation*

5.71 Finally, the United States argues that the Panel should refrain from offering a specific suggestion on how the European Communities should comply in this case. This case is not unusual in this regard, and the European Communities, like other Members, has the right to determine how it will bring its measure into compliance.

F. *Venezuela*

1. *Introduction*

5.72 Venezuela submits that its participation as a third party in this dispute is based on a systemic interest relating to the correct interpretation of the TBT Agreement, in particular Article 2.4. Venezuela submits that it also has a genuine trade interest, inasmuch as the conditions for the marketing of canned sardines on the European market, as set out in the EC Regulation, are prejudicial to Venezuelan exports of sardines to that market, which is a major destination for Venezuela's export industry.

2. *Remarks on the Term "sardines"*

5.73 Venezuela argues that from the standpoint of statistical data, the term "sardines", in the broad sense, has been used to cover species other than *Sardina Pilchardus*. Organizations such as the FAO classify under the same heading species of the genera *Sardina*, *Sardinops*, *Opisthonema*, *Clupea* and *Sardinella*, *inter alia*.²⁶ The FAO also groups sardines, sardinella and brisling or sprat production, import and export statistics in a single table, which is not confined to the species *Sardina Pilchardus*.²⁷ Likewise, the word "sardines" is used to identify various species, according to relevant European and international publications.²⁸ In the view of Venezuela, the above facts point to the universality of the term "sardines".

5.74 Venezuela also submits that the broad use of a name is not exclusive to sardines; on the contrary, there is a variety of other examples. Mussels, for instance, are known under the scientific names of *Mytilus edulus*, *Perna Perna* and *Perna viridis*, but "mussel" is the common trade description for all these species. Another example given by Venezuela is tuna, whose trade description includes bluefin tuna (*Tunnus thynnus*), yellowfin tuna (*Tunnus albacares*), bigeye tuna (*Tunnus obesus*) and skipjack tuna (*Katsuwonus pelamis*). Thus, Venezuela argues that the use of generic nomenclature to justify trade descriptions is not relevant and that probably the case of the European sardines is the only one where attempts have been made to match the trade description with the scientific name. Even where both terms obviously coincide, it is not possible to argue exclusivity in respect of a trade description, because this practice is not in universal use.

²⁶ See FAO Yearbook of Fishery Statistics, Catches and Landings, Vol. 80, 1995, pp. 308 ff.

²⁷ See FAO Yearbook of Fishery Statistics, Commodities, Vol. 89, p. 102.

²⁸ See Multilingual Illustrated Dictionary of Aquatic Animals and Plants, and www.fishbase.org.

5.75 Venezuela further argues that scientific names of species may vary over time as a result of taxonomic revision. Thus, species of the genus *Sardinops* were initially named *Sardina spp*, as was the case of *Sardinops caeruleus*, which is a synonym for *Sardina sagax* and *Alausa californica*, and the species *Sardinops neopilchardus*, which is a synonym for *Sardinella neopilchardus*. Similarly, *Sardina pilchardus* and *Sardinella aurita* were initially described as belonging to the genus *Clupea* – the former in 1792 under the name *Clupea pilchardus* and the latter in 1810 under the name *Clupea allecia*, a term which is also used for the Australian sardine pilchard.

3. Article 2.4 of the TBT Agreement

5.76 Venezuela argues that the labelling requirements for preserved sardines laid down in the EC Regulation do not comply with Article 2.4 of the TBT Agreement because they disregard the relevant international standards. In its view, the EC Regulation, as a technical regulation, must not only recognize but also apply international standards such as those established in Codex Stan 94.

5.77 Venezuela argues that the term "as a basis" in Article 2.4 of the TBT Agreement should be interpreted to mean "shall be based on, in such a way as not to contradict any of its aspects". Therefore, Venezuela argues that the EC Regulation cannot be considered to "be based on" Codex Stan 94 because the EC Regulation does not provide for the possibility of canned products prepared from other species of sardines (other than *Sardina pilchardus*) to include the word "sardines" to indicate the species from which the canned product is prepared. On the contrary, Codex Stan 94 stipulates that the common name "sardines" may be used for products made from species other than *Sardina pilchardus*, provided that (a) the name is supplemented by an indication identifying the country of origin, the geographical area in which the species is to be found or the name of the species, or (b) the product is made under the common name in the language of the member State of the European Communities in which it is sold.

5.78 Venezuela submits that the Codex Alimentarius is the source of standards, codes of practice and internationally accepted guidelines that have become a global benchmark for food consumers, producers and manufacturers, national food control agencies and the international food trade. Venezuela also points out that Codex's contribution to the international harmonization of food standards, by providing for the protection of consumer health and guaranteeing fair practices, is indisputable.

5.79 Venezuela contends that species of different genera are marketed under the name "X sardines" in almost every country in the world, and points out that, in the past, the name was acceptable for describing different genera, including in some countries of the European Communities. In Venezuela's view, the European Communities' argument that if *Sardinops sagax* products were to be marketed as "X sardines", they would benefit from the reputation enjoyed by another product (namely sardines) and the customer would be misled, is without merit. Contrary to the European Communities' assumption that the term "sardines" is

used exclusively at the European level, Venezuela indicates that Latin America and North America have given the name "sardines" to a finished product prepared from a different raw material which, however, possesses similar organoleptic characteristics. Moreover, in Venezuela, the term "sardines" is used to describe a product prepared essentially from the raw material *Sardinella aurita*. For example, in Venezuela's view, it would be hard to imagine consumers of caviar (i.e., a finished product), for example, being misled by the product's presentation under the name Iranian, Russian or American caviar, knowing as everyone does, that each involves a different type of sturgeon.

5.80 Venezuela argues that in view of the above-mentioned facts and, given the similarities between the species, all that would need to be done in order to distinguish one product from another from the standpoint of the objectives of the EC Regulation would be to use the common name "sardines", accompanied by a reference to its geographical area of origin – in other words, to use the name "X sardines", as provided for in the Codex Stan 94. Consumers purchasing products prepared from X sardines would thus know that these were made from sardines of a species other than the type found in European waters.

5.81 Venezuela also emphasizes that the legitimate objectives set forth in the TBT Agreement are to promote achievement of the goals of the GATT 1994 and to ensure that technical regulations and rules, including those relating to labelling, do not create unnecessary barriers to international trade. Venezuela argues that the objective of the EC Regulation is to enhance the profitability of sardine production in the Community, the market outlets therefor, as well as to facilitate disposal of its products, is not compatible with the above objectives.²⁹ Venezuela considers that, if it is a matter of fulfilling the objective laid down in the EC Regulation, there are other trade mechanisms, within the framework of the WTO, that can be used to that end, such as the application of tariff regimes and more specific tariff regulations.

4. *Article 2.2 of the TBT Agreement*

5.82 Venezuela submits that the objectives of the EC Regulation can be achieved by means of a less trade-restrictive measure. Venezuela argues that the EC Regulation has a restrictive impact given that it prevents countries that prepare products from fish of species similar to *Sardina pilchardus* from marketing such products under a name containing the word "sardines", although this is allowed by the relevant international standard. Venezuela is of the opinion that this diminishes the value of the products for the European customer, since their perceived value of a product using a scientific name as a commercial name bears no relation to the true quality of the product. This fact places those products at a disadvantage in competition with like European products. This type of measure is discriminatory in terms of where the sardines were caught, by reserving exclusivity of the trade description for products of European origin.

²⁹ Based on the introductory remarks to Council Regulation N° 2136/89 of 21 June 1989.

5. *Remarks on Implementation*

5.83 If the Panel decides to suggest any action to the European Communities, Venezuela requests that the European Communities should be required to bring its Regulation into line with the WTO Agreement and to agree that its Regulation be based on the Codex Alimentarius, in other words, that it be made sufficiently broad to include similar types of sardines, including the Venezuelan sardine *Sardinella aurita*.

VI. INTERIM REVIEW³⁰

6.1 Our interim report was issued to the parties on 28 March 2002, pursuant to Article 15.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). On 5 April 2002, the European Communities requested us to review certain aspects of the interim report. Peru did not have any comments on the interim report. Neither of the parties requested us to hold an interim review meeting. When sending the interim report to the parties, we provided each party an opportunity to transmit in writing its comments on the other party's interim review comments, if no meeting was requested. In a letter dated 11 April 2002, Peru requested that we not consider the new evidence submitted by the European Communities. We carefully reviewed the arguments and issues presented by the European Communities and each issue is addressed below.

6.2 The European Communities requested a change to the summary of the European Communities' arguments in paragraph 4.73. We would like to point out that the European Communities' arguments are fully reflected in paragraphs 4.73 and 4.81.

6.3 The European Communities requested us to either change the heading of Chapter A of the findings from "Measure at issue" to "Product at issue", or to delete the two first paragraphs of Chapter A (7.1-7.2). We are of the view that the repetition, in the beginning of the findings section, of the basic characteristics of the two fish species at issue in the dispute is useful. As suggested by the European Communities, we have inserted paragraphs 7.1 and 7.2 under the newly created heading entitled "Products at issue".

6.4 The European Communities made the following comments on paragraphs 7.27 and 7.28 of the findings: "A regulator cannot set by legislative means the characteristics that are 'intrinsic' to a product. By definition, these are present in nature, they exist within the product and do not come from the outside. Consequently, it is an error to qualify as a 'product characteristic' the fact that preserved sardines must be prepared from fish of the species *Sardina*. The Codex Alimentarius, by reserving the term 'sardines' only to fish of the species *Sardina*, recognizes this fact". We do not agree with the notion that regulators cannot establish

³⁰ Pursuant to Article 15.3 of the DSU, "The findings of the final panel report shall include a discussion of the arguments made at the interim review stage". The following section entitled "interim review" therefore forms part of the findings.

intrinsic product characteristics by legislative means and do not consider that it is an error to qualify as a "product characteristic" the fact that preserved sardines must be prepared from fish of the species *Sardina pilchardus*. The Appellate Body in *EC — Asbestos* unequivocally stated that "'product characteristics' include, not only features and qualities *intrinsic* to the product itself, but also related 'characteristics' such as the means of identification, the presentation and the appearance of a product" (emphasis added).³¹ As we explained in our findings (paragraphs 7.26 and 7.27), various provisions of the EC Regulation lay down product characteristics that deal with features and qualities affecting composition, size, shape, colour and texture of preserved sardines. One product characteristic required by Article 2 of the EC Regulation is that preserved sardines must be prepared exclusively from fish of the species *Sardina pilchardus*. As we pointed out, this product characteristic must be met for the product to be "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. We considered that the requirement to use exclusively *Sardina pilchardus* is a product characteristic as it objectively defines features and qualities of preserved sardines for the purposes of their "market[ing] as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. For these reasons, we have not made any changes to paragraphs 7.26 and 7.27.

6.5 With respect to the section dealing with whether Codex Stan 94 is a relevant international standard, the European Communities claimed that we did not consider the fact that Codex Stan 94 had only been accepted by 18 countries, of which only four accepted it fully, and that neither Peru nor any member States of the European Communities were among these 18 countries. Therefore, the European Communities asked us to justify why we disregarded this argument. We did consider this argument but were not persuaded that this argument was relevant in determining whether Codex Stan 94 is an international standard. We note that the European Communities is referring to the Acceptance Procedure set by the Codex Alimentarius Commission which allows a country to accept a Codex standard in accordance with its established legal and administrative procedures. We recall that Annex 1.2 of the Agreement on Technical Barriers to Trade (the "TBT Agreement") defines a standard as a "document approved by a recognized body" and does not require that the standard be accepted by countries as part of their domestic law. Codex Stan 94 was adopted by the Codex Alimentarius Commission and we consider that this is the relevant factor for purposes of determining the relevance of an international standard within the meaning of the TBT Agreement.

6.6 With regard to paragraph 7.66 of the findings, the European Communities asserted that our reasoning did not accurately reflect the "conditional argument that ... there would be less doubts about this [the status of the Codex Alimentarius Commission as an international standardization body] if the European

³¹ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products* ("EC — Asbestos"), WT/DS135/AB/R, adopted 5 April 2001, para. 67.

Communities would be allowed to become a member". We note that all member States of the European Communities are parties to the Codex Alimentarius Commission and that the European Communities is an observer at the Commission. We stated in the findings that Annex 1.4 of the TBT Agreement defines an "international body" as a "[b]ody or system whose membership is open to the relevant bodies of at least all Members". According to Rule 1 of the Statutes and Rules of Procedures of the Codex Alimentarius Commission, "[m]embership of the joint FAO/WHO Codex Alimentarius Commission ... is open to all Member Nations and Associate Members of the FAO and/or WHO". As membership to the Codex Alimentarius Commission is open to all WTO Members, we found that it is an international body within the meaning of Annex 1.4 of the TBT Agreement and the European Communities did not contest the status of the Codex Alimentarius Commission as an international standardization body for the purposes of the TBT Agreement. We have included in the descriptive part the European Communities' argument that the status of the Codex Alimentarius Commission as an international standardization body would come into doubt if the European Communities were not allowed to become a member of the Codex.

6.7 The European Communities commented on paragraphs 7.93 to 7.96 where it felt that its position on the understanding of the text of paragraph 6.1.1(ii) of Codex Stan 94 had not been adequately reflected. The European Communities requested us to justify why the European Communities' arguments about the editorial change were not persuasive. The European Communities also asserted that there were differences between the three linguistic versions of Codex Stan 94. Contrary to the European Communities' assertion, we dealt with the European Communities' arguments set out in paragraphs 4.34 and 4.48 and actually explained why we were not persuaded that the negotiating history supported the European Communities' interpretation that Codex Stan 94 allows Members to choose between "X sardines" on the one hand and the common name of the species in accordance with the law and custom of the country in which the product is sold on the other hand. Our reasoning on this issue was in threefold. First, the text of Codex Stan 94 is clear on its face that it provides Members with four alternatives. Second, the deletion of the third alternative and the adoption of the current text indicate that the latter reflects the true intentions of the drafters. Third, that the change is referred to as "editorial" in the minutes of the meeting suggests that both the earlier version and the final text expressed the same view but the final text did so more succinctly. Moreover, we considered that Codex standards are adopted in a procedurally correct manner and were not persuaded that Codex Stan 94 was not adopted in a procedurally correct manner. Concerning the European Communities' argument in respect of the three different linguistic versions, we stated, in paragraphs 7.108 and 7.109 of the findings, that there was no difference between the French and the English text, and that the Spanish version confirmed the view that the name of the species or common name must be added to the word "sardines" and not replace the word "sardines". Therefore, we reject the arguments made by the European Communities with respect to these paragraphs.

6.8 The European Communities reminded us of its requests that the Codex Alimentarius Commission be consulted on the meaning of the text of paragraph 6.1.1(ii). We recall the European Communities' statement at the Second Substantive Meeting that "[i]f the Panel should have any doubt that the interpretation of Article 6.1.1(ii) [of] Codex Stan 94 advanced by the European Communities is correct and considers that it will reach the question of the meaning of Article 6.1.1(ii) of Codex Stan 94, the European Communities invites the Panel to ask the Codex Alimentarius to provide its view of the meaning of this text". This request is reflected in paragraph 4.49 of the descriptive part. In accordance with Article 13 of the DSU, it is the right of the panel to seek or refuse to seek information.³² In this regard, in *EC — Hormones*, the Appellate Body stated that Article 13 of the DSU "enable[s] panels to seek information and advice as they deem appropriate in a particular case".³³ Also, in *US — Shrimp*, the Appellate Body considered that "a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case...".³⁴ In this case, we determined that there was no need to seek information from the Codex Alimentarius Commission.

6.9 The European Communities requested that the adjective "European" in front of the word "sardines" in the seventh line of paragraph 7.124 be deleted, as well as the whole sentence that follows. The European Communities argued that "[i]t is, in fact, factually incorrect to state that 'if a hermetically sealed container is labelled simply as 'sardines' without any qualification, the European consumer would know that it contains European sardines". The EC Regulation, in fact, only requires that preserved sardines be made of *Sardina pilchardus*, irrespective of its origin of landing. Accordingly, what a European consumer knows when buying a hermetically sealed container labelled simply as 'sardines' is that it contains sardines, i.e. *Sardina pilchardus*; it does not know the origin of the fish". We recall a statement made by the European Communities in response to a question posed by Peru at the First Substantive Meeting: "The European consumers, when offered a can labelled 'sardines' expect to buy the product they know under this name, the European sardines, even if it has been caught in non-European waters." We were not persuaded that the European consumers would consider "sardines" combined with the name of a country or geographic area to be European sardines for the reasons set out in paragraphs 7.129 to 7.136 of the findings. We therefore decline to delete the word "European" and the sentence that follows.

³² "Panels *may* seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter" (emphasis added).

³³ *European Communities — Measures Concerning Meat and Meat Products ("EC — Hormones")*, WT/DS26/AB/R and WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, para. 147.

³⁴ *United States — Import Prohibition of Certain Shrimp and Shrimp Products ("US — Shrimp")*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, para. 104.

6.10 The European Communities objected to the summary, in paragraph 7.127, of the European Communities' statement that the EC Regulation created "uniform" consumer expectations. The European Communities claimed that this assertion was used out of its context. We disagree with this claim and would like to recall the statement made by the European Communities in its entirety: "In most parts of the European Communities, especially in the production countries, the term 'sardine' has historically made reference only to the *Sardina pilchardus*. [Footnote omitted] However, other species like sprats (*Sprattus sprattus*) were sold in tiny quantities on the European Communities market with the denomination 'brisling sardines'. In view of the confusion that this created in the market place, the European Communities has constantly tried to clarify the situation, both externally (note of 16/04/73 to Norway [footnote omitted]) and internally (Regulation 2136/89). This situation has now created uniform consumer expectations throughout the European Communities, the term 'sardine' referring only to a preserve made from *Sardina pilchardus*". This entire quote is set out in paragraph 7.125. In light of this, we reject the European Communities' claim that we used its argument "out of its context, that the EC Regulation artificially created 'uniform consumer expectations'".

6.11 The European Communities further requested the deletion of the adjective "trade restrictive" in front of the word "measure" in the following sentence (paragraph 7.127): "If we were to accept that a WTO Member can 'create' consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations in the existence of those 'created' consumer expectations, we would be endorsing the permissibility of 'self-justifying' regulatory trade barriers". The European Communities argued that the question of whether the measure at issue was trade-restrictive was an issue on which we had exercised judicial economy and therefore should "refrain from gratuitously qualifying the EC measure as 'trade-restrictive'". We used the expression "trade-restrictive" as part of the legal reasoning to state that if Members can create consumer expectations and then justify the trade restrictive measure, we would be endorsing the permissibility of self-justifying regulatory trade barriers. Therefore, we were justified in using the term "trade-restrictive". Moreover, in our examination of the EC Regulation, we were of the view that the EC Regulation was more trade-restrictive than the relevant international standard, i.e., Codex Stan 94. Our characterization of the EC Regulation as such is based on the fact that the EC Regulation prohibited the use of the term "sardines" for species other than *Sardina pilchardus* whereas Codex Stan 94 would permit the use of the term "sardines" in a qualified manner for species other than *Sardina pilchardus*.³⁵

³⁵ In addition, we took note of the context provided by Article 2.5 of the TBT Agreement which states that if a technical regulation is in accordance with relevant international standards, "it shall be rebuttably presumed not to create an unnecessary obstacle to international trade." Because the EC Regulation was not in accordance with Codex Stan 94, we considered that it could create an "unnecessary obstacle to trade", which, in our view, can be construed to mean more trade-restrictive than necessary.

6.12 The European Communities objected to the use of dictionaries as proof of consumer expectations and rejected our assertion in paragraph 7.131 that "the European Communities acknowledged that one of the common names for *Sardinops sagax* is 'sardines' or its equivalent thereof in the national language combined with the country or geographical area of origin". Concerning the first comment, we are of the view that the use of the dictionaries referred to by both parties is an appropriate means to examine whether the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name that refers to species other than *Sardina pilchardus*, especially in light of the fact that the *Multilingual Illustrated Dictionary of Aquatic Animals and Plants* was published in cooperation with the European Commission and member States of the European Communities for the purposes of, *inter alia*, improving market transparency. We note that the electronic publication, *Fish Base*, was also produced with the support of the European Commission. In making our finding, not only did we consider carefully dictionaries referred to by both parties but also considered other evidence such as the regulations of several member States of the European Communities, statements made by the Consumers' Association and the trade description used by Canadian exporters of *Clupea harengus harengus* to the Netherlands and the United Kingdom. In our weighing and balancing of the totality of evidence before us, including the examination of the *Oxford Dictionary* referred to by Peru³⁶ and Canada as well as the *Grand Dictionnaire Encyclopédique Larousse* and *Diccionario de la lengua española* referred to by the European Communities, we were persuaded, on balance, that the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name in the European Communities and that the consumers in the European Communities do not associate the term "sardines" exclusively with *Sardina pilchardus*.³⁷ For the sake of clarity, we inserted a sentence to reflect that Peru demonstrated that European consumers do not associate "sardines" exclusively with *Sardina pilchardus* by pointing out that the term "sardines", either by itself or combined with the name of a country or geographic area, is a common name for *Sardinops sagax* in the European Communities. Concerning the second comment, we consider that the last sentence of paragraph 7.131 accurately reflects the statements made by the European Communities in its first written submission. For the sake of clarity, we have cited in Footnote 100 what the European Communities stated in paragraph 28 of its first written submission.

³⁶ Peru's First Oral Statement, para. 4.

³⁷ We noted that *Grand Dictionnaire Encyclopédique Larousse* refers the term "sardine" to *Sardina pilchardus*. We also took note of the fact that the same dictionary states "[o]n trouve des espèces voisines dans le Pacifique (*Sardinops caerulea*), ainsi que sur les côtes du sud de l'Afrique (*S. sagax*) et d'Australie (*S. neopilchardus*)". *Diccionario de la lengua española* defines the term "sardina" as "pez teleosteo marino fisóstomoto, de 12 a 15 centímetros de largo, parecido al arenque, pero de carne más delicada, cabeza relativamente menor, la aleta dorsal muy delantera y el cupero más delicada y el cuerpo más fusiforme y de color negro ayulado por encima, dorado en la cabeza y peteado en los costados y vientre." (emphasis added) These two dictionaries referred to by the European Communities support the view that the term "sardines" is not limited to just *Sardina pilchardus* but includes other species, including *Sardinops sagax*.

6.13 The European Communities made a number of comments with respect to paragraph 7.132. First, the European Communities stated that "[t]he assessment of the facts developed by the Panel in this paragraph to establish that sardines is a generic term in the territory of the European Communities is not objective". The European Communities makes this assertion based on the probative value we attached to the letter of the United Kingdom Consumers' Association and the use of "slid" and "herring" in addition to the use of the term "sardines" to market the Canadian *Clupea harengus harengus*. In addition, the European Communities argued that "the Panel completely ignores the evidence submitted ... on the range and diversity of preserved fish products that the European consumers can find in any European supermarket and that responds to their expectations that each fish be called and marketed with its own name". As a claim that a panel has not made an objective assessment is very serious,³⁸ we will examine each of the European Communities' arguments.

6.14 With respect to the first argument that questions the probative value or the relative weight we ascribed to the Consumers' Association's letter, we note that the Appellate Body in *Korea — Dairy* stated:

...under Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof ... The determination of the significance and weight properly pertaining to the evidence presented by one party is a function of a panel's appreciation of the probative value of all the evidence submitted by both parties considered together.³⁹

6.15 We are also mindful that we are not "required to accord to factual evidence of the parties the same meaning and weight as do the parties".⁴⁰ We did consider the Consumers' Association letter in determining whether the European consumers associate the term "sardines" exclusively with *Sardina pilchardus* but, as stated above, this was not the sole basis on which we made the determination as other evidence was considered in the overall weighing and balancing process. We therefore do not agree with the European Communities' argument that our approach was partial.

6.16 The European Communities submitted additional evidence, i.e., letters it had received lately from other European consumers' associations on the same

³⁸ The Appellate Body in *European Communities — Measures Affecting the Importation of Certain Poultry Products* ("EC — Poultry"), WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, stated that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' ... is a very serious allegation". Para. 133.

³⁹ Appellate Body Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products* ("Korea — Dairy"), WT/DS98/AB/R, adopted 12 January 2000, para. 137.

⁴⁰ Appellate Body Report, *Australia — Measures Affecting the Importation of Salmon* ("Australia — Salmon"), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, para. 267.

issue. In a letter dated 11 April 2002, Peru requested that the new evidence submitted by the European Communities not be considered. In this regard, Peru referred to Article 12 of the Panel's Working Procedures which did not provide for the submission of new evidence at this stage of the Panel proceedings. Article 12 of the Panel's Working Procedures reads as follows: "Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions, answers to questions or comments on answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate". We are obliged to point out that Peru submitted the letter from Consumers' Association as a part of its rebuttal submission. In light of this, it is our view that the European Communities should have submitted the evidence at the second substantive meeting or at least not later than at the time it submitted answers to the questions posed by the Panel. Further, the European Communities did not request an extension of time-period to rebut the letter from Consumers' Association. Nor did the European Communities demonstrate the requisite "good cause" which must be shown by the party submitting the new evidence. We do not consider that the interim review stage is the appropriate time to introduce new evidence. Therefore, we decline to consider the new evidence submitted by the European Communities.

6.17 With respect to the letter from an exporter submitted by Canada, on balance we found the argument that the juvenile product of *Clupea harengus harengus* was marketed as sardines in the European Communities credible and therefore considered it as a part of the overall evidence in determining whether the European consumers associate the term "sardines" exclusively with *Sardina pilchardus*. With respect to the European Communities' argument that "the real use of the word 'sardines' for Canada's product was for sales to Surinamese in the Netherlands of a Canadian product they had got to know in Suriname", we do not see how this detracts from the fact that Canada exported *Clupea harengus harengus* as "Canadian sardines" to the Netherlands for thirty years until 1989. The fact that the majority of consumers of Canadian sardines in the Netherlands originates from Suriname does not affect the relevance of the evidence.

6.18 Finally, the European Communities claimed that in paragraph 7.132 we "completely ignor[ed] the evidence submitted by the European Communities on the range and diversity of preserved fish products that the European consumers could find in any European supermarket and that responds to their expectations that each fish be called by and marketed under its own name". Again, we did not ignore any evidence and we took note of the fact that there is diverse range of fish products that are available in European supermarkets. However, we were not persuaded that the existence of diverse preserved fish products in the European market suggested that the European consumers associate the term "sardines" exclusively with *Sardina pilchardus*. We therefore reject the European Communities' argument that we "completely ignored" the evidence it submitted.

6.19 In light of the above, we reject the European Communities' argument that our assessment was not objective and decline to change our views set out in paragraph 7.132. We have, however, for the sake of clarity, revised the last sentence to state that the term "sardines", either by itself or combined with the name of a country or geographic area is a common name for *Sardinops sagax* in the European Communities. We are obliged to point out, in response to the European Communities' comment that "[t]he assessment of the facts developed by the Panel ... to establish that sardines is a *generic* term in the territory of the European Communities is not objective", that we stated in Footnote 107 of the findings: "With respect to parties' argument about whether the term 'sardines' is generic, we do not consider it necessary to make a determination on this particular issue".

6.20 The European Communities argued that we incorrectly described Article 7 of the EC Regulation in Footnote 104 of the findings. Concerning the composition of "sardine mousse", the European Communities argued that the EC Regulation referred to at least 25% *Sardina pilchardus* of the net weight of the product and that these products could not materially be composed of 100% fish. The European Communities further noted that these products consisted of 40% to 50% of the net weight of sardine meat, whilst the rest were non-fish ingredients which are necessary to give the product its particular texture and taste. We have made changes to Footnote 104 to accurately reflect Article 7 of the EC Regulation in light of the European Communities' argument.

6.21 Finally, the European Communities contested "the partial and random use made by the Panel of the evidence submitted by the parties on the negotiating history of the Codex Stan 94, which is considered unnecessary in certain parts and is selectively relied upon in others". With regard to paragraph 7.136, the European Communities further recalled a statement by France in the 1969 Synopsis of Governments' Replies on the Questionnaire on Canned Sardines: "the use of country of origin as a prefix is confusing, because several species would have the same trade name and a single species would be given several names according to the country where it is caught or processed". We would like to emphasize again that we considered the totality of the evidence before us. We considered the text of Codex Stan 94 in determining that the language provided therein took into account the issue of consumer protection in countries producing preserved sardines using *Sardina pilchardus*. We resorted to the negotiating history only to confirm that Codex Stan 94 takes into account the European Communities' concern that consumers might be misled if a distinction were not made between *Sardina pilchardus* and other species.

6.22 For the sake of clarity, we have inserted a sentence at the end of paragraph 7.99 and added paragraph 7.139 which summarizes our findings by way of an overall conclusion, which is reflected in paragraph 8.1, with respect to Article 2.4 of the TBT Agreement.

VII. FINDINGS

A. *Products at Issue*

7.1 This dispute concerns *Sardina pilchardus* Walbaum ("*Sardina pilchardus*") and *Sardinops sagax sagax* ("*Sardinops sagax*"), two small fish species which belong, respectively, to genus *Sardina* and *Sardinops* of the *Clupeinae* subfamily of the *Clupeidae* family; fish of the *Clupeidae* family populate almost all oceans. *Sardina pilchardus* is found mainly around the coasts of the Eastern North Atlantic, in the Mediterranean Sea and in the Black Sea, and *Sardinops sagax* is found mainly in the Eastern Pacific along the coasts of Peru and Chile. Despite the various morphological differences that can be observed between them, such as those concerning the head and length, the type and number of gill-rakes or bone striae and size and weight, *Sardina pilchardus* and *Sardinops sagax* display similar characteristics: they live in a coastal pelagic environment, form schools, engage in vertical migration, feed on plankton and have similar breeding seasons.

7.2 Both fish, as well as other species of the *Clupeidae* family, are used in the preparation of preserved and canned fish products, packed in water, oil or other suitable medium.

B. *Measure at Issue*⁴¹

7.3 Regulation (EEC) 2136/89 laying down common marketing standards for preserved sardines (the "EC Regulation") was adopted on 21 June 1989.⁴² The EC Regulation defines the standards governing the marketing of preserved sardines in the European Communities.

7.4 Article 2 of the EC Regulation provides that only products prepared from fish of the species *Sardina pilchardus* may be marketed as preserved sardines. Article 2 reads as follows:

Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:

- they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
- they must be prepared exclusively from the fish of the species "*Sardina pilchardus* Walbaum";
- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
- they must be sterilized by appropriate treatment.

⁴¹ Pertinent parts of the European Communities measure at issue and Codex Stan 94 set out in the descriptive part are reproduced in this part of the Report.

⁴² The EC Regulation in its entirety is attached as Annex 1.

C. *The Codex Alimentarius Commission Standard for Canned Sardines and Sardine-Type Products (codex stan 94 –1981 rev.1 – 1995)*

7.5 The Codex Alimentarius Commission of the United Nations Food and Agriculture Organization ("FAO") and the World Health Organisation ("WHO") ("Codex Alimentarius Commission") adopted, in 1978, a standard ("Codex Stan 94") for canned sardines and sardine-type products.⁴³ Article 1 of Codex Stan 94 states that this standard applies to "canned sardines and sardine-type products packed in water or oil or other suitable packing medium" and that it does not apply to speciality products where fish content constitutes less than 50% m/m of the net contents of the can.

7.6 Article 2.1 of Codex Stan 94 provides that canned sardines or sardine-type products are prepared from fresh or frozen fish from a list of 21 species, amongst them *Sardina pilchardus* and *Sardinops sagax*.⁴⁴

7.7 Article 6 of Codex Stan 94 reads as follows:

6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following specific provisions shall apply:

6.1 NAME OF THE FOOD

The name of the products shall be:

6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or

(ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

⁴³ Codex Stan 94 was amended in 1979 and 1989 by adding more species and revised in 1995. Codex Stan 94 is attached in its entirety as Annex 2.

⁴⁴ Article 2.1.1 lists the following species:

- *Sardina pilchardus*
- *Sardinops melanostictus*, *S. neopilchardus*, *S. ocellatus*, *S. sagax* *S. caeruleus*
- *Sardinella aurita*, *S. brasiliensis*, *S. maderensis*, *S. longiceps*, *S. gibbosa*
- *Clupea harengus*
- *Sprattus sprattus*
- *Hyperlophus vittatus*
- *Nematalosa vlaminghi*
- *Etrumeus teres*
- *Ethmidium maculatum*
- *Engraulis anchoita*, *E. mordax*, *E. ringens*
- *Opisthonema oglinum*

D. Findings and Recommendations Requested by the Parties

7.8 Peru makes the following requests:

- (a) Peru requests the Panel to find that the measure at issue, the EC Regulation, prohibiting the use of the term "sardines" to be used in combination with the name of the country of origin ("Peruvian Sardines"); the geographical area in which the species is found ("Pacific Sardines"); the species ("Sardines — *Sardinops sagax*"); or the common name of the species *Sardinops sagax* customarily used in the language of the member State of the European Communities in which the product is sold ("Peruvian Sardines" in English or "Südamerikanische Sardinen" in German) is inconsistent with Article 2.4 of the TBT Agreement because the European Communities did not use the naming standard set out in paragraph 6.1.1(ii) of Codex Stan 94 as a basis for its Regulation even though that standard would be an effective and appropriate means to fulfil the legitimate objectives pursued by the Regulation.
- (b) If the Panel were to find that the EC Regulation is consistent with Article 2.4 of the TBT Agreement, Peru requests the Panel to find that the EC Regulation is inconsistent with Article 2.2 of the TBT Agreement because it is more trade-restrictive than necessary to fulfil the legitimate objective of market transparency that the European Communities claims to pursue.
- (c) If the Panel were to find that the EC Regulation is consistent with Articles 2.2 and 2.4 of the TBT Agreement, Peru requests the Panel to find that the measure is inconsistent with Article 2.1 of the TBT Agreement because it is a technical regulation that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus*.
- (d) If the Panel were to find that the measure at issue is consistent with the TBT Agreement, Peru requests the Panel to find that it is inconsistent with Article III:4 of the GATT 1994 because it is a requirement affecting the offering for sale of imported sardines that accords Peruvian products prepared from fish of the species *Sardinops sagax* treatment less favourable than that accorded to like European products made from fish of the species *Sardina pilchardus*.

7.9 Peru requests the Panel to recommend that the Dispute Settlement Body ("DSB") request the European Communities to bring its measure into conformity with the TBT Agreement. Peru specifically requests the Panel to suggest that the European Communities permit Peru, without any further delay, to market its sardines in accordance with a naming standard consistent with the TBT Agreement.

7.10 The European Communities requests the Panel to reject Peru's claims that the EC Regulation is inconsistent with Articles 2.4, 2.2 and 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

E. General Interpretative Issues

1. Rules of Interpretation

7.11 The TBT Agreement constitutes an integral part of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement"). As such, the TBT Agreement is one of the "covered agreements" and is therefore subject to the DSU. Article 3.2 of the DSU provides that panels are to clarify the provisions of "covered agreements" in accordance with customary rules of interpretation of public international law.

7.12 In *US — Gasoline*, the Appellate Body stated that the fundamental rule of treaty interpretation as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention")⁴⁵ had "attained the status of a rule of customary or general international law" and "forms part of the 'customary rules of interpretation of public international law'".⁴⁶ Pursuant to Article 31(1) of the Vienna Convention, the duty of a treaty interpreter is to determine the meaning of a term in accordance with the ordinary meaning to be given to the term in its context and in light of the object and purpose of the treaty.

7.13 If, after applying the rule of interpretation set out in Article 31(1), the meaning of the treaty term remains ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, Article 32 allows the treaty interpreter to have a recourse to "supplementary means of interpretation, including the preparatory work on the treaty and the circumstances of its conclusion".⁴⁷ We will apply the principles enunciated by the Appellate Body in the *US — Gasoline* to interpret the relevant provisions of the TBT Agreement in this Report.

2. Order of Analysis of the Claims

7.14 Peru requests that we examine its claim under Article 2.4 of the TBT Agreement first and then examine its claims in the order of Articles 2.2 and 2.1 of the TBT Agreement only if we were to determine that the EC Regulation is

⁴⁵ Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; (1969) 8 International Legal Materials 679.

⁴⁶ Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline* ("*US — Gasoline*"), adopted 20 May 1996, DSR 1996:I, p. 16. See also Appellate Body Report, *Japan — Taxes on Alcoholic Beverages* ("*Japan — Alcoholic Beverages II*") WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 104; Appellate Body Report, *India — Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India — Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, para. 46; *European Communities — Customs Classification of Certain Computer Equipment* ("*EC — Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, para. 84; and *US — Shrimp*, para. 114.

⁴⁷ Appellate Body Report, *EC — Computer Equipment*, para. 86.

not inconsistent with Article 2.4. If we were to determine that the EC Regulation is not inconsistent with the provisions of the TBT Agreement invoked by Peru, it requests that we examine its claims in respect of Article III:4 of the GATT 1994.

7.15 In addressing the issue of the order of analysis, we have taken into account earlier considerations of this question. We recall the Appellate Body's statement in *EC — Bananas III* which stated that the panel "should" have applied the Licensing Agreement first because this agreement deals "specifically, and in detail" with the administration of import licensing procedures. The Appellate Body noted that if the panel had examined the measure under the Licensing Agreement first, there would have been no need to address the alleged inconsistency with Article X:3 of the GATT 1994.⁴⁸ The Appellate Body suggests that where two agreements apply simultaneously, a panel should normally consider the more specific agreement before the more general agreement.

7.16 Arguably, the TBT Agreement deals "specifically, and in detail" with technical regulations. If the Appellate Body's statement in *EC — Bananas III* is a guide, it suggests that if the EC Regulation is a technical regulation, then the analysis under the TBT Agreement would precede any examination under the GATT 1994. Moreover, Peru, as the complaining party, requested that we first examine its claim under Article 2.4 of the TBT Agreement followed by Article 2.2 if we find that the EC Regulation is consistent with Article 2.4. And similarly, only if we were to find that the EC Regulation is consistent with Article 2.2 does Peru ask us to consider its claim under Article 2.1. In the event that we were to find that the EC Regulation is consistent with the TBT Agreement, Peru requests that we examine its claim under Article III:4 of the GATT 1994. We note that the European Communities did not contest Peru's request regarding this sequencing analysis.

7.17 These requests by Peru on sequencing of claims thereby oblige us to consider whether there is an interpretative methodology that compels panels to adopt a particular order which, if not followed, would constitute an error of law.⁴⁹ We recall the Appellate Body's statement in *US — FSC* in relation to the US argument that the panel erred by commencing its analysis with Article 3.1(a) rather than footnote 59 of the Subsidies and Countervailing Measures Agreement. The Appellate Body stated:

In our view, it was not a legal error for the Panel to begin its examination of whether the FSC measure involves export *subsidies*

⁴⁸ Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas* ("*EC — Bananas III*"), WT/DS27/R, adopted 25 September 1997, DSR 1997:II, para. 204.

⁴⁹ In *US — Shrimp*, for example, the Appellate Body considered the sequence of analysis important in examining whether the U.S. measure protecting sea turtles was justifiable under Article XX of the GATT 1994. It held that the panel erred by looking at the chapeau of Article XX and then subsequently examining whether the U.S. measure was covered by the terms of Article XX(b) or (g) because "[t]he task of interpreting the chapeau so as to prevent the abuse or misuse of the specific exemptions provided for in Article XX is rendered very difficult, if indeed it remains possible at all, where the interpreter ... has not first identified and examined the specific exception threatened with abuse". Appellate Body Report, *US — Shrimp*, para. 120.

by examining the general definition of a "*subsidy*" that is applicable to export *subsidies* in Article 3.1(a). In any event, whether the examination begins with the general definition of a "subsidy" in Article 1.1 or with footnote 59, we believe that the outcome of the European Communities' claim under Article 3.1(a) would be the same. The appropriate meaning of both provisions can be established and can be given effect, irrespective of whether the examination of the claim of the European Communities under Article 3.1(a) begins with Article 1.1 or with footnote 59.⁵⁰

7.18 In our view, if the EC Regulation is a technical regulation, it would not constitute an error of law to start the examination of the consistency of the EC Regulation with Article 2.4 followed by Articles 2.2 and 2.1 of the TBT Agreement as necessary since such sequential examination would not affect the interpretation of the other provisions.

7.19 Accordingly, the order of examination will follow the order of the claims set out in Peru's submission. That is, claims will be examined in the following order: Articles 2.4, 2.2, 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

F. *Applicability of the TBT Agreement*

1. *Consideration of the EC Regulation as a Technical Regulation*

7.20 Peru, as the complaining party, invoked paragraphs 1, 2 and 4 of Article 2 of the TBT Agreement as the legal basis of its claim to argue that the EC Regulation is inconsistent with those provisions. We note that the substantive provisions of the TBT Agreement have not been construed by either panels or the Appellate Body⁵¹ and that the provisions of the Tokyo Round Agreement on Technical Barriers to Trade (the "Tokyo Round Standards Code") which preceded the TBT Agreement have also not been addressed by any panel. As the drafters of the TBT Agreement intended to further the objective of the GATT 1994 with a specialized legal regime that applies only to a limited class of measures, it is necessary to commence our analysis by examining whether the EC Regulation constitutes a technical regulation within the meaning of the TBT Agreement. Only if it is established that the EC Regulation constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, will we then proceed to consider the consistency of the EC Regulation with the substantive obligations set out in Articles 2.4, 2.2 and 2.1 of the TBT Agreement.

7.21 Peru notes that paragraph 1 of Annex 1 of the TBT Agreement defines the term "technical regulation" as a document which lays down product characteris-

⁵⁰ Appellate Body Report, *United States — Tax Treatment for "Foreign Sales Corporations"* ("US — FSC"), WT/DS108/AB/R, adopted 20 March 2000, para. 89.

⁵¹ The panel and the Appellate Body examined whether the measure at issue was a technical regulation in Appellate Body Report, *EC — Asbestos*.

tics with which compliance is mandatory and submits that the EC Regulation lays down "common marketing standards for preserved sardines". Peru argues that the EC Regulation constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement because it lays down characteristics which preserved sardines must possess if they are to be "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. In particular, Peru submits that Article 2 of the EC Regulation sets out characteristics preserved sardines must possess in order to market them in the European Communities under the name "sardines" and notes that one such characteristic is that the product in question must be prepared from the fish of species *Sardina pilchardus*. Peru also argues that the language of Article 9 of the EC Regulation which provides that the EC Regulation "shall be binding in its entirety and directly applicable in all Member States" makes compliance with the measure mandatory.

7.22 The European Communities does not contest that the EC Regulation is a technical regulation for the purposes of the TBT Agreement. Nevertheless, the European Communities does not accept that the measure identified by Peru is a technical regulation because the EC Regulation deals with naming, not labelling, and the definition of technical regulation refers to labelling of products and not to naming of products. The European Communities also argues that the Regulation does not lay down mandatory labelling requirements for fish of species other than *Sardina pilchardus*, i.e., *Sardinops sagax*.

7.23 The term "technical regulation" is defined in Annex 1.1 of the TBT Agreement and states:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

7.24 Based on the textual reading of the definition as set out in Annex 1.1 of the TBT Agreement, a measure constitutes a "technical regulation" if the measure lays down product characteristics and compliance is mandatory. We note that the key part of the definition is that the document has to lay down "product characteristics". In this regard, the Appellate Body in *EC — Asbestos* stated:

[T]he "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities

intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".⁵²

7.25 The Appellate Body provides a comprehensive definition of "characteristics" of a product and adds that a technical regulation, if it is to be enforceable, must be applicable to an identifiable product, or group of products. In support of this view, the Appellate Body states that compliance with Article 2.9.2 of the TBT Agreement, which imposes an obligation on Members to notify other Members "of the products to be covered" by a proposed technical regulation, calls for identification of the product coverage of a technical regulation.⁵³ By this logic, if a technical regulation applies to a group of products or products generally, the product need not be expressly named, identified or specified in the regulation.

7.26 In determining whether the EC Regulation is a technical regulation, we first note that it identifies a product, namely preserved sardines. In its preambular language, the EC Regulation alludes to "the adoption of [common marketing standards] for preserved sardines". In addition to identifying the product, the EC Regulation lays down certain product characteristics, both intrinsic and related, that preserved sardines must possess in order for them to be "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. The definition provided in Annex 1.1 of the TBT Agreement indicates that a technical regulation can require one or more product characteristics. This is confirmed by the Appellate Body's finding that the use of the word "exclusively" with the disjunctive word "or" indicates that a technical regulation may lay down one or a few product characteristics. Thus, it is plausible that a technical regulation may contain just one product characteristic or several product characteristics, whether they be intrinsic and/or related characteristics of the product.

7.27 Various provisions of the EC Regulation lay down product characteristics that deal with features and qualities affecting composition, size, shape, colour and texture of preserved sardines. For instance, one product characteristic required by Article 2 of the EC Regulation is that preserved sardines must be prepared exclusively from fish of the species *Sardina pilchardus*. This product characteristic must be met for the product to be "marketed as preserved sardines

⁵² Appellate Body Report, *EC — Asbestos*, para. 67.

⁵³ *Ibid.*, para. 70.

and under the trade description referred to in Article 7" of the EC Regulation. We consider that the requirement to use exclusively *Sardina pilchardus* is a product characteristic as it objectively defines features and qualities of preserved sardines for the purposes of their "market[ing] as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. Article 2 of the EC Regulation lays down additional product characteristics for a product to be "marketed as preserved sardines and under the trade description referred to in Article 7", e.g., the product must be pre-packaged with any appropriate covering medium in a hermetically sealed container and sterilized by appropriate treatment. In addition to these product characteristics laid down in Article 2, the EC Regulation contains other product characteristics of preserved sardines.

7.28 Article 3 states that sardines must be "appropriately trimmed of the head, gills, caudal fin and internal organs other than ova, milt and kidneys, and according to the market presentation concerned, backbone and skin". Article 4 sets out the presentation of preserved sardines and Article 5 deals with the covering media. Article 6 requires, *inter alia*, that sardines be uniform in size and must not have significant breaks in the abdominal wall; comprise flesh of normal consistency with light or pinkish color; and retain the odour and flavor characteristics of the species *Sardina pilchardus*. Article 7, in addition to dealing with trade description, covers the ratio between the weight of the sardines and covering media. We find that these provisions of the EC Regulation also lay down product characteristics.

7.29 The second requirement for a measure to be a technical regulation is that compliance must be mandatory. With regard to this requirement, the Appellate Body stated:

A "technical regulation" must, in other words, regulate the "characteristics" of products in a binding or compulsory fashion. It follows that, with respect to products, a "technical regulation" has the effect of *prescribing* or *imposing* one or more "characteristics" – "features", "qualities", "attributes", or other "distinguishing mark".⁵⁴

7.30 With respect to the requirement that compliance with the technical regulation must be mandatory, Article 9 of the EC Regulation states that the requirements contained therein are "binding in its entirety and directly applicable in all Member States". Thus, the EC Regulation fulfils the mandatory compliance aspect of the definition set out in Annex 1.1 of the TBT Agreement.

7.31 Although the European Communities does not contest that its Regulation is a technical regulation, it argued that Peru has taken one aspect of the measure, i.e., Article 2 of the EC Regulation, isolated that provision and classified the Regulation as a technical regulation. The European Communities argued that it is not possible to single out one aspect of a measure and analyze it as a technical

⁵⁴ Appellate Body Report, *EC — Asbestos*, para. 68.

regulation and that Article 2 has to be interpreted in the context of the entire Regulation.

7.32 In *EC — Asbestos*, in determining whether French Decree No. 96-1133 concerning asbestos and products containing asbestos constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, the Appellate Body stated that "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole" and concluded that the measure at issue had to be examined as an "integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it".⁵⁵ We note that Peru did not argue that it was taking Article 2 of the EC Regulation in separation from the whole regulation and classifying only that provision as a technical regulation. Peru argued that it considers the EC Regulation in its entirety to be a technical regulation because it lays down characteristics for sardines to be marketed in the European Communities as preserved sardines but Peru challenges only the WTO-consistency of the requirement set out in Article 2 of the EC Regulation.⁵⁶

7.33 Moreover, Peru indicated that the other elements of the EC Regulation were relevant in considering whether the requirement set out in Article 2 of the EC Regulation is consistent with Articles 2.1, 2.2 and 2.4 of the TBT Agreement. Indeed, examining Article 2 of the EC Regulation for the purposes of determining the trade description would necessarily entail examining Article 7 which in turn refers to Articles 4 and 5 of the EC Regulation. Peru refers to other provisions of the EC Regulation, i.e., objectives of the regulation as set out in the preamble and the provision relating to the binding nature of the Regulation, in its claim that the EC Regulation is inconsistent with Article 2 of the TBT Agreement.

7.34 We do not consider that, under the DSU, a complaining party is required to list all provisions of a measure it deems inconsistent and can instead identify and challenge only those offending provisions of the measure it deems central to its interest in resolving the dispute. Peru decided in this case to focus on Article 2 of the EC Regulation and its decision to narrow the scope of the examination to Article 2 does not suggest that Peru considers only Article 2 to be a technical regulation in isolation from the rest of the provisions of the EC Regulation. We therefore reject the European Communities' argument that the measure identified by Peru is not a technical regulation because it did not take into account the whole of the EC Regulation but only Article 2 of the EC Regulation.

7.35 Based on the reasons set out above and subject to review below of the arguments advanced by the European Communities, we find that the EC Regulation is a technical regulation as it lays down product characteristics for preserved sardines and makes compliance with the provisions contained therein mandatory.

⁵⁵ *Ibid.*, para. 64.

⁵⁶ Peru's Rebuttal Submission, para. 25.

2. *Consideration of the European Communities' Arguments that its Regulation does not Contain a Labelling Requirement and does not Concern Preserved Sardinops Sagax*

7.36 Although the European Communities accepts that the EC Regulation is a technical regulation for the purposes of the TBT Agreement because it lays down marketing standards for preserved *Sardina pilchardus*, the European Communities argues that its Regulation does not contain a labelling requirement and does not lay down marketing standards for preserved *Sardinops sagax*.

(a) *The European Communities' Argument that its Regulation is not a Technical Regulation Because it Deals with Naming Rather than Labelling of a Product*

7.37 The European Communities claims that its Regulation does not constitute a technical regulation because the definition of technical regulation as set out in Annex 1 of the TBT Agreement covers labelling of products, not naming of products. The European Communities argues that it is Directive 2000/13 on the laws of the European Communities' member States relating to the labelling, presentation and advertising of foodstuffs for sale to the final consumer ("EC Directive 2000/13"), in conjunction with Article 2 of the EC Regulation, that requires preserved *Sardina pilchardus* to be labelled "preserved sardines".

7.38 We reject the European Communities' argument on two grounds. First, we do not consider that the EC Regulation, even if it were to contain a "naming" rather than "labelling" requirement, could no longer be a technical regulation within the meaning of the TBT Agreement. Second, we do not consider that the distinction between "naming" and "labelling" as applied by the European Communities to its Regulation is meaningful.

7.39 First, we recall the Appellate Body's statement that a "technical regulation" may be confined to laying down only one or a few "product characteristics" and we have already found that the EC Regulation lays down product characteristics that preserved sardines must possess, i.e., they must be prepared from fish of species *Sardina pilchardus* only and meet certain requirements dealing with weight, organoleptic aspects and the covering medium. Consequently, even if it were determined that the EC Regulation does not contain a labelling requirement, it cannot detract from our conclusion that the EC Regulation constitutes a technical regulation because that conclusion is based on our finding that it lays down certain product characteristics we have already identified. A finding to the effect that the EC Regulation does not contain a related product characteristic in the form of a labelling requirement does not negate the existence of other product characteristics set out in the EC Regulation.

7.40 Second, we fail to see the basis on which a distinction can be drawn between a requirement to "name" and a requirement to "label" a product for the purposes of the TBT Agreement. The ordinary meaning of the term "label" is

"name" and vice versa.⁵⁷ Moreover, these two concepts denote the means of identification of a product. The Appellate Body in *EC — Asbestos* referred to "terminology, symbols, packaging, marking or labelling requirements" as constituting "the means of identification, the presentation and the appearance of a product". The ordinary meaning of the term "label" is "[a]n affixation to or marking on a manufactured article, giving information as to its nature or quality, or the contents of a material, package or container, or the name of the maker"⁵⁸ and the term "marking" in turn is defined as "write a word or symbol on (an object), typically for identification".⁵⁹ The ordinary meaning of the term "naming" is "identify by name".⁶⁰ Based on the ordinary meaning, we consider that labelling and naming requirements are essentially "means of identification" of a product and as such, they come within the scope of the definition of "technical regulation".

7.41 In any event, the distinction which we have been asked to draw between "naming" and "labelling" requirements is not supported by the text and structure of the EC Regulation. Article 2 of the EC Regulation states that only products meeting the requirements contained therein may be marketed as preserved sardines and under the trade description referred to in Article 7. Article 7 of the EC Regulation in turn stipulates that the trade description must correspond to the presentation of sardines on the basis of corresponding designation set out in Article 4 of the EC Regulation which allows the marketing of preserved sardines as simply "sardines", "sardines without bones", "sardines without skin or bones", "sardine fillets", "sardine trunks" or any other form that is distinguishable from the five presentations mentioned above. Article 7 of the EC Regulation also requires that the designation of the covering medium, which is addressed in Article 5, must form an integral part of the trade description. Article 5 allows olive oil, other refined vegetable oils, tomato sauce, natural juice, marinade and any other covering medium that is distinguishable from the five covering media mentioned above. Based on the foregoing reading of the EC Regulation, the label would have to indicate the term "sardines" accompanied by the corresponding designation for presentation and the covering medium. The European Communities confirmed this interpretation of its Regulation when it stated, in response to the Panel's question whether the EC Regulation requires that the label indicate that the product is preserved sardines, that Article 7 of the EC Regulation, in conjunction with Articles 4 and 5, require "the description of the product on the labels will bear the indication 'sardines' and will have to reflect these two requirements".⁶¹ In light of the ordinary meaning of the term "label" and based on the European Communities' response, Article 2 of the EC Regulation, in conjunction with Articles 4, 5 and 7, also constitutes a related product characteristic in the

⁵⁷ *The Cassell Thesaurus Dictionary*, (Mackays of Chatham PLC, 1998), pp. 387 and 453.

⁵⁸ *Black's Law Dictionary*, (West Publishing Company, 1979, fifth edition), p. 786.

⁵⁹ *The New Oxford Dictionary of English*, (Clarendon Press, Oxford, 1998), p. 1132.

⁶⁰ *Ibid.*, p. 1229.

⁶¹ EC's Response to Panel Question 7. We note that the label on a sample of sardines submitted as evidence by the European Communities states "Sardines MAROCAINES SANS PEAU & SANS ARÊTES — À L'HUILE D'OLIVE".

form of a labelling requirement as it comes within the ambit of "[an] affixation to or marking on a manufactured article, giving information as to its nature or quality, or the content of a material, package or container, or the name of the maker". Finally, the fact that the European Communities may have another domestic regulation deemed to be a labelling regulation does not vitiate our conclusion that the EC Regulation contains a labelling element within the meaning of the TBT Agreement.⁶²

7.42 For the reasons stated above, we reject the European Communities' argument that its Regulation does not constitute a technical regulation on the basis that it deals with naming, not labelling.

(b) The European Communities' Argument that its Regulation does not Lay Down Mandatory Labelling Requirement for Products Other than Preserved *Sardina Pilchardus*

7.43 The European Communities argues that although Article 2 of the EC Regulation provides that the term "sardines" can only be used for preserved *Sardina pilchardus*, it does not mean that the EC Regulation lays down mandatory labelling requirement for preserved *Sardinops sagax* or any species other than *Sardina pilchardus*.⁶³

7.44 The European Communities' argument goes to the issue of whether its Regulation is the relevant technical regulation. This argument, in our view, disregards the notion that a document may prescribe or impose product characteristics in either a positive or negative form — that is, by inclusion or by exclusion.⁶⁴ In discussing the form in which a document may regulate a product, the Appellate Body held in *EC — Asbestos* that a document may require positively that a product contain certain characteristics or it may require negatively that the product not possess certain characteristics.⁶⁵ In the case at hand, Article 2 of the EC Regulation states that "*only* the products meeting the ... requirements [set out in that Article] may be marketed as preserved sardines and under the trade description referred to in Article 7". This formulation thereby makes a distinction

⁶² We note in this regard that the fifth preamble of Directive 2000/13 states that "[r]ules of specific nature which apply vertically only to particular foodstuff should be laid down in provisions dealing with those products".

⁶³ EC's Rebuttal Submission, para. 12.

⁶⁴ The positive and negative formulation stemmed from the facts of *EC — Asbestos*, where the measure was a ban on asbestos and products containing asbestos fibres.

⁶⁵ The Appellate Body stated in paragraph 69:

"Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain "characteristics", or the document may require, negatively, that products *must not possess* certain "characteristics". In both cases, the legal result is the same: the document "lays down" certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.

between those product characteristics that are included in the measure versus those that are excluded.

7.45 By this logic, the language contained in Article 2 of the EC Regulation requires positively that preserved sardines possess the product characteristic of using only fish of the species *Sardina pilchardus*. The negative implication that follows from this requirement is that preserved sardines cannot possess the product characteristic of using fish of species other than *Sardina pilchardus*. That is, a product containing fish of the species *Sardinops sagax*, or any species other than *Sardina pilchardus* for that matter, cannot be "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. Therefore, by requiring the use of only the species *Sardina pilchardus* as preserved sardines, the EC Regulation in effect lays down product characteristics in a negative form, that is, by excluding other species, such as *Sardinops sagax*, from being "marketed as preserved sardines and under the trade description referred to in Article 7" of the EC Regulation. It is for this reason that we do not accept the European Communities' argument that the EC Regulation is not a technical regulation for preserved *Sardinops sagax*. This argument would be persuasive only if technical regulations were to lay down product characteristics in a positive form.

7.46 If only characteristics set out in a positive form of an identifiable product can be taken into account in determining whether it constitutes a technical regulation without considering the negative implications stemming therefrom, it would be possible to circumvent the obligations contained in the TBT Agreement. It would be possible to argue that a measure is not the relevant technical regulation on the basis that it does not positively set out product characteristics of the identifiable product although such product would be affected by the negative implications of the technical regulation. Yet, the European Communities makes this argument when it claims that because the EC Regulation lays down product characteristic of preserved *Sardina pilchardus*, it is not a labelling requirement for preserved *Sardinops sagax* and that "the fact that the name 'sardines' cannot be used for products other than preserved *Sardina pilchardus* is in fact simply the logical consequence of the fact that this name is reserved for ... products produced exclusively from preserved *Sardina pilchardus*".⁶⁶ In our judgement, if only product characteristics set out in a positive form can be considered in examining a technical regulation, such interpretation could render the TBT Agreement meaningless and it is unlikely that the drafters of the TBT Agreement envisaged such situation.

7.47 Based on the foregoing reasons, we reject the European Communities' argument that the EC Regulation does not lay down mandatory labelling requirements for products other than preserved *Sardina pilchardus* and that its Regulation is not a technical regulation for preserved *Sardinops sagax*.

⁶⁶ EC's Rebuttal Submission, para. 12.

G. *Consistency of the EC Regulation with Article 2.4 of the TBT Agreement*

1. *Burden of Proof*

7.48 The issue of burden of proof has been repeatedly examined in WTO jurisprudence. The Appellate Body stated in *US — Wool Shirts and Blouses* that:

... the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.⁶⁷

7.49 Once the Panel determines that the party asserting the affirmative of a particular claim or defence has succeeded in raising a presumption that its claim is true, it is incumbent upon the Panel to assess the merits of all the arguments advanced by the parties and the admissibility, relevance and weight of all the factual evidence submitted with a view to establishing whether the party contesting a particular claim has successfully refuted the presumption raised. In the event that the arguments and the factual evidence adduced by the parties remain in equipoise, the Panel must, as a matter of law, find against the party who bears the burden of proof.

7.50 Under the well-established principle concerning burden of proof, it is for the complaining party to establish the violation it alleges; it is for the party invoking an exception or an affirmative defence to prove that the conditions contained there are met; and it is for the party asserting a fact to prove it.⁶⁸ Applying this principle in the context of Article 2.4 of the TBT Agreement, it is Peru, as the complaining party, that bears the burden of establishing a *prima facie* case by demonstrating that a relevant international standard exists and that this standard was not used as a basis for the technical regulation. At this point, should the European Communities make an assertion to rebut Peru's claims, it carries the burden of establishing that assertion. We note that the European Communities asserted that Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation. According to the Appellate Body, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".⁶⁹ Thus, in line with the principle enunciated by the Appellate Body, the burden of proof rests with the European Communities, as the party "assert[ing] the affirmative of a particular claim or defence", to demonstrate that the international standard is an ineffective

⁶⁷ Appellate Body Report, *United States — Measures Affecting Imports of Woven Wool Shirts and Blouses from India* ("US — Wool Shirts and Blouses"), WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, p. 335.

⁶⁸ Panel Report, *Turkey — Restrictions on Imports of Textile and Clothing Products* ("Turkey — Textiles"), WT/DS34/R, as modified by the Appellate Body Report, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, para. 9.57.

⁶⁹ Appellate Body Report, *US — Wool Shirts and Blouses*, p. 335.

or inappropriate means to fulfil the legitimate objectives pursued by the EC Regulation.⁷⁰

7.51 Moreover, we are concerned that a complaining party, if it were to be required to determine, as part of the *prima facie* case it has to establish, what the "legitimate" objectives pursued by the respondent are and what factors may render the international standard "inappropriate" in light of the respondent's specific conditions, may not be in a position to do so. A complainant cannot in our view be required to spell out the "legitimate" objectives pursued by a technical regulation. Only the respondent Member can do so. Similarly, we consider that the assessment of whether a relevant international standard is "inappropriate" includes considerations which may be distinct from those underlying an "effectiveness" assessment, and may extend to considerations which are proper to the Member adopting or applying a technical regulation. As indicated below, whereas the "effectiveness" of an international standard bears upon the *result* of the means employed, the "appropriateness" of that international standard bears upon the *nature* of the means employed. Consequently, when a Member challenges a technical regulation under Article 2.4, it cannot in our view be required to second-guess what those considerations of "appropriateness" are which underlie the respondent's decision not to use a relevant international standard as a basis. A complainant would then be required to explain why a relevant international standard is not "inappropriate", without knowing on what basis the respondent considers the relevant international standard "inappropriate".⁷¹

7.52 For the reasons stated above, it is for Peru, as the complaining party, to establish *prima facie* that the EC Regulation is a technical regulation within the meaning of the TBT Agreement; that relevant international standards exist; and that such standards were not used as a basis for the technical regulation. The burden rests with the European Communities, as the party "assert[ing] the affirmative of a particular claim or defence", to demonstrate that the international standard is an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the Regulation.

⁷⁰ We are cognizant of the Appellate Body's finding in *EC — Hormones* that, in reference to Articles 3.1 and 3.3 of the SPS Agreement, the latter provision, which allows Members to establish their own level of sanitary protection, does not constitute an exception to the general obligation of Article 3.1, and that the burden of the complaining party to establish a *prima facie* case of inconsistency "is not avoided by simply describing that provision as an 'exception'". However, we consider that the Appellate Body's finding in *EC — Hormones* does not have a direct bearing on the matter before us.

⁷¹ We are aware that Members, pursuant to Article 2.5 of the TBT Agreement, upon the request of another Member, "shall explain the justification for that technical regulation in terms of the provisions of paragraphs 2 to 4 [of Article 2]". It cannot be excluded, however, that a Member, while acting in good faith, does not provide all the information required in sufficient detail for the respondent to determine with accuracy what the "legitimate" objectives pursued are and, if applicable, what considerations of "inappropriateness" underlie the Member's decision not to use the international standard as a basis. Lack of such information could frustrate a complainant's efforts to meet its burden of proof regarding the ineffectiveness or inappropriateness of an international standard.

2. *Application of the TBT Agreement to Measures Adopted Before 1 January 1995*

7.53 The European Communities argues that Article 2.4 of the TBT Agreement is not applicable to measures that were adopted before 1 January 1995. Referring to Article 28 of the Vienna Convention, the European Communities claims that the adoption of its Regulation was an "act ... which took place ... before the date of entry into force of the treaty" and since there is no expression of contrary intention, Article 2.4 does not apply to the Regulation.

7.54 Article 2.4 of the TBT Agreement states:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

7.55 Peru claims that the expression "[w]here technical regulations are required" indicates that Article 2.4 applies in the situations in which technical regulations are required and not merely at the point in time when the decision to adopt them was taken. Peru argues that the European Communities' argument cannot be reconciled with Article XVI:4 of the WTO Agreement, which provides that "each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided for in the annexed agreements" or with Article 28 of the Vienna Convention, pursuant to which a treaty does apply to situations that continue to exist after its entry into force. Peru points out that the European Communities made a similar claim in the context of the SPS Agreement in *EC — Hormones* which the Appellate Body rejected by stating that "if negotiators had wanted to exempt the very large group of SPS measures in existence on 1 January 1995 ... it appears reasonable to us to expect that they would have said so explicitly".

7.56 The general principle of international law embodied in Article 28 of the Vienna Convention is that "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." In *Brazil — Desiccated Coconut*, the Appellate Body stated that, in reference to Article 28 of the Vienna Convention, "[a]bsent a contrary intention, a treaty cannot apply to acts or facts which took place, or situations which ceased to exist, before the date of its entry into force".⁷² We note that the EC Regulation was adopted on 21 June 1989 and the TBT Agreement entered into force on 1 January 1995. In this regard, the EC Regulation is a situation which has not ceased to exist after the date

⁷² Appellate Body Report, *Brazil — Measures Affecting Desiccated Coconut* ("Brazil — Desiccated Coconut"), WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, pp. 179-180.

of the entry into force of the TBT Agreement but is a continuing situation. Therefore, absent a contrary intention, the TBT Agreement applies to the EC Regulation.

7.57 The TBT Agreement itself does not reveal any such contrary intentions. The TBT Agreement does not contain a transition period and there are provisions that indicate that the TBT Agreement was intended to apply to technical regulations that were adopted before the entry into force of the TBT Agreement. We note, for instance, that Article 2.2 states that "Members shall ensure that technical regulations are not prepared, adopted or *applied* with a view to or with the effect of creating unnecessary obstacles to international trade"; Article 2.3 states that "[t]echnical regulations shall not be *maintained* if the circumstances or objectives giving rise to their adoption no longer exists..."; and Article 2.6 states that a "Member preparing, adopting or *applying* a technical regulation which may have a significant effect on trade of other Members shall ... explain justification for that technical regulation" (emphasis added).

7.58 Although the temporal issue has not been considered by panels or the Appellate Body in the context of the TBT Agreement, an analogous temporal issue has been considered in the context of the SPS Agreement. The Appellate Body in *EC — Hormones* examined whether the SPS Agreement applies to certain SPS measures that were enacted before the entry into force of the SPS Agreement on 1 January 1995 and held that, under Article 28 of the Vienna Convention, the SPS Agreement is applicable to such measures:

We agree with the Panel that the *SPS Agreement* would apply to situations or measures that did not cease to exist, such as the 1981 and 1988 Directives, unless the *SPS Agreement* reveals a contrary intention. We also agree with the Panel that the *SPS Agreement* does not reveal such an intention. The *SPS Agreement* does not contain any provision limiting the temporal application of the *SPS Agreement*, or of any provision thereof, to SPS measures adopted after 1 January 1995. In the absence of such a provision, it cannot be assumed that central provisions of the *SPS Agreement*, such as Articles 5.1 and 5.5, do not apply to measures which were enacted before 1995 but which continue to be in force thereafter.⁷³

7.59 The factual aspect of the current dispute is not dissimilar to the one in hand in *EC — Hormones* in that, like the 1981 and 1988 Directives, the EC Regulation is a "situation or measure that did not cease to exist" and the TBT

⁷³ Appellate Body Report, *EC — Hormones*, para. 128. In *Canada — Term of Patent Protection* ("*Canada — Patent Term*"), WT/DS170/R, adopted 12 October 2000, as upheld by the Appellate Body Report, WT/DS170/AB/R, the panel held that the TRIPS Agreement was applicable to patents that were granted before the date of entry into force of the TRIPS Agreement (1 January 1996 for developed Members) because the subject matter of the patent that was granted protection is ongoing and continues past 1 January 1996 and to the extent that the protection of the subject matter continues beyond that date, it is a situation that has not ceased to exist and the TRIPS Agreement is therefore applicable.

Agreement does not reveal a contrary intention to limit the temporal application of the TBT Agreement to measures adopted after 1 January 1995.

7.60 Therefore, Article 2.4 of the TBT Agreement applies to measures that were adopted before 1 January 1995 but which have not ceased to exist.

3. *Whether Codex Stan 94 is a Relevant International Standard*

(a) *Consideration of Codex Stan 94 as a Relevant International Standard*

7.61 Peru argues that Codex Stan 94 is a relevant international standard as it was adopted by the Codex Alimentarius Commission which is an internationally recognized standard setting body that develops standards for food products. Referring to the definition of "standard" set out in Annex 1 of the TBT Agreement, Peru argues that it is an international standard that was adopted by consensus. Peru claims that Codex Stan 94 is also a relevant international standard that applies to sardines and sardine-type products that are prepared from the fish of 21 different species, including *Sardina pilchardus* and *Sardinops sagax*.

7.62 Although the European Communities does not contest that the Codex Alimentarius Commission is an internationally recognized standard setting body, the European Communities claims that the requirement to use relevant international standards as a basis set out in Article 2.4 of the TBT Agreement does not apply to existing measures. The European Communities also argues that Codex Stan 94 is not a relevant international standard on the basis that it did not exist and its adoption was not imminent when the EC Regulation was adopted. Furthermore, the European Communities also takes issue with several procedural features surrounding the development of Codex Stan 94. The European Communities argues that the standard was not adopted by consensus and that the prior, non-final draft of Codex Stan 94 indicates that the use of the common name for the species other than *Sardina pilchardus* without the word "sardines" is an independent option and Peru's interpretation that it is not an independent option would render Codex Stan 94 invalid. The European Communities argues that if Peru's interpretation were accurate, it would render Codex Stan 94 invalid because the change in the language of the standard was made without a referral back to the Committee for its approval. According to the European Communities, under Codex rules, any substantive change in the process of developing an international standard requires the approval of the Committee. The European Communities finally argues that paragraph 6.1.1(ii) of Codex Stan 94 is not the relevant provision for the EC Regulation because the EC Regulation does not regulate products other than preserved *Sardina pilchardus*.

7.63 International standards are standards that are developed by international bodies. Our starting point of analysis, therefore, is whether Codex Stan 94 comes within the scope of the definition of "standard" provided in Annex 1.2 of the TBT Agreement and followed by whether the Codex Alimentarius Commission

is an international body within the meaning set out in Annex 1.2 of the TBT Agreement.

7.64 The term "standard" is defined as:

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

7.65 A standard comes within the definition set out in paragraph 2 of Annex 1 of the TBT Agreement if it provides "for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods"; compliance is not mandatory; and is approved by a "recognized body". We note that the parties are in agreement that Codex Stan 94 is a "standard" and see no reason to disagree with that assessment for the purposes of this dispute. We therefore find that Codex Stan 94 is a standard within the meaning of Annex 1.2 of the TBT Agreement.

7.66 With respect to whether the Codex Alimentarius Commission is an international body for the purposes of this dispute,⁷⁴ we note that "international body" is defined in Annex 1.4 of the TBT Agreement as a "[b]ody or system whose membership is open to the relevant bodies of at least all Members". According to Rule 1 of the Statutes and Rules of Procedures of the Codex Alimentarius Commission, "[m]embership of the joint FAO/WHO Codex Alimentarius Commission ... is open to all Member Nations and Associate Members of the FAO and/or WHO." As membership to the Codex Alimentarius Commission is open to all WTO Members, it is an international body within the meaning of annex 1.4 of the TBT Agreement. Moreover, we note that Peru submitted that the Codex Alimentarius Commission was an internationally recognized standard setting body that develops standards for food products and the European Communities indicated, in a response to the Panel's question on the matter, that it did not "contest the status of the Codex Alimentarius Commission as an international standardization body for the purposes of the TBT Agreement".

7.67 Based on the reasons above, we find that Codex Stan 94 is an international standard for the purposes of this dispute.

7.68 Having determined that Codex Stan 94 is an international standard, the analysis turns to whether Codex Stan 94 is a "relevant" international standard in respect of the EC Regulation. We note that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in hand; pertinent".⁷⁵ Based

⁷⁴ We note that the Codex Alimentarius Commission is explicitly referred to in Article 3.4 of the SPS Agreement.

⁷⁵ *Webster's New World Dictionary*, (William Collins & World Publishing Co., Inc., 1976), p. 1199.

on the ordinary meaning, Codex Stan 94 must bear upon, relate to or be pertinent to the EC Regulation for it to be a relevant international standard.

7.69 The title of Codex Stan 94 is "Codex Standard for Canned Sardines and Sardine-type Products" and the EC Regulation lays down common marketing standards for preserved sardines. The European Communities indicated in its response that the term "canned sardines" and "preserved sardines" are essentially identical.⁷⁶ Therefore, it is apparent that both the EC Regulation and Codex Stan 94 deal with the same product, namely preserved sardines. The scope of Codex Stan 94 covers various species of fish, including *Sardina pilchardus* which the EC Regulation covers, and includes, *inter alia*, provisions on presentation (Article 2.3), packing medium (Article 3.2), labelling, including a requirement that the packing medium is to form part of the name of the food (Article 6), determination of net weight (Article 7.3), foreign matter (Article 8.1) and odour and flavour (Article 8.2). The EC Regulation contains these corresponding provisions set out in Codex Stan 94, including the section on labelling requirement.

7.70 Therefore, for the reasons set out above and subject to the consideration of European Communities' arguments below, we find that Codex Stan 94 is a relevant international standard.

(b) Consideration of European Communities' Temporal Argument and its Arguments that Codex Stan 94 is not a Relevant International Standard

7.71 We noted that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in hand; pertinent". The dictionary meaning indicates that relevance refers to the subject matter at issue, i.e., preserved sardines, and not to the temporal aspect of the international standard or procedural aspect of the adoption of the international standard. We will nevertheless consider the European Communities' argument that Codex Stan 94 is not a relevant international standard on the ground that it did not exist and its completion was not imminent when the European Communities adopted the Regulation.

(i) The European Communities' Argument that the Requirement to Use Relevant International Standards as a Basis does not Apply to Existing Technical Regulations

7.72 The European Communities advances the argument that the language of Article 2.4 of the TBT Agreement requiring that relevant international standards be used as a basis for drawing up technical regulations suggests that the obligation does not apply to existing measures. The European Communities argues that the requirement to use a relevant international standard for technical regulations exists prior to the adoption of the measure, not afterwards because international

⁷⁶ EC's Response to Panel Question 6.

standards cannot be used as a basis when technical regulations have already been adopted. The European Communities argues that the use of the word "imminent" further confirms its interpretation. For these reasons, the European Communities argues that Article 2.4 of the TBT Agreement applies only to preparation and adoption and not to the application of technical regulations.

7.73 As noted earlier, Article 2.4 of the TBT Agreement states:

Where technical regulations are required and relevant international standards *exist or their completion is imminent*, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems. (emphasis added)

7.74 Article 2.4 of the TBT Agreement starts with the language "where technical regulations are required". We construe this expression to cover technical regulations that are already in existence as it is entirely possible that a technical regulation that is already in existence can continue to be required. Considered in the context of Article 28 of the Vienna Convention, the existing technical regulation is a situation that has not ceased to exist but continues to exist and Article 2.4 that requires the use of relevant international standards for technical regulations would therefore apply to those existing technical regulations. Moreover, we note that the first part of the sentence of Article 2.4 is in the present tense ("exist") and not in the past tense — "[w]here technical regulations are required and relevant international standards *exist or their completion is imminent*", Members are obliged to use such international standards as a basis. This supports the view that Members have to use relevant international standards that currently exist or whose completion is imminent with respect to the technical regulations that are already in existence. We do not consider that the word "imminent", the ordinary meaning of which is "likely to happen without delay",⁷⁷ is intended to limit the scope of the coverage of technical regulations to those that have yet to be adopted. Rather, the use of the word "imminent" means that Members cannot disregard a relevant international standard whose completion is imminent with respect to their existing technical regulations. Therefore, a textual reading of Article 2.4 does not support the view that the requirement to use relevant international standards as a basis for technical regulations applies only to technical regulations that are to be prepared and adopted and is not applicable to existing technical regulations.

7.75 There is contextual support for the interpretation that Article 2.4 applies to technical regulations that are already in existence. The context provided by Article 2.5, which explicitly refers to Article 2.4, speaks of "preparing, adopting or *applying*" a technical regulation and is not limited to, as the European Communities claims, to preparing and adopting. A technical regulation can only be

⁷⁷ Webster's New World Dictionary, *supra*, p. 702.

applied if it is already in existence. The first sentence imposes an obligation on a Member "preparing, adopting or applying" a technical regulation that may have a significant effect on trade of other Members to provide the justification for that technical regulation. The second sentence of Article 2.5 states that whenever a technical regulation is "prepared, adopted or *applied*" for one of the legitimate objectives explicitly set out in Article 2.2 and is in accordance with relevant international standards, it is to be rebuttably presumed not to create an unnecessary obstacle to trade. The use of the term "apply", in our view, confirms that the requirement contained in Article 2.4 is applicable to existing technical regulations.

7.76 Article 2.6 provides another contextual support. It states that Members are to participate in preparing international standards by the international standardizing bodies for products which they have either "*adopted*, or expect to adopt technical regulations." Those Members that have in place a technical regulation for a certain product are expected to participate in the development of a relevant international standard. Article 2.6 would be redundant and it would be contrary to the principle of effectiveness, which is a corollary of the general rule of interpretation in the Vienna Convention, if a Member is to participate in the development of a relevant international standard and then claim that such standard need not be used as a basis for its technical regulation on the ground that it was already in existence before the standard was adopted. Such reasoning would allow Members to avoid using international standards as a basis for their technical regulations simply by enacting preemptive measures and thereby undermine the object and purpose of developing international standards.

7.77 Based on our examination of the ordinary meaning of the words contained in Article 2.4 of the TBT Agreement and the context provided by Articles 2.5 and 2.6, we are of the view that the requirement contained in Article 2.4 to use relevant international standards as a basis for technical regulations applies to technical regulations that are already in existence. We note, however, that the European Communities argued that while relevant international standards could be used as a basis for a technical regulation when it is amended, this issue was not before the Panel. The European Communities argued that the question at issue is whether Members have an obligation after the WTO Agreement entered into force to revise their existing technical regulations to ensure that they have used relevant international standards as a basis. The European Communities argued that there is no obligation to review and amend existing technical regulations whenever an international standard is adopted or amended and that such obligation would turn standardisation bodies virtually into "world legislators". The European Communities noted that the Appellate Body stated with respect to "an obligation to use standards: We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than less burdensome, obligation...".

7.78 In our view, Article 2.4 of the TBT Agreement imposes an ongoing obligation on Members to reassess their existing technical regulations in light of the adoption of new international standards or the revision of existing international standards. We do not, however, share the concern expressed by the European

Communities that the obligation to amend a technical regulation when a new international standard is adopted would turn standardization bodies into "world legislators" because the nature of the obligation agreed to by Members is circumscribed by four elements. First, the obligation applies only "where technical regulations are required". If a Member does not enact a technical regulation or determines that the technical regulation is no longer required, it need not consider the international standard. Second, the obligation exists only to the extent that the international standard is relevant for the existing technical regulation. Third, if it is determined that a technical regulation is required and the international standard is relevant, Members are to use that international standard "as a basis", which means that Members are to use a relevant international standard as "the principal constituent ... or fundamental principle"⁷⁸ and does not mean that Members must conform to or comply with that relevant international standard. The requirement to use the relevant international standard as a basis does not impose a rigid requirement to bring the technical regulation into conformity with the relevant international standard.⁷⁹ This provides Members with a certain amount of latitude in complying with the obligation set out in Article 2.4 of the TBT Agreement. In our view, the reference to the term "use as a basis" in Article 2.4 of the TBT Agreement recognizes that there may be various ways in which Members can use the relevant international standard in the formulation of their technical regulations. Finally, Members are not obliged to use the relevant international standard if such international standard is ineffective or inappropriate to fulfil the legitimate objectives pursued by the technical regulation.⁸⁰ Thus, a judicious application of the obligations contained in Article 2.4 provides assurances against the over-reaching implied by the European Communities.

7.79 If Members did not have an ongoing obligation to examine their technical regulation in light of relevant international standards that are adopted or revised, the effect would be to create grandfather rights for those existing technical regulations that are at odds with those international standards as only the technical regulations enacted after the adoption or revision of the international standard would be subject to the international standard.⁸¹ If we were to find that Members do not have an ongoing obligation to reassess their technical regulations, it would be possible to preempt obligations under Article 2.4 of the TBT Agreement by adopting technical regulations before relevant international standards are adopted. As we have examined above, the ordinary meaning and context, especially in the context of Article 2.6 of the TBT Agreement, do not support the view that Members do not have an ongoing obligation to reassess their technical regulations in light of new international standards that are adopted.

⁷⁸ *Webster's New World Dictionary, supra*, p. 117.

⁷⁹ This reading of Article 2.4 of the TBT Agreement is consistent with the Appellate Body's finding in *EC — Hormones* that "based on" does not mean "conform to".

⁸⁰ A detailed discussion on the meaning of ineffective and inappropriate is set out in paragraph 7.116.

⁸¹ We note in this regard that the Appellate Body stated that because the "WTO Agreement was accepted definitively by Members ... there are no longer 'existing legislative' exceptions (so called 'grandfather rights')". *EC — Hormones*, para. 128.

7.80 There are other provisions that contextually support the view that the obligation under Article 2.4 is not a static obligation and that there is an ongoing obligation to reassess technical regulations in light of international standards that are adopted or revised. Article 2.3 of the TBT Agreement states:

Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

7.81 The language of Article 2.3 suggests that Members are to eliminate technical regulations that no longer serve their purpose or amend them if the changed circumstances or objectives can be addressed in a less trade-restrictive manner. This requirement also applies to technical regulations that were enacted before the TBT Agreement came into force. Thus, Members would be under an obligation to periodically evaluate their technical regulations and either discontinue them if they no longer serve their objectives or change them if there is a less trade-restrictive manner in which to achieve the underlying objectives of the regulations. Such reading of Article 2.3 is supported by Article 2.8 of the TBT Agreement which states that, wherever appropriate, Members are to "specify technical regulations based on product requirements in terms of *performance* rather than design or descriptive characteristics". Performance, the ordinary meaning of which is "operation or functioning, usually with regard to effectiveness",⁸² of products can change and technical regulations governing these products are to reflect these changes. The above interpretation is also consistent with the object and purpose of not creating unnecessary obstacles to international trade and one way to achieve that objective is to discontinue technical regulations that no longer serve their purpose or find a less trade-restrictive manner in which the objective can be fulfilled.

7.82 In support of its argument that Article 2.4 does not create an ongoing obligation to reassess technical regulations when international standards are adopted or amended, the European Communities referred to the Appellate Body's statement that "[w]e cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation...". The full sentence reads: "We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations". Thus, it is clear that the Appellate Body was distinguishing an obligation to conform to or comply with international standard from the language "based on". We have unequivocally stated that the term "use as a basis" does not mean conform to or comply with relevant international standards. It is our view, however, that, based on the reasons set out above, Members intended to impose an ongoing obligation to reassess their technical regulations in light of international standards that are adopted or revised

⁸² *Webster's New World Dictionary, supra*, p. 1056.

and to use those relevant international standards as a basis for the technical regulations.

7.83 Based on the reasons set out above, we reject the European Communities' argument that Article 2.4 does not apply to existing technical regulations.

- (ii) The European Communities' Argument that the "predecessor standard" to Codex Stan 94 Should Have Been Invoked Because Codex Stan 94 is not the Relevant International Standard as it did not Exist and its Adoption was not Imminent when the EC Regulation was Adopted

7.84 The European Communities argues that even if Article 2.4 were to have a retroactive effect, Codex Stan 94 is not a relevant international standard because "it did not exist and its adoption was not 'imminent' when the Regulation was adopted". The European Communities claims that Peru should have invoked the "predecessor standard" in arguing that the EC Regulation is inconsistent with the relevant international standard. The European Communities points out that "it did comply with the requirements of the Tokyo Round Standards Code when it adopted the Regulation and notified it to the GATT".⁸³

7.85 We examined above the European Communities' temporal argument that Article 2.4 of the TBT Agreement does not apply to measures that were enacted prior to 1 January 1995 and found that, under Article 28 of the Vienna Convention, the EC Regulation is a situation that has not ceased to exist but continues to exist and Article 2.4 of the TBT Agreement therefore is applicable to the EC Regulation. Our conclusion becomes more apparent when the EC Regulation is considered from the perspective of the application rather than the adoption of the Regulation.⁸⁴

7.86 Having determined that Article 2.4 is applicable to the EC Regulation, we note that Article 2.4 does not impose any temporal constraint in respect of relevant international standards that are to be used as a basis for technical regulations. Moreover, as we noted in paragraphs 7.78 to 7.82, Members have an ongoing obligation to reassess their technical regulations in light of relevant international standards that are adopted or revised. We do not agree with the European Communities' argument that Peru should have invoked the "predecessor standard", presumably the 1978 version of Codex Stan 94, for the reasons set out in paragraphs 7.56 to 7.60.⁸⁵

⁸³ EC's First Submission, para. 115.

⁸⁴ The European Communities argued that "[t]he adoption of the Regulation was an 'act' ... which took place ... before the date of the entry into force of the treaty and, since there is no expression of contrary intention Article 2.4 does not apply to it". EC's First Submission, para. 113.

⁸⁵ With respect to the European Communities' argument that it complied with the Tokyo Round Standards Code when it adopted the Regulation, we note that the Tokyo Round Standards Code was

7.87 Based on the reasons set out above, we reject the European Communities' argument that Codex Stan 94 is not a relevant international standard because it did not exist and its adoption was not imminent when the EC Regulation was adopted and that Peru should have invoked the predecessor standard.

(iii) The European Communities' Argument that Codex Stan 94 is not a Relevant International Standard Because it was not Adopted by Consensus

7.88 The European Communities argues that because there was no consensus in adopting Codex Stan 94, it is inconsistent with the principle of relevance contained in the Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement (the "Decision") and therefore is not a relevant international standard.

7.89 For the purposes of determining whether standards must be based on consensus, the controlling provision is paragraph 2 of Annex 1 of the TBT Agreement and its explanatory note. The explanatory note for paragraph 2 provides:

Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

7.90 The first sentence reiterates the norm of the international standardization community that standards are prepared on the basis of consensus. The following sentence, however, acknowledges that consensus may not always be achieved and that international standards that were not adopted by consensus are within the scope of the TBT Agreement.⁸⁶ This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard.

7.91 The Decision to which the European Communities refers is a policy statement of preference and not the controlling provision in interpreting the expression "relevant international standard" as set out in Article 2.4 of the TBT Agreement. The controlling provision must be understood as paragraph 2 of Annex 1 of the TBT Agreement. As we have seen above, the explanatory note of Annex 1.2 states that standards covered by the TBT Agreement include those that were adopted by consensus and those that were not adopted by consensus.

7.92 Therefore, we reject the European Communities' argument that Codex Stan 94 is not a relevant international standard.

terminated pursuant to a decision taken by the Tokyo Round Committee on Technical Barriers to Trade.

⁸⁶ The record does not demonstrate that Codex Stan 94 was not adopted by consensus. In any event, we consider that this issue would have no bearing on our determination in light of the explanatory note of paragraph 2 of Annex 1 of the TBT Agreement which states that the TBT Agreement covers "documents that are not based on consensus".

- (iv) The European Communities' Argument that Codex Stan 94 is not a Relevant International Standard on the Basis that Peru's Interpretation Would Mean that the Codex Stan 94 is Invalid Because there was no Referral to the Committee Even Though there was a Substantive Change

7.93 The European Communities argues that the negotiating history of paragraph 6.1.1 of Codex Stan 94 indicates that the provision provides an option between "X sardines" on the one hand and the common name of the species on the other. The European Communities' claim is based on the fact that the change is described as "editorial" in the minutes of the meeting. The European Communities points out that the text of paragraph 6.1.1 was prepared and discussed in steps 1 to 7 and the text reads:

6.1.1 The name of the product shall be:

(i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or

(ii) "X sardines", where "X" is the name of a country, a geographic area, or the species; or

(iii) the common name of the species;

in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

The final version of the text reads:

The name of the product shall be:

6.1.1 (i) "Sardines" to be reserved exclusively for *Sardina pilchardus* (Walbaum); or

(ii) "X Sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

7.94 The European Communities' argument is that these changes are "editorial" as indicated in the minutes of the meeting and points out that substantive changes cannot be made at step 8 of the adoption process because an amendment at the stage requires the text to be referred back to the relevant committee for comments before its final adoption. Therefore, according to the European Communities, the reformulation of the text at step 8 cannot have produced any substantive change and its interpretation that a Member can choose between "X sardines" and common names is correct and that any change to this interpretation would render Codex Stan 94 invalid and therefore cannot be deemed relevant.

7.95 While the European Communities' explanation on the negotiating history and the process involving the adoption of an international standard is much ap-

preciated, we are not persuaded that the negotiating history supports the European Communities' interpretation that Codex Stan 94 allows Members to choose between "X sardines" on the one hand and the common name of the species in accordance with the law and custom of the country in which the product is sold on the other hand. The text of Codex Stan 94 is clear on its face that it provides Members with four alternatives using the term "sardines" combined with the name of a country, the name of a geographic area, the name of species or the common name.⁸⁷ Moreover, the deletion of the third alternative and the adoption of the current text indicate that the latter reflects the true intentions of the drafters. That the change is referred to as "editorial" in the minutes of the meeting suggests that both the earlier version and the final text expressed the same view but the final text did so more succinctly. Thus, paragraph 6.1.1 of Codex Stan 94 provides four alternatives and the use of the common name is not, as argued by the European Communities, "a self standing option independent from the formula 'X sardine'".

7.96 For these reasons, we reject the European Communities' argument that Codex Stan 94 is not a relevant international standard.

(v) The European Communities' Argument that Codex Stan 94 is not a Relevant International Standard Because the EC Regulation does not Regulate Products Other than Preserved *Sardina pilchardus*

7.97 The European Communities argues that paragraph 6.1.1(ii) of Codex Stan 94, on which Peru relies to argue that the EC Regulation is inconsistent with Article 2.4, is not the relevant provision because the EC Regulation does not apply to products other than preserved *Sardina pilchardus*. The European Communities argues that the relevant part of the international standard is paragraph 6.1.1(i) of Codex Stan 94 which deals with *Sardina pilchardus*.

7.98 We referred to the Appellate Body finding in *EC — Asbestos* that a document may prescribe a product characteristic in either a positive or a negative form. We determined that Article 2 of the EC Regulation requires positively that only products using *Sardina pilchardus* can be "marketed as preserved sardines and under the trade description referred to in Article 7" and that the negative implication flowing therefrom is that those products using species other than *Sardina pilchardus* cannot be "marketed as preserved sardines and under the trade description referred to in Article 7". We considered that by laying down a product characteristic that only *Sardina pilchardus* can constitute preserved sardines, the EC Regulation regulates species other than *Sardina pilchardus* by laying down product characteristics in a negative form.

7.99 As a standard that lays down product characteristics for *Sardinops sagax* and other species except *Sardina pilchardus*, we consider that paragraph 6.1.1(ii)

⁸⁷ Our examination of paragraph 6.1.1 of Codex Stan 94 is set out in paragraphs 7.103 to 7.109.

of Codex Stan 94 is the relevant provision of the international standard in respect of species other than *Sardina pilchardus* and therefore reject the European Communities' argument that paragraph 6.1.1(ii) of Codex Stan 94 is not the relevant provision. Therefore, we confirm our finding in paragraph 7.70 that Codex Stan 94 is a relevant international standard.

4. *Whether Codex Stan 94 Was Used as a Basis for the Technical Regulation*

7.100 Peru acknowledges that a measure would be consistent with paragraph 6.1.1(i) if it requires the term "sardines", when used without any qualification, be reserved for *Sardina pilchardus*. However, Peru contends that all other species referred to in Codex Stan 94 may be marketed, pursuant to sub-paragraph (ii), as "X sardines" where "X" is either a country, a geographic area, the species or the common name of the species. Peru argues that *Sardinops sagax* exported by Peru to the European Communities shall be marketed as "Peruvian sardines", "Pacific sardines", just "sardines" combined with the name of the species or the common name in the European Communities' member State in which the sardines are sold, such as "Südamerikanische Sardinen" in Germany. Peru contends that in each of the four alternatives set out in this labelling standard, the term "sardines" is part of the trade description and a total prohibition on the use of the term "sardines" in the labelling of canned sardines is not foreseen. Peru argues that it is therefore inconsistent with sub-paragraph (ii) of paragraph 6.1.1 of Codex Stan 94 if sardines of the species *Sardinops sagax* may not be marketed under the name "sardines" qualified by the name of a country, name of a geographic area of origin, name of the species or the common name.

7.101 The European Communities argues that, under paragraph 6.1.1(ii) of Codex Stan 94, each country has the option of choosing between "X sardines" and the common name of the species. The European Communities argues that "the common name of the species in accordance with the law and customs of the country in which the product is sold" is intended to be a self-standing option independent of the formula "X sardines". The European Communities argues that the fact that the name for products other than *Sardina pilchardus* could not be harmonized and had to defer to each country is reflected in the language "in accordance with the law and custom of the country in which the product is sold". The European Communities argues that the use of the word "sardines" for products other than preserved *Sardina pilchardus* would not be in accordance with the law and custom of the European Communities' member States and would mislead the consumers in the European Communities. The European Communities notes that there is an additional element contained in Codex Stan 94 that is not applicable to *Sardina pilchardus* but applicable to other species, namely that the trade description of the latter group of species must not mislead the consumer in the country in which the product is sold.

7.102 Paragraph 6.1.1 of Codex Stan 94 reads:

The name of the product shall be:

- 6.1.1 (i) "Sardines" to be reserved exclusively for *Sardina pilchardus* (Walbaum); or
- (ii) "X Sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

7.103 Textual reading of paragraph 6.1.1(ii) suggests that for species other than *Sardina pilchardus*, the label would read "X Sardines" with the "X" denoting a country, a geographic area, the species or the common name of the species in accordance with the law and custom of the country where the product is sold. We consider that paragraph 6.1.1(ii) of Codex Stan 94 contains four alternatives and each alternative envisages the use of the term "sardines" combined with the name of a country, name of a geographic area, name of the species or the common name of the species in accordance with the law and custom of the country in which the product is sold.

7.104 The European Communities construes paragraph 6.1.1(ii) of Codex Stan 94 as providing a choice between "X sardines" with the "X" representing a country, geographical area or the species on the one hand and the common name of species in accordance with the law and custom of the country in which the product is sold on the other hand. The European Communities' interpretation is based on the fact that the phrase "the common name of the species in accordance with the law and custom of the country in which the product is sold" is situated between commas; there is no comma between "species" and "in accordance with"; and there is a comma before "and in a manner not to mislead the consumer".

7.105 We are not persuaded that the European Communities' reasons support its interpretation. As a matter of English grammar, it is not uncommon to insert a comma before the words "or" when listing more than two items. That is, the expression "A, B, C, or D" means one of the four items. It does not mean that A, B or C constitute one option while D is another option. For the European Communities' interpretation to be persuasive, Codex Stan 94 would at least have to contain an additional "or" so as to read:

"X Sardines" of a country, a geographical area *or* the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

7.106 With respect to the European Communities' second argument that there is no comma between "species" and "in accordance with", the comma is missing because the words "in accordance with the law and custom of the country in which the product is sold" refer to the "common name of the species" and not to the name of a country, a geographical area or the species which need not be subject to the law and custom of the country.⁸⁸

⁸⁸ We note that the Report of the Tenth Session of the Codex Committee on Fish and Fishery Products states: "The attention of the Committee was drawn to the clause that the name of the food should

7.107 With respect to the European Communities' third argument, the existence of a comma before "and in a manner not to mislead the consumer" indicates that the requirement of not misleading the consumer attaches to all four alternatives.

7.108 The interpretation that paragraph 6.1.1(ii) of Codex Stan 94 contains four alternatives which provide for the use of the term "sardines" in each alternative is confirmed by the French text of Codex Stan 94. We note that the official languages of the Codex Alimentarius Commission are English, French and Spanish which means that all three versions are authentic. The French version reads:

"Sardines X", "X" désignant un pays, une zone géographique, l'espèce ou le nom commun de l'espèce en conformité des lois et usages du pays où le produit est vendu, de manière à ne pas induire le consommateur en erreur. (emphasis added)

7.109 The French version confirms the interpretation that a Member is to choose among the four available alternatives and that it does not offer the option of choosing between "X Sardines" of a country, a geographical area or the species on the one hand and the common name in accordance with the law and custom of the country on the other hand. The Spanish version also confirms the view that the name of the species or common name must be added to the word "sardines" and not replace the word "sardines".

7.110 We note the European Communities' argument that even if Peru's interpretation were valid in that the term "sardines" must be used with a qualification for species other than *Sardina pilchardus*, Article 2.4 of the TBT Agreement would still not require that such name be used because use as a basis does not mean conform to. We are cognizant of the Appellate Body's finding in *EC — Hormones* that the term "based on" does not mean "conform to". Yet, this observation does not resolve the issue at hand. Article 2.4 states that Members "shall use" international standards "as a basis" for their technical regulation. The use of the word "shall" denotes a requirement that is obligatory in nature and that goes beyond mere encouragement. The ordinary meaning of the word "use" is "to employ for or apply to a given purpose".⁸⁹ The word "basis" means "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge".⁹⁰ Thus, if the European Communities "used" the existing relevant international standard, that is, if it employed or applied Codex Stan 94 as the principal constituent or fundamental principle for the purpose of enacting its technical regulation governing preserved sardines, the EC Regulation would not be inconsistent with Article 2.4 of the TBT Agreement.

7.111 In this regard, the European Communities argued that its Regulation uses Codex Stan 94 as a basis and is therefore consistent with Article 2.4 of the TBT

be 'in accordance with the law and custom of the country in which the product is sold'. One delegation held the view that such a requirement was not conducive to harmonization of food legislation. Other delegations stated that for sardines and sardine type products this provision was indispensable. It was agreed to request governments to supply information on the *names commonly used* in labelling of these types of products in their countries". (emphasis added)

⁸⁹ *Webster's New World Dictionary, supra*, p. 1564.

⁹⁰ *Ibid.*, p. 117.

Agreement. Specifically, the European Communities argued that Codex Stan 94 provides that the trade description for species other than *Sardina pilchardus* is to be determined by the country in which the product is sold in accordance with its law and custom. Based on this interpretation of Codex Stan 94, the European Communities argued that because the UK and German laws prescribe that the trade description for *Sardinops sagax* is to be Pacific pilchard and *Sardinops* or pilchard, respectively, there is no need to allow *Sardinops sagax* to be labelled as sardines on the basis that the use of the term "sardines" would not be in accordance with the law and custom of European Communities' member States. As we have found above, paragraph 6.1.1(ii) of Codex Stan 94 contains four alternatives for labelling species other than *Sardina pilchardus* and all four alternatives require the use of the term "sardines" with a qualification. The European Communities' interpretation that Members need not use the term "sardines" if their laws provide otherwise would render international standards meaningless because Members would be able to justify their non-use of the relevant international standard on the basis that their domestic technical regulations are contrary to the international standard.

7.112 We recall our finding that the EC Regulation constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement as it lays down product characteristics of preserved sardines. We also found that the EC Regulation contains a labelling requirement that permits only products prepared from *Sardina pilchardus* to be labelled as "sardines" and that species such as *Sardinops sagax* cannot be called "sardines" even when it is combined with the name of a country, name of a geographic area, name of the species or the common name in accordance with the law and custom of the country in which the product is sold. The European Communities confirmed that species other than *Sardina pilchardus* cannot use the word "sardines" and that preserved *Sardinops sagax* is referred to as pilchards in the European Communities. In light of our findings above, we find that the relevant international standard, i.e., Codex Stan 94, was not used as a basis for the EC Regulation.

5. *Whether Codex Stan 94 would be an Ineffective or Inappropriate Means for the Fulfilment of the Legitimate Objectives Pursued*

7.113 The European Communities contends that Codex Stan 94, by allowing for the use of the word "sardines" for products other than *Sardina pilchardus*, is ineffective or inappropriate to fulfil the objectives of consumer protection, market transparency and fair competition. The European Communities argues that its consumers expect that products of the same nature and characteristics will always have the same trade description, and that consumers in most member States of the European Communities have always, and in some member States have for at least 13 years, associated "sardines" exclusively with *Sardina pilchardus*. With respect to the objective of promoting fair competition, the European Communities argues that Peru should not be able to take advantage of the reputation associated with the term "sardines", but that Peru should "develop its own repu-

tation with its own name and persuade the consumer to appreciate its product with its own characteristics".

7.114 In paragraph 7.50, we determined that the European Communities, as the party asserting that Codex Stan 94 is ineffective or inappropriate to fulfil the legitimate objectives pursued by the Regulation, has the burden of proving this assertion. Although the burden of proof rests with the European Communities to prove that Codex Stan 94 is an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, we note that Peru has provided sufficient evidence and legal arguments, as set out below, to demonstrate that Codex Stan 94 is not an ineffective or inappropriate means to fulfil the legitimate objectives pursued by the EC Regulation.

7.115 In assessing the arguments presented by the European Communities, we must first determine what should be understood by the term "ineffective or inappropriate" and what the "legitimate objectives" referred to by this provision are.

7.116 Concerning the terms "ineffective" and "inappropriate", we note that "ineffective" refers to something which is not "having the function of accomplishing", "having a result", or "brought to bear",⁹¹ whereas "inappropriate" refers to something which is not "specially suitable", "proper", or "fitting".⁹² Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. An inappropriate means will not necessarily be an ineffective means and vice versa. That is, whereas it may not be *specially suitable* for the fulfilment of the legitimate objective, an inappropriate means may nevertheless be *effective* in fulfilling that objective, despite its "unsuitability". Conversely, when a relevant international standard is found to be an effective means, it does not automatically follow that it is also an appropriate means. The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed.

7.117 We note that the terms "ineffective" and "inappropriate" are separated in the text by the disjunctive "or". Thus, it is clear that the party invoking the affirmative defence under Article 2.4 need not establish that a relevant international standard is both ineffective and inappropriate. If it is established by a party that the relevant international standard is either an ineffective or inappropriate means for the fulfilment of the legitimate objective pursued, that party would not have to use the international standard as a basis for its technical regulation.⁹³

7.118 The next question we address concerns the phrase "legitimate objectives pursued". We first consider that the "legitimate objectives" referred to in Article 2.4 must be interpreted in the context of Article 2.2, which lists examples of ob-

⁹¹ *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), p. 786.

⁹² *Ibid.*, p. 103.

⁹³ In this case, we observe that the European Communities has used the terms "ineffective" and "inappropriate" interchangeably throughout its oral and written statements.

jectives which are considered legitimate under the TBT Agreement. As indicated by the phrase "*inter alia*", this list is illustrative and allows for the possibility that other objectives, which are not explicitly mentioned, may very well be legitimate under the TBT Agreement.

7.119 We also note in this respect that the WTO Members expressed in the preamble to the TBT Agreement their desire that:

[...] technical regulations and standards [...] do not create *unnecessary obstacles* to trade [...]; (emphasis added)

and recognized that:

no country should be prevented from taking measures to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, *at the levels it considers appropriate*, subject to the requirement that they are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail or a *disguised restriction on international trade* [...]. (emphasis added)

7.120 Article 2.2 and this preambular text affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them. At the same time, these provisions impose some limits on the regulatory autonomy of Members that decide to adopt technical regulations: Members cannot create obstacles to trade which are unnecessary or which, in their application, amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Thus, the TBT Agreement, like the GATT 1994, whose objective it is to further, accords a degree of deference with respect to the domestic policy objectives which Members wish to pursue. At the same time, however, the TBT Agreement, like the GATT 1994, shows less deference to the means which Members choose to employ to achieve their domestic policy goals. We consider that it is incumbent upon the respondent to advance the objectives of its technical regulation which it considers legitimate.

7.121 Article 2.4 refers to "the legitimate objective pursued". The ordinary meaning of "to pursue" is "to try to obtain or accomplish" and "to aim at".⁹⁴ Thus, a "legitimate objective pursued" is a legitimate objective which a Member aims at or tries to accomplish. Only the Member pursuing the legitimate objective is in a position to elaborate the objective it is trying to accomplish. Panels are, however, required to determine the legitimacy of those objectives. We note in this regard that the panel in *Canada — Pharmaceuticals Patents*, in defining the term "legitimate interests", stated that it must be defined "as a normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms".⁹⁵

⁹⁴ *The New Shorter Oxford English Dictionary, supra*, p. 2422.

⁹⁵ Panel Report, *Canada — Patent Protection of Pharmaceutical Products* ("Canada — Pharmaceuticals"), WT/DS114/R, adopted 7 April 2000, para. 7.69. Similarly, the panel in *US — Section 110(5) Copyright Act* stated that the term has to be considered from a "normative perspective,

7.122 Thus, we are obliged to examine whether the objectives outlined by the European Communities are legitimate in the context of Article 2.4 of the TBT Agreement. We note, however, that in this case Peru acknowledged that the objectives identified by the European Communities are legitimate and we see no reason to disagree with the parties' assessment in this respect. Accordingly, we will proceed with our examination based on the premise that the objectives identified by the European Communities are legitimate.

7.123 We now turn to the arguments presented by the European Communities in support of its position that Codex Stan 94 is ineffective or inappropriate for the fulfilment of the three legitimate objectives pursued by its Regulation. We recall that the three legitimate objectives pursued by the EC Regulation are market transparency, consumer protection and fair competition and these objectives, as argued by the European Communities, are interdependent and interact with each other. In this regard, we are mindful of the European Communities' argument that providing accurate and precise names allows products to be compared with their true equivalents rather than with substitutes and imitations whereas inaccurate and imprecise names reduce transparency, cause confusion, mislead the consumer, i.e., make consumers believe that they are buying something they are not, allow products to benefit from the reputation of other different products, give rise to unfair competition and reduce the quality and variety of products available in trade and ultimately for the consumer. In light of the fact that the three objectives are closely interrelated, if we were to find that Codex Stan 94 allows for precise labelling of products so as to improve market transparency, such finding would have a bearing upon whether Codex Stan 94 is effective or appropriate in protecting consumers and promoting fair competition, that is, not misleading consumers and confusing them into believing that they are buying something that they are not. We also note that the European Communities' stated objectives are based on the factual premise that the consumers in the European Communities associate "sardines" exclusively with *Sardina pilchardus*. Thus, the persuasiveness of European Communities' argument will be affected by the extent to which this factual premise is supported by the evidence and established to be valid.

7.124 Under Codex Stan 94, if a hermetically sealed container contains fish of species *Sardina pilchardus*, the product would be labelled "sardines" without any qualification. A product containing preserved *Sardinops sagax*, however, would be labelled "X sardines" with the "X" representing the name of a country, the name of a geographic area, the name of the species or the common name in accordance with the law and custom of the country in which the product is sold. If a hermetically sealed container is labelled simply as "sardines" without any qualification, the European consumer would know that it contains European sardines. However, if the product is labelled, for example, "Pacific sardines", the European consumer would be informed that the product does not contain sar-

in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights". Panel Report, *United States — Section 110(5) of the US Copyright Act ("US — Section 110(5) Copyright Act")*, WT/DS160/R, adopted 27 July 2000, para. 6.224.

dines originating from Europe. We note that preserved sardines from Morocco, which contains *Sardina pilchardus*, sold in the European Communities is labelled "Sardines Marocaines". Although the product could simply be called "sardines" because it contains *Sardina pilchardus*, the label containing the name of a country provides a precise trade description by informing the European consumers of the provenance of the preserved *Sardina pilchardus*.

7.125 The European Communities, however, argued that "X sardines" is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation because European consumers associate the term "sardines" exclusively with *Sardina pilchardus* and even if "sardines" is combined with a qualification, it would suggest to European consumers that the products are the same but come from different countries or geographic areas. As noted above, the argument advanced by the European Communities in support of its claim that Codex Stan 94 is ineffective or inappropriate is based on the underlying factual assumption that consumers in most member States of the European Communities have always associated the common name "sardines" exclusively with *Sardina pilchardus* and that the use of "sardines" in conjunction with "Pacific", "Peruvian" or "*Sardinops sagax*" would therefore not enable the European consumer to distinguish products made from *Sardinops sagax* as opposed to *Sardina pilchardus*. The European Communities summarizes its argument as follows:

In most parts of the European Communities, especially in the production countries, the term "sardine" has historically made reference only to the *Sardina pilchardus*.⁹⁶ However, other species like sprats (*Sprattus sprattus*) were sold in tiny quantities on the European Communities market with the denomination "brisling sardines". In view of the confusion that this created in the market place, the European Communities has constantly tried to clarify the situation, both externally (note of 16/04/73 to Norway⁹⁷) and internally (Regulation 2136/89).

*This situation has now created uniform consumer expectations throughout the European Communities, the term "sardine" referring only to a preserve made from *Sardina pilchardus*.*⁹⁸

7.126 Thus, the European Communities asserted, on the one hand, that in most member States the term "sardines" has historically responded to the particular consumer expectations which in its view underlie its Regulation, and acknowledged, on the other hand, that in some member States, it is the Regulation which "created" those "uniform" consumer expectations. The European Communities therefore made a factual distinction between two situations, and we will address these two situations separately.

⁹⁶ (footnote original) See Spanish legislation (Exhibit EC-21) and French legislation (Exhibit EC-22).

⁹⁷ (footnote original) See Exhibit EC-23.

⁹⁸ EC's First Submission, paras. 64-65. Emphasis added.

7.127 The European Communities acknowledged that it is the Regulation which in certain member States "created" the consumer expectations which it now considers require the maintenance of that same Regulation. Thus, through regulatory intervention, the European Communities consciously would have "created" consumer expectations which now are claimed to affect the competitive conditions of imports. If we were to accept that a WTO Member can "create" consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations, we would be endorsing the permissibility of "self-justifying" regulatory trade barriers. Indeed, the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of the governmentally created consumer expectations. Mindful of this concern, we will proceed to examine whether the evidence and legal arguments before us demonstrate that consumers in most member States of the European Communities have always associated the common name "sardines" exclusively with *Sardina pilchardus* and that the use of "sardines" in conjunction with "Pacific", "Peruvian" or "*Sardinops sagax*" would therefore not enable European consumers to distinguish between products made from *Sardinops sagax* and *Sardina pilchardus*.

7.128 As indicated above, the European Communities asserted that in most member States the consumer expectations allegedly underlying the EC Regulation existed before the EC Regulation introduced an EC-wide regime. To that effect, the European Communities submitted copies of pre-1989 Spanish and French regulations prescribing the common name "sardines" for products made from *Sardina pilchardus*. The European Communities also submitted copies of the 1981 and 1996 United Kingdom Food Labelling Regulations and a copy of the 2000 German *Lebensmittelbuch*, which the European Communities has described as constituting "only a guideline". These documents prescribe the common name "sardines" for *Sardina pilchardus*, and "Pacific pilchard" or "pilchard" for *Sardinops sagax*. Thus, the European Communities argued that for those four European Communities' member States, domestic regulations reserving the common name "sardines" for *Sardina pilchardus* is to be considered probative of consumer perceptions at that time and thereafter. In other words, governments in those countries would have "codified" consumer expectations in their domestic regulations. Although it may be debatable as to whether this will always be so,⁹⁹ we will proceed on the assumption that domestic legislation predating¹⁰⁰ the EC Regulation may indeed have such probative value regarding consumer expectations.

⁹⁹ See paragraph 7.127 wherein we express our concern that "Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory invention on the basis of the governmentally created consumer expectation".

¹⁰⁰ With respect to the post-1989 regulations in the United Kingdom and Germany, we fail to see how these documents could be relevant for our assessment, considering the European Communities' confirmation that its Regulation, which predates both documents, "is the law directly applicable" in all European Communities' member States (EC's Response to Panel Question 42(b)). Thus, if Euro-

7.129 Concerning the pre-1989 versions of Spanish, French and United Kingdom regulations, we consider that these do indeed demonstrate that the legislative or regulatory authorities in those countries considered that the common name "sardines" without any qualification was to be reserved for products made from *Sardina pilchardus*, even before the EC Regulation entered into force.¹⁰¹ We note, however, that these documents, which concern three European Communities' member States, are not probative of the assertion that the use of a qualifying term, such as "Pacific", "Peruvian" or "*Sardinops sagax*", in combination with "sardines" would not enable European consumers to distinguish products made from *Sardinops sagax* as opposed to *Sardina pilchardus*.

7.130 We also note that in the United Kingdom, which imports 97% of all Peruvian exports of preserved *Sardinops sagax* to the European Communities, the 1981 Food Labelling Regulations also allowed for the use of the common name "pilchards" for *Sardina pilchardus* and prescribed the common name "Pacific pilchards" for *Sardinops sagax*. Thus, United Kingdom consumers did not associate *Sardina pilchardus* exclusively with the common name "sardines", and were able to distinguish *Sardinops sagax* from *Sardina pilchardus* by the simple indication of a geographical region (i.e., "Pacific"). If the insertion of the geographic area "Pacific" with the word "pilchard" was used in the United Kingdom to distinguish between *Sardina pilchardus* and *Sardinops sagax*, we fail to see why the inclusion of the name of a country, name of a geographic area, name of the species or the common name with the term "sardines" to refer to *Sardina sagax* would be ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation.

7.131 Contrary to the European Communities' assertion, Peru submitted evidence to demonstrate that European consumers do not associate "sardines" exclusively with *Sardina pilchardus*. It did so by demonstrating that the term "sardines" either by itself or combined with the name of a country or the geographic area, is a common name for *Sardinops sagax* in the European Communities. In support of its assertion that "sardines" by itself or combined with the name of a country or geographic region is a common name for *Sardinops sagax* in the European Communities, Peru referred to the *Multilingual Illustrated Dictionary of Aquatic Animals and Plants*, published in close cooperation with the European Commission and the member States of the European Communities for the purpose of, *inter alia*, improving market transparency, which lists the common name of *Sardinops sagax* in nine European languages as "sardines" or the equivalent thereof in the national language combined with the country or geo-

pean Communities' member States are to comply with the EC Regulation, it would have been surprising to find member State regulations or guidelines post-1989 which extend the right to use the trade description "sardines" also to products made from *Sardinops sagax*, as this would be clearly inconsistent with Article 2 of the EC Regulation. These documents therefore do not demonstrate that consumers in most member States of the European Communities have always, and in some member States have for at least 13 years, associated the trade description "sardines" exclusively with *Sardina pilchardus*. They are simply consistent with the EC Regulation, as they can be expected to be.

¹⁰¹ We note, however, that the European Communities have not provided any evidence regarding this assertion for the twelve other European Communities' member States.

graphic area of origin. Similarly, Peru submitted copies of the electronic publication, *Fish Base*, produced with the support of the European Commission, which indicates that a common name for *Sardinops sagax* in Italy, the Netherlands, Germany, France, Sweden and Spain is "sardines" or its equivalent in the national language combined with the country or geographical area of origin. In addition, Peru relied on the *Multilingual Dictionary of Fish and Fish Products* prepared by the Organisation for Economic Cooperation and Development ("OECD") which indicates that a common name of *Sardinops sagax* is "sardines", either by itself or combined with the name of a country or geographic area. According to this *Multilingual Dictionary of Fish and Fish Products*, one of the common names in English is "Pacific Sardine", or "Sardine du Pacifique" in French. Even the European Communities acknowledged that one of the common names for *Sardinops sagax* is "sardines" or its equivalent thereof in the national language combined with the country or geographical area of origin.¹⁰²

7.132 According to the Consumers' Association, "a wide array of sardines were made available to European consumers for many decades prior to the imposition of this restrictive Regulation".¹⁰³ Canada submitted evidence showing that a Canadian company exported *Clupea harengus harengus* under the trade description "Canadian sardines" to the Netherlands for thirty years, until 1989. Canada also submitted evidence showing that there have been exports of *Clupea harengus harengus* under the trade description "[company name] sardines in hot tabasco" to the United Kingdom for forty years, until 1989. We note in this regard that with respect to the objective of promoting fair competition, the aim of which is to prevent producers of one product from benefitting from the reputation associated with another product,¹⁰⁴ the underlying premise is that the term "sardines" is associated only with *Sardina pilchardus*. However, as species other than *Sardina pilchardus* also contributed to the reputation of the term "sardines" and in light of the fact that "sardines", either by itself or combined with the name of a country or a geographic area, is a common name for *Sardinops sagax* in the European Communities, we do not consider that only *Sardina pilchardus* developed the reputation associated with the term "sardines".

7.133 Even if we were to assume that the consumers in the European Communities associate the term "sardines" exclusively with *Sardina pilchardus*, the concern expressed by the European Communities, in our view, was taken into account when Codex Stan 94 was adopted. By establishing a precise labelling requirement "in a manner not to mislead the consumer", the Codex Alimentarius Commission considered the issue of consumer protection in countries producing preserved sardines from *Sardina pilchardus* and those producing preserved sardines from species other than *Sardina pilchardus* by reserving the term "sardines" without any qualification for *Sardina pilchardus* only. The other species enumerated in Codex Stan 94 are to be labelled as "X sardines" with the "X"

¹⁰² EC's First Submission, paras. 25 and 27-28. The European Communities lists one of the common names for *Sardinops sagax* as "sardina" in Spain and "Pacific sardine" in the United Kingdom.

¹⁰³ Exhibit Peru-16, p. 8.

¹⁰⁴ EC's First Submission, paras. 63, 140 and 141.

denoting the name of a country, name of a geographic area, name of the species or the common name in accordance with the law and custom of the country in which the product is sold. Thus, Codex Stan 94 allows Members to provide precise trade description of preserved sardines which promotes market transparency so as to protect consumers and promote fair competition.¹⁰⁵

7.134 Negotiating history confirms that Codex Stan 94 takes into account the European Communities' concern that consumers might be misled if a distinction were not made between *Sardina pilchardus* and other species. The Report of Codex Committee on Fish and Fishery Products on the Seventh Session states:

The traditional canners of this fish [*Sardina pilchardus*] were adamant that no other species should be allowed to use "sardines" without some form of qualification. Nor were they disposed to agree to qualifications which in their view could lead to confusion as to the species ... For [countries producing fish of other species] any distinction was discriminatory and would result in their consumers being misled *The Committee agreed upon the need to protect the consumer.*¹⁰⁶ (emphasis added)

7.135 At the Twelfth Session of the Codex Alimentarius Commission where the Commission adopted the draft standard for canned sardines and sardine-type products, a proposal was made to include *Engraulis mordax* and *Sardinella longiceps*. In response to this proposal, it is recorded that:

France stated that, in its opinion, the list of species (2.1.2) covered too broad range of fish which could place the consumer at a disadvantage with regard to making a sound choice between different products. It was pointed out that the present standard was a group

¹⁰⁵ We note that Article 7(c) of the EC Regulation permits, "by way of derogation from Article 2, second indent", a can of sardines to be labelled as "sardine mousse", "sardine paste" or "sardine pâté", even if the can is comprised of only 25% *Sardina pilchardus* and 75% other fish, including those of *Sardinops sagax*. In its response to the Panel's question on the matter, the European Communities confirmed that a can containing at least 25% of homogenised *Sardina pilchardus* flesh and the remainder containing "the flesh of other fish which have undergone the same treatment" can be marketed as "sardine mousse", "sardine paste", or "sardine pâté" if the content of the flesh of any other fish is less than 25%. Thus, as long as the 25% of *Sardina pilchardus* is the predominant weight, the product can be marketed as "sardine mousse", "sardine paste", or "sardine pâté". For example, if a mousse is made of 60% fish and 40 % other ingredients, the fish component could, according to Article 7, be comprised of 25% *Sardina pilchardus* and 15% each of five different fish and it would still be a "sardine mousse". On the other hand, a mousse of which the fish component represents 49.9% *Sardina pilchardus* and 50.1% *Sardinops sagax*, however, would not. The European Communities argues that consumers will nevertheless be protected by the indication of the ingredients on the can. However, if the indication of ingredients on the can is sufficient to inform consumers that their "sardine" product in reality contains 25% *Sardina pilchardus* and 75% other fish, we fail to see why Codex Stan 94 which informs consumers that no *Sardina pilchardus* is contained by labelling the product "X sardines" is ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation.

¹⁰⁶ Exhibit Canada-3, Report of the Codex Committee on Fish and Fishery Products, Seventh Session, 2-7 October 1972, ALINORM 74/18, paras. 57 and 59.

standard and that the labelling section contained adequate provisions to safeguard the consumer.¹⁰⁷

7.136 Moreover, a 1969 Synopsis of Governments Replies on the Questionnaire on "Canned Sardines", prepared by the Codex Committee on Fish and Fishery Products, demonstrates that the governments of several current European Communities' member States, such as Denmark, Sweden and the United Kingdom, responded affirmatively to the question "[i]s it accepted that existing practices whereby sardine-type products are often labelled as sardines but with an appropriate qualifying phrase should be fully taken into account and provided for so long as the consumer is not deceived?". These governments considered "that this way of designating the sardine-type products as sardines has been in use for about one century in many countries". France was recorded as stating that "only the species recognized as sufficiently near to *Sardina pilchardus* might be designated as 'sardine' followed or preceded by a qualifying term", adding that "a geographic qualifying term could be acceptable on the condition that the consumer is not deceived (i.e., Atlantic sardine can mean either *Sardina pilchardus*, or another species caught in the Atlantic Ocean)". Of all current European Communities' members States, only the Federal Republic of Germany, Portugal and Spain stated that their domestic legislation did "not accept any designation of 'sardines' even with a qualifying term for species other than *Sardina pilchardus* (Walbaum)".

7.137 In light of our considerations above and based on our review of the available evidence and legal arguments, we find that it has not been established that consumers in most member States of the European Communities have always associated the common name "sardines" exclusively with *Sardina pilchardus* and that the use of "X sardines" would therefore not enable the European consumer to distinguish preserved *Sardina pilchardus* from preserved *Sardinops sagax*.^{108, 109} We also find that Codex Stan 94 allows Members to provide precise trade description for preserved sardines and thereby promote market transparency so as to protect consumers and promote fair competition.

7.138 We therefore conclude that it has not been demonstrated that Codex Stan 94 would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued by the EC Regulation, i.e., consumer protection,

¹⁰⁷ Exhibit Canada-3, Report of the Twelfth Session of the Joint FAO/WHO Codex Alimentarius Commission, p. 52.

¹⁰⁸ In light of our finding that the consumers in the European Communities do not necessarily associate sardines exclusively with *Sardina pilchardus*, it is worth noting that the regulation governing tuna and bonito indicates that Atlantic and Pacific bonito, Atlantic little tuna, Eastern little tuna, black skipjack and other species of the genus *Euthynnus* can be labelled "bonito" without any qualification. If a requirement that is less precise, especially in respect of the geographic origin, than that set out in Codex Stan 94 can "ensure market transparency" and "ensure clarity in the trade description of the products concerned", Codex Stan 94 that allows a more precise trade description to be used is arguably effective and appropriate to fulfil the objective of promoting market transparency, protecting consumers and promoting fair competition.

¹⁰⁹ With respect to parties' argument about whether the term "sardines" is generic, we do not consider it necessary to make a determination on this particular issue.

market transparency and fair competition. We conclude that Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation.

6. *Overall Conclusion with Respect to Article 2.4 of the TBT Agreement*

7.139 In light of our findings that Codex Stan 94 is a relevant international standard, that it was not used as a basis for the EC Regulation and that it is not ineffective or inappropriate to fulfil the legitimate objectives pursued by the EC Regulation, we find that the EC Regulation is inconsistent with Article 2.4 of the TBT Agreement.

H. *Consideration of the European Communities' Argument that Peru Broadened its Claims*

7.140 The European Communities argues that Peru's reformulated request for findings broadens the claims made by Peru in its first written submission and is therefore inadmissible. The European Communities argues that Peru is claiming in its second written submission that the European Communities and its member States cannot use a common name of the species *Sardinops sagax* according to the relevant law and custom to designate the preserved product unless it is accompanied by the word "sardines".

7.141 The European Communities argues that Peru's formulation of its request for findings seeks to obtain a declaratory judgment that would require the European Communities to take certain specific action rather than simply remove any inconsistency and, in the European Communities' view, this request goes beyond the panel's mandate and is inadmissible. The European Communities argues that Peru's reformulation of its claim is a consequence of the fact that Peru failed to properly research the common names of *Sardinops sagax* in the European Communities prior to commencing this dispute.

7.142 Concerning the European Communities' argument that Peru broadened its claim, it is necessary to examine the terms of reference which are set out in document WT/DS231/16:

To examine, in the light of the relevant provisions of the covered agreements cited by Peru in document WT/DS231/6, the matter referred to the DSB by Peru 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.

7.143 Regarding the term "matter", the Appellate Body in *Guatemala — Cement I* stated that the matter consists of the specific measure and the claims relating to it, both of which must be identified in the request for the establishment of

a panel.¹¹⁰ In its Request for the Establishment of a Panel, Peru invoked the EC Regulation as the specific measure at issue and claimed that the EC Regulation is inconsistent with Articles 2 and 12 of the TBT Agreement and Articles I, III and XI:1 of the GATT 1994. In the so-called reformulated request for findings, Peru asked the Panel to find that the EC Regulation prohibiting the use of the term "sardines" combined with the name of a country of origin, name of a geographic area, name of the species or the common name of *Sardinops sagax* used in the language of the member State of the European Communities in which the product is sold is inconsistent with Article 2.4 of the TBT Agreement. Peru specifically referred to the EC Regulation and Article 2.4 of the TBT Agreement, both of which are set out in Peru's Request for the Establishment of a Panel. Therefore, we do not consider that Peru, even if it broadened the scope of its request beyond what it originally requested in its first written submission, made any claims that exceeded the terms of reference.¹¹¹

7.144 We are well aware that panels can consider only those *claims* that it has the authority to consider under the terms of reference which sets out our mandate. In this regard, a distinction must be made between claims and arguments.¹¹² We note that the Appellate Body stated:

there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and *progressively* clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.¹¹³ (emphasis added)

¹¹⁰ Appellate Body Report, *Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico ("Guatemala — Cement I")*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, para. 72.

¹¹¹ In any event, we note that the findings requested by Peru as set out in the first and second written submissions are not substantively different. Peru's second written submission refers to the prohibition to market the products prepared from *Sardinops sagax* under the name "sardines" combined with an indication of the name of the country of origin, the geographic area, the species and the common name whereas the first written submission, while similar in all respect, refers to "the prohibition ... to market the products ... under the common name of the species *Sardinops sagax* customarily used in the language of the member State of the European Communities in which the product is sold (such as 'Peruvian sardine' in English, or 'Südamerikanische Sardine' in German)". Although the latter does not contain the explicit reference to the term "sardines" combined with the common name, we note that examples cited by Peru uses the term "sardines" with the putative common name. Moreover, Peru argued throughout the proceedings that the term "sardines" has to be used in combination with the four alternatives set out in Codex Stan 94.

¹¹² The Appellate Body in *Korea — Dairy*, para. 139, stated that "[b]y 'claim' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement. Such a *claim of violation* must, as we have already noted, be distinguished from the *arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision" (emphasis original).

¹¹³ Appellate Body Report, *EC — Bananas III*, para. 141.

7.145 The request for findings submitted by Peru in its first and second written submissions, in our view, is a summation of its arguments and do not constitute claims. And, as arguments, we are not bound by them.

7.146 For the reasons set out above, we reject the European Communities' argument that Peru's reformulated request broadens the claim and that Peru's request goes beyond the Panel's mandate.

I. *Judicial Economy*

7.147 In this dispute, Peru requested us to first examine the consistency of the EC Regulation with Article 2.4 of the TBT Agreement. Peru requested that we consider the consistency of the EC Regulation with Article 2.2 of the TBT Agreement only if we were to find that the EC Regulation is consistent with Article 2.4 of the TBT Agreement and then examine its claim under Article 2.1 of the TBT Agreement only if we were to find the EC Regulation is consistent with Article 2.2 of the TBT Agreement. In the event that we were to find the EC Regulation consistent with the TBT Agreement, Peru requested that we examine whether the EC Regulation is consistent with Article III:4 of the GATT 1994. The European Communities did not contest Peru's requests.

7.148 We note that our obligation as a panel is set out in Article 11 of the DSU which provides:

a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and the make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

7.149 We are mindful that "[n]othing in [Article 11 of the DSU] or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party"¹¹⁴ but note that the principle of judicial economy has to be applied bearing in mind the aim of the dispute settlement mechanism which is to "secure a positive solution to a dispute".

7.150 Panels in a number of disputes have applied the principle of judicial economy. We are mindful that in some instances, the Appellate Body found that principle was applied incorrectly; in others, the Appellate Body affirmed the panel's decision. As initially developed in *US — Wool Shirts and Blouses*, the Appellate Body stated that "a panel need only address those claims which must be addressed in order to resolve the matter at issue".¹¹⁵ This was further qualified in *Australia — Salmon* where the Appellate Body stated that:

the principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. The aim is to resolve the matter at issue and to secure a positive solution to the

¹¹⁴ Appellate Body Report, *US — Wool Shirts and Blouses*, p. 339. Emphasis original.

¹¹⁵ Appellate Body Report, *US — Wool Shirts and Blouses*, p. 340.

dispute. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members".¹¹⁶

7.151 Therefore, in keeping with the principle of judicial economy, we conclude that it is not necessary for us to consider other claims and arguments raised by the parties in this dispute. We made an objective assessment of whether the EC Regulation is consistent with Article 2.4 of the TBT Agreement and found that the EC Regulation is not consistent with Article 2.4 of the TBT Agreement. This finding, in our view, produces a positive solution to the current dispute and also enables the DSB to make sufficiently precise recommendations and rulings without any further findings under Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994. Although panels are not bound by the complaining party's request which is not contested by the responding party, we are aided in our view by the complaining party's specific request that we examine the consistency of the EC Regulation with other legal provisions invoked by Peru only if we were to find the EC Regulation is consistent with Article 2.4 of the TBT Agreement.

7.152 Accordingly, we exercise judicial economy with respect to Peru's claim under Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the findings above, we conclude that the EC Regulation is inconsistent with Article 2.4 of the TBT Agreement.

8.2 Pursuant to Article 3.8 of the DSU which provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification and impairment", we conclude that the EC Regulation nullified and impaired the benefits of Peru under the WTO Agreement, in particular under the TBT Agreement.

8.3 Peru requested that we suggest in accordance with Article 19.1 of the DSU that "the European Communities permit Peru without any further delay to market its sardines in accordance with a naming standard consistent with the TBT Agreement." We note that Article 19.1 states that the panel may suggest a way to implement the recommendations of the panel and that the panel is not required to make such suggestion. As the authority under Article 19.1 is one of discretion, we decline to make a suggestion. We recommend that the DSB re-

¹¹⁶ Appellate Body Report, *Australia — Salmon*, para. 223.

quest the European Communities to bring its measure into conformity with its obligations under the TBT Agreement.

IX. ANNEXES

A. *Annex 1: Council Regulation (EEC) 2136/89 of 21 June 1989 Laying Down Common Marketing Standards for Preserved Sardines*

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3796/81 of 29 December 1981 on the common organization of the market in fishery products¹¹⁷, as last amended by Regulation (EEC) No 1495/89¹¹⁸, and in particular Article 2(3) thereof,

Having regard to the proposal from the Commission,

Whereas Regulation (EEC) No 3796/81 provides for the possibility of adopting common marketing standards for fishery products in the Community, particularly in order to keep products of unsatisfactory quality off the market and to facilitate trade relations based on fair competition;

Whereas the adoption of such standards for preserved sardines is likely to improve the profitability of sardine production in the Community, and the market outlets therefor, and to facilitate disposal of the products;

Whereas it must be specified in this context, particularly in order to ensure market transparency, that the products concerned must be prepared exclusively with fish of the species "*Sardina pilchardus* Walbaum" and must contain a minimum quantity of fish;

Whereas, in order to ensure good market presentation, the criteria for the preparation of the fish prior to packaging, the presentations in which it may be marketed and the covering media and additional ingredients which may be used should be laid down; whereas these criteria must not, however, be such as to preclude the introduction of new products on to the market;

Whereas, to prevent the marketing of unsatisfactory products, certain criteria which preserved sardines must satisfy in order to be marketed in the Community for human consumption should be defined;

Whereas Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States related to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer¹¹⁹ as last amended by Directive 86/197/EEC¹²⁰ and Council Directive 76/211/EEC of 20 January 1976

¹¹⁷ OJ No L 379, 31.12.1981, p. 1.

¹¹⁸ OJ No L 148, 1.6.1989, p. 1.

¹¹⁹ OJ No L 33, 8.2.1979, p. 1.

¹²⁰ OJ No L 144, 29.5.1986, p. 38.

on the approximation of the laws of the Member States relating to making-up by weight or by volume of certain pre-packaged products¹²¹ as last amended by Directive 78/891/EEC¹²², specify the particulars required for correct information and protection of the consumer as regards the contents of packages; whereas, for preserved sardines, the trade description should be determined according to the culinary preparation proposed, having particular regard to the ratio between the various ingredients in the finished product; whereas, where the covering medium is oil, the way in which the oil must be described should be specified;

Whereas the Commission should have responsibility for the adoption of any technical implementing measures,

HAS ADOPTED THIS REGULATION:

Article 1

This Regulation defines the standards governing the marketing of preserved sardines in the Community.

Article 2

Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:

- they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
- they must be prepared exclusively from fish of the species "*Sardina pilchardus* Walbaum";
- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
- they must be sterilized by appropriate treatment.

Article 3

The sardines must, to the extent required for good market presentation, be appropriately trimmed of the head, gills, caudal fin and internal organs other than the ova, milt and kidneys, and, according to the market presentation concerned, backbone and skin.

Article 4

Preserved sardines may be marketed in any of the following presentations:

1. sardines: the basic product, fish from which the head, gills, internal organs and caudal fin have been appropriately removed. The head must be removed by making a cut perpendicular to the backbone, close to the gills;

¹²¹ OJ No. L 46, 21.2.1976, p. 1.

¹²² OJ No L 311, 4.11.1978, p. 21.

2. sardines without bones: as the basic product referred to in point 1, but with the additional removal of backbone;
3. sardines without skin or bones: as the basic product referred to in point 1, but with the additional removal of the backbone and skin;
4. sardine fillets: portions of flesh obtained by cuts parallel to the backbone, along the entire length of the fish, or a part thereof, after removal of the backbone, fins and edge of the stomach lining. Fillets may be presented with or without skin;
5. sardine trunks: sardine portions adjacent to the head, measuring at least 3 cm in length, obtained from the basic product referred to in point 1 by making transverse cuts across the backbone;
6. any other form of presentation, on condition that it is clearly distinguished from the presentations defined in points 1 to 5.

Article 5

For the purposes of the trade description laid down in Article 7, a distinction shall be drawn between the following covering media, with or without the addition of other ingredients:

1. olive oil;
2. other refined vegetable oils, including olive-residue oil used singly or in mixtures;
3. tomato sauce;
4. natural juice (liquid exuding from the fish during cooking), saline solution or water;
5. marinade, with or without wine;
6. any other covering medium, on condition that it is clearly distinguished from the other covering media defined in points 1 to 5.

These covering media may be mixed, but olive oil may not be mixed with other oils.

Article 6

1. After sterilization, the products in the container must satisfy the following minimum criteria:
 - (a) for the presentations defined in points 1 to 5 of Article 4, the sardines or parts of sardine must:
 - be reasonably uniform in size and arranged in an orderly manner in the container,
 - be readily separable from each other,
 - present no significant breaks in the abdominal wall,
 - present no breaks or tears in the flesh,

- present no yellowing of tissues, with the exception of slight traces,
 - comprise flesh of normal consistency. The flesh must not be excessively fibrous, soft or spongy,
 - comprise flesh of a light or pinkish colour, with no reddening round the backbone, with the exception of slight traces;
- (b) the covering medium must have the colour and consistency characteristic of its description and the ingredients used. In the case of an oil medium, the oil may not contain aqueous exudate in excess of 8 % of net weight;
- (c) the product must retain the odour and flavour characteristics of the species "*Sardina pilchardus* Walbaum" and the type of covering medium, and must be free of any disagreeable odour or taste, in particular bitterness, or taste of oxidation or rancidity;
- (d) the product must be free of any foreign bodies;
- (e) in the case of products with bones, the backbone must be readily separable from the flesh and friable;
- (f) products without skin and without bones must present no significant residues thereof.
2. The container may not present external oxidation or deformation affecting good commercial presentation.

Article 7

Without prejudice to Directives 79/112/EEC and 76/211/EEC, the trade description on the pre-packaging of preserved sardines must correspond to the ratio between the weight of sardines in the container after sterilization and the net weight, both expressed in grams.

- (a) For the presentations defined in points 1 to 5 of Article 4, the ratio shall be not less than the following values:
- 70 % for the covering media listed in points 1, 2, 4 and 5 of Article 5,
 - 65 % for the covering medium described in point 3 of Article 5;
 - 50 % for the covering media referred to in point 6 of Article 5.

Where these values are complied with, the trade description must correspond to the presentation of the sardine on the basis of the corresponding designation referred to in Article 4. The designation of the covering medium must form an integral part of the trade description.

In the case of products in oil, the covering medium must be designated by one of the following expressions:

- "in olive oil", where that oil is used,
- or

- "in vegetable oil", where other refined vegetable oils, including olive-residue oil, or mixtures thereof are used,
or
 - "in . . . oil", indicating the specific nature of the oil.
- (b) For the presentations referred to in point 6 of Article 4, the ratio referred to in the first subparagraph must be at least 35 %.
- (c) In the case of culinary preparations other than those defined in (a), the trade description must indicate the specific nature of the culinary preparation.
- By way of derogation from Article 2, second indent at point (b) of this Article, preparations using homogenized sardine flesh, involving the disappearance of its muscular structure, may contain the flesh of other fish which have undergone the same treatment provided that the proportion of sardines is at least 25 %.
- (d) The trade description, as defined in this Article, shall be reserved for the products referred to in Article 2.

Article 8

Where necessary, the Commission shall adopt, in accordance with the procedure laid down in Article 33 of Regulation (EEC) No 3796/81, the measures necessary to apply this Regulation, in particular the sampling plan for assessing conformity of manufacturing batches with the requirements of this Regulation.

Article 9

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

It shall apply as from 1 January 1990.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 21 June 1989.

For the Council

The President

C. ROMERO HERRERA

B. Annex 2: The Codex Alimentarius Commission Standard for Canned Sardines and Sardine-Type Products (Codex Stan 94 – 1981 rev.1 – 1995)

1. SCOPE

This standard applies to canned sardines and sardine-type products packed in water or oil or other suitable packing medium. It does not apply to speciality products where fish content constitute less than 50% m/m of the net contents of the can.

2. DESCRIPTION

2.1 PRODUCT DEFINITION

2.1.1 Canned sardines or sardine-type products are prepared from fresh or frozen fish of the following species:

- *Sardina pilchardus*
- *Sardinops melanostictus*, *S. neopilchardus*, *S. ocellatus*, *S. sagax* *S. caeruleus*
- *Sardinella aurita*, *S. brasiliensis*, *S. maderensis*, *S. longiceps*, *S. gibbosa*
- *Clupea harengus*
- *Sprattus sprattus*
- *Hyperlophus vittatus*
- *Nematalosa vlaminghi*
- *Etrumeus teres*
- *Ethmidium maculatum*
- *Engraulis anchoita*, *E. mordax*, *E. ringens*
- *Opisthonema oglinum*

2.1.2 Head and gills shall be completely removed; scales and/or tail may be removed. The fish may be eviscerated. If eviscerated, it shall be practically free from visceral parts other than roe, milt or kidney. If ungutted, it shall be practically free from undigested feed or used feed.

2.2 PROCESS DEFINITION

The products are packed in hermetically sealed containers and shall have received a processing treatment sufficient to ensure commercial sterility.

2.3 PRESENTATION

Any presentation of the product shall be permitted provided that it:

- (i) contains at least two fish in each can; and
- (ii) meets all requirements of this standard; and

(iii) is adequately described on the label to avoid confusing or misleading the consumer;

(iv) contain only one fish species.

3. ESSENTIAL COMPOSITION AND QUALITY FACTORS

3.1 RAW MATERIAL

The products shall be prepared from sound fish of the species listed under sub-section 2.1 which are of a quality fit to be sold fresh for human consumption.

3.2 OTHER INGREDIENTS

The packing medium and all other ingredients used shall be of food grade quality and conform to all applicable Codex standards.

3.3 DECOMPOSITION

The products shall not contain more than 10 mg/100g of histamine based on the average of the sample unit tested.

3.4 FINAL PRODUCT

Products shall meet the requirements of this Standard when lots examined in accordance with Section 9 comply with provisions set out in Section 8. Product shall be examined by the methods given in Section 7.

4. FOOD ADDITIVES

Only the use of the following additives is permitted.

Additive	Maximum Level in the Final Product
<i>Thickening or Gelling Agents</i>	
(for use in packing media only)	
400 Alginic acid	GMP
401 Sodium alginate	
402 Potassium alginate	
404 Calcium alginate	
406 Agar	
407 Carrageenan and its Na, K, and NH ₄ salts (including furcelleran)	
407 Processed <i>Eucheuma</i> Seaweed (PES)	
410 Carob bean gum	
412 Guar gum	
413 Tragacanth gum	
415 Xanthan gum	
440 Pectins	
466 Sodium carboxymethylcellulose	
<i>Modified Starches</i>	
1401 Acid treated starches (including white and yellow dextrans)	GMP
1402 Alkaline treated starches	
1404 Oxidized starches	
1410 Monostarch phosphate	
1412 Distarch phosphate, esterified	
1414 Acetylated distarch phosphate	
1413 Phosphated distarch phosphate	
1420/1421 Starch acetate	
1422 Acetylated distarch adipate	
1440 Hydroxypropyl starch	
1442 Hydroxypropyl starch phosphate	
<i>Acidity Regulators</i>	
260 Acetic acid	GMP
270 Lactic acid (L-, D- and DL-)	
330 Citric acid	
<i>Natural Flavours</i>	
Spice oils	GMP
Spice extracts	
Smoke flavours (natural smoke solutions and extracts)	

5. HYGIENE AND HANDLING

5.1 The final product shall be free from any foreign material that poses a threat to human health.

5.2 When tested by appropriate methods of sampling and examination as prescribed by the Codex Alimentarius Commission, the product:

- (i) shall be free from micro-organisms capable of development under normal conditions of storage;
- (ii) no sample unit shall contain histamine that exceeds 20 mg per 100 g;
- (iii) shall not contain any other substance including substances derived from microorganisms in amounts which may represent a hazard to health in accordance with standards established by the Codex Alimentarius Commission;
- (iv) shall be free from container integrity defects which may compromise the hermetic seal.

5.3 It is recommended that the product covered by the provisions of this standard be prepared and handled in accordance with the appropriate sections of the Recommended International Code of Practice – General Principles of Food Hygiene (CAC/RCP 1-1969, Rev. 3-1997) and the following relevant Codes:

- (i) the Recommended International Code of Practice for Canned Fish (CAC/RCP 10-1976);
- (ii) the Recommended International Code of Hygienic Practice for Low-Acid and Acidified Low-Acid Canned Foods (CAC/RCP 23-1979);

6. LABELLING

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985, Rev. 3-1999) the following special provisions apply:

6.1 NAME OF THE FOOD

The name of the product shall be:

- 6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or
- (ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

6.1.2 The name of the packing medium shall form part of the name of the food.

6.1.3 If the fish has been smoked or smoke flavoured, this information shall appear on the label in close proximity to the name.

6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer.

7. SAMPLING, EXAMINATION AND ANALYSES

7.1 SAMPLING

- (i) Sampling of lots for examination of the final product as prescribed in Section 3.3 shall be in accordance with the FAO/WHO Codex Alimentarius Sampling Plans for Prepackaged Foods (AQL-6.5) (Ref. CAC/RM 42-1977);
- (ii) Sampling of lots for examination of net weight and drained weight where appropriate shall be carried out in accordance with an appropriate sampling plan meeting the criteria established by the CAC.

7.2 SENSORIC AND PHYSICAL EXAMINATION

Samples taken for sensoric and physical examination shall be assessed by persons trained in such examination and in accordance with Annex A and the *Guidelines for the Sensory Evaluation of Fish and Shellfish in Laboratories* (CAC/GL 31-1999).

7.3 DETERMINATION OF NET WEIGHT

Net contents of all sample units shall be determined by the following procedure:

- (i) Weigh the unopened container.
- (ii) Open the container and remove the contents.
- (iii) Weigh the empty container, (including the end) after removing excess liquid and adhering meat.
- (iv) Subtract the weight of the empty container from the weight of the unopened container. The resultant figure will be the net content.

7.4 DETERMINATION OF DRAINED WEIGHT

The drained weight of all sample units shall be determined by the following procedure:

- (i) Maintain the container at a temperature between 20°C and 30°C for a minimum of 12 hours prior to examination.
- (ii) Open and tilt the container to distribute the contents on a pre-weighed circular sieve which consists of wire mesh with square openings of 2.8 mm x 2.8 mm.
- (iii) Incline the sieve at an angle of approximately 17-20° and allow the fish to drain for two minutes, measured from the time the product is poured into the sieve.
- (iv) Weigh the sieve containing the drained fish.
- (v) The weight of drained fish is obtained by subtracting the weight of the sieve from the weight of the sieve and drained product.

7.5 PROCEDURES FOR PACKS IN SAUCES (WASHED DRAINED WEIGHT)

- (i) Maintain the container at a temperature between 20°C and 30°C for a minimum of 12 hours prior to examination.
- (ii) Open and tilt the container and wash the covering sauce and then the full contents with hot tap water (approx. 40°C), using a wash bottle (e.g., plastic) on the tared circular sieve.
- (iii) Wash the contents of the sieve with hot water until free of adhering sauce; where necessary separate optional ingredients (spices, vegetables, fruits) with pincers. Incline the sieve at an angle of approximately 17-20° and allow the fish to drain two minutes, measured from the time the washing procedure has finished.
- (iv) Remove adhering water from the bottom of the sieve by use of paper towel. Weigh the sieve containing the washed drained fish.
- (v) The washed drained weight is obtained by subtracting the weight of the sieve from the weight of the sieve and drained product.

7.6 DETERMINATION OF HISTAMINE

AOAC 977.13 (15th Edition, 1990)

8. DEFINITION OF DEFECTIVES

A sample unit will be considered defective when it exhibits any of the properties defined below.

8.1 FOREIGN MATTER

The presence in the sample unit of any matter, which has not been derived from the fish or the packing media, does not pose a threat to human health, and is readily recognized without magnification or is present at a level determined by any method including magnification that indicates non-compliance with good manufacturing and sanitation practices.

8.2 ODOUR/FLAVOUR

A sample unit affected by persistent and distinct objectionable odours or flavours indicative of decomposition or rancidity.

8.3 TEXTURE

- (i) Excessively mushy flesh uncharacteristic of the species in the presentation.
- (ii) Excessively tough or fibrous flesh uncharacteristic of the species in the presentation.

8.4 DISCOLOURATION

A sample unit affected by distinct discolouration indicative of decomposition or rancidity or by sulphide staining of more than 5% of the fish by weight in the sample unit.

8.5 OBJECTIONABLE MATTER

A sample unit affected by Struvite crystals – any struvite crystal greater than 5 mm in length.

9. LOT ACCEPTANCE

A lot will be considered as meeting the requirements of this standard when:

- (i) the total number of defectives as classified according to Section 8 does not exceed the acceptance number (c) of the appropriate sampling plan in the Sampling Plans for Prepackaged Foods (AQL-6.5) (CAC/RM 42-1977);
- (ii) the total number of sample units not meeting the presentation defined in 2.3 does not exceed the acceptance number (c) of the appropriate sampling plan in the Sampling Plans for Prepackaged Foods (AQL-6.5) (CAC/RM 42-1977);
- (iii) the average net weight or the average drained weight where appropriate of all sample units examined is not less than the declared weight, and provided there is no unreasonable shortage in any individual container;
- (iv) the Food Additives, Hygiene and Labelling requirements of Sections 3.3, 4.5.1, 5.2 and 6 are met.

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