

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

*Recourse to Article 21.5 by Argentina*

**(DS)/207**

**Oral Statement of the European Communities**

**Geneva  
2 August 2006.**



**I. INTRODUCTION**

1. Mr. Chairman, Distinguished Members of the Panel, the European Communities (“EC”) would like to thank the Panel for this opportunity to submit observations on the present dispute.
2. As is customary, the EC will refrain from analysing in detail the facts of this case, and from applying the law to those facts. The EC will present its views on a number of issues which raise systemic concerns. It will first consider the appropriate interpretation of Article 4.2 of the *Agreement on Agriculture*. Thereafter, it examines the extent to which a complainant may raise new claims in an Article 21.5 proceeding.

**II. INTERPRETATION OF ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE**

3. The task of the Panel is to determine whether the revised Price Band System (PBS) is consistent with Article 4.2 of the *Agreement on Agriculture*. In order to prevail, Argentina must convince you that the revised PBS is a measure which would have been required to be converted into ordinary customs duties. The revised PBS will not be such a measure unless it can be shown to be “a similar border measure” to “variable import levies” or “minimum import prices”.
4. As you are well aware, the Appellate Body has had occasion to examine these terms. The Appellate Body concluded that a “variable import levy” had the following characteristics:
  - Continuous variation;
  - Automatic variation;
  - A lack of transparency; and,

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➤ A lack of predictability.<sup>1</sup>

5. The Appellate Body emphasised that the first two of these conditions were *necessary* characteristics but that they were not *sufficient* in themselves.<sup>2</sup> This can only be taken as meaning that at least all four conditions must be present for a variable import levy to exist. Of course here, the Panel is tasked with analysing whether a measure *similar* to a variable import levy is being maintained by Chile. In the words of the Appellate Body, the measure being examined must “share sufficient features” with a variable import levy before it can be considered “similar”.<sup>3</sup>
6. The EC must express a certain amount of sympathy with the Panel and the main parties to this dispute. Defining how “continuous” the variation must be, how “automatic” it should be, and whether the measure is sufficiently “transparent” or “predictable” is no easy task. Once defined, deciding whether there is sufficient sharing of features so as to make the measure “similar” is again far from clear. Unfortunately, as currently framed, there is little which is transparent or predictable about this test. Nevertheless, in the view of the EC, the high standards Argentina is asking you to set for this test are not supported by the text of Article 4.2 *Agreement on Agriculture*. To give one concrete example, the “transparency” obligation does not, in the view of the EC, require a WTO Member to explain why it chose particular reference prices, provided it explains what those prices are.
7. Argentina’s attempt to load obligations onto the back of Article 4.2 should be kept carefully in context. It should be recalled that the *Agreement on Agriculture* is the start of a reform process in the field of international agricultural trade, intended eventually to bring the obligations on agricultural products in line with those applicable to industrial products. The scope of Article 4.2 should not be expanded into a soul-searching transparency exercise, or a blunt instrument intended to prohibit alleged “disconnects” between international and domestic prices. This is particularly the case when no such requirements exist under the law applicable to

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<sup>1</sup> Appellate Body Report, *Chile- Price Band*, paras. 233 and 234.

<sup>2</sup> *Ibid.* para. 234.

<sup>3</sup> *Ibid.* para. 239.

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- trade in industrial goods, and when such requirements clearly go beyond those features distinctive to the types of measures brought under the scope of Article 4.2.
8. The EC starts its analysis by recalling that the Appellate Body has determined that GATT 1994 does not regulate the type of duties which can be imposed. In *Argentina – Footwear* the Appellate Body held that Argentina could apply a specific duty provided that the *ad valorem* equivalent of that specific duty did not exceed the bound rate (which was expressed in *ad valorem* form).<sup>4</sup> That case concerned a specific duty calculated on the basis of a “representative international price”. Members are thus in a position to apply different types of duties. They can calculate such duties in a number of different manners without acting inconsistently with GATT 1994. A Member may even decide a particular tariff on the basis of no form of calculation – other than a non-arithmetical political or economic one. Further, as the Appellate Body recognised, varying a duty is a common occurrence and a perfectly legal one at that. To provide a concrete example, it is perfectly legal for a WTO Member to review, from time-to-time, an applied duty, and to adjust it in the light of market developments (i.e. to increase the duty as international prices decrease), provided of course the Member stays within its bound levels.
9. Given variations of tariffs, the transparency of the calculation of the tariff, the predictability of the moment of the change of the tariff (provided there is appropriate publication) and frequent variation of the tariff are not regulated by the GATT the question arises as to when such elements are such as to give rise to an inconsistency with Article 4.2 of the *Agreement on Agriculture*. In the view of the EC, it is only when the measures clearly have sufficient similarity to measures coming under the scope of Article 4.2 - that is features unique to the measures listed in the footnote to Article 4.2 are also found in the measures challenged - that there is a possible violation of Article 4.2. The existence of features which are not unique to the measures found under Article 4.2 cannot be sufficient, on their own, to render a measure inconsistent with Article 4.2.

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<sup>4</sup> See, Appellate Body Report, *Argentina – Footwear*, para. 55.

10. The Appellate Body stressed that the variation in the amount of the duties had to be “continuous”. What amounts to a “continuous” variation is not clear. In the original case, neither Argentina nor Chile disputed that the variation was continuous. In the original PBS, the variation in the amount of the duties occurred every week, i.e. 52 times a year. In the revised PBS, the variation takes place every two months, i.e. six times a year. The EC has considerable difficulty in describing a variation which takes place so infrequently as “continuous.”
11. The criterion of automaticity is likewise far from clear. A variation in a duty could be brought about automatically in the sense that no legislative or executive action is required to vary the duty. If the executive has no discretion, but yet still has to act in order to vary the duty, and the nature of the variation in the duty is determined by a formula, then it is hard to describe that variation of the duty as anything other than automatic.
12. As already noted, the key features of a variable import levy are the continuous and automatic variation, and a lack of transparency and predictability. The EC considers that for a measure to be “similar” to such a measure, it must display all of these features. If these first conditions are met, the question then arises as to how untransparent and how unpredictable the measure must be, and whether other criteria also have to be met. The EC submits that provided all the elements of the calculation are published, and if all of the data used is publicly available, then the system is both transparent and predictable because an interested economic operator will be in a position to predict the nature of a change in the amount of the duties – where that is necessary because a change is pending. In particular, in the view of the EC, it is not necessary that transparency extend to why a particular market has been chosen to calculate representative prices, provided it is clear what prices are to be used.
13. Both Argentina and Brazil make a great deal of an alleged “disconnect” between domestic Chilean and international prices. The Appellate Body never explicitly addressed the weight, if any, to be given to this issue. In the view of the EC, the Panel should be very cautious in approaching this issue. It is a feature of tariffs to soften the impact of, or disconnect international prices from domestic markets.

This is the effect of any tariff, whether specific or *ad valorem*. The extent of the softening or disconnect varies from case to case. Further, the extent of the softening can be adjusted, either by varying an applied tariff within the limits of bindings or even by undertaking Article XXVIII negotiations. So, in the view of the EC, decisive weight cannot be given to the existence of any disconnect or softening in assessing consistency with Article 4.2, since the extent of such a disconnect or softening will always be a relative analysis. For these reasons, the EC suggests that extreme caution be used in analysing this issue.

14. In terms of conclusion on Article 4.2, the EC would like to stress that in its view, for a measure similar to a measure listed in the footnote of Article 4.2 to exist, the measure must exhibit all of the features identified by the Appellate Body in the original dispute. That is, any duty must vary continuously and automatically, but in addition, the measure must lack transparency and predictability. In the view of the EC it is not necessary that a measure explain why certain choices have been made, provided those choices are clearly made public and are predictable. Finally, the EC is far from convinced that the question of the alleged disconnect between international and domestic price should be given anywhere near the importance it appears to have been given by Argentina.

### III. SCOPE OF ARTICLE 21.5 PROCEEDINGS

15. A first observation of the EC in relation to the issues at stake under this section is that the parties do not dispute the fact that the revised price band system is a “new measure”. The core of the claims on the nature of this new measure is whether it is, as the previous PBS was determined to be, a “similar border measure” inconsistent with Article 4.2 of the *Agreement on Agriculture*. In this respect, the revised PBS may also be seen as similar to the original one, but it is both formally and substantially different, and this seems undisputed.
16. On this basis, the EC generally holds the view that the mere fact that the measure is a new one globally entails the emergence of new factual circumstances and thus a broad right to bring new claims against the new measure in all its elements, irrespective of the fact that a new claim may concern an aspect or element of the

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- new measure which was taken over from the previous regulatory framework without any formal change, provided, of course, that this element is part of “the measure taken to comply”.
17. What is important then is that the new factual and legal contexts will, as a matter of principle, provoke a change in the factual circumstances – “the relevant facts” - on the basis of which the conformity or not of the new measure with any provision of the covered agreements should be analysed. Both parties have referred to the Appellate Body report in the *EC-Bed Linen (Art 21.5 India)* case, where indeed this right for a complainant in Article 21.5 proceedings to raise new claims, arguments and factual circumstances different from those raised in the original proceedings is acknowledged<sup>5</sup>.
18. Whether the invocation by Argentina of the 1.56 conversion factor is to be construed as a new argument or as a new claim, the factual circumstances of its operation have changed with the adoption of the revised PBS, and thus the examination of its effect on the conformity of the revised PBS with Article 4.2 of the *Agreement on Agriculture* should fall within the terms of reference of this Panel.
19. As regard the claim made by Argentina relating to the second sentence of Article II: 1 (b) of the GATT, and in the view of the EC, what counts in this context is again the fact that the new measure (the revised PBS) has created a new set of regulatory and factual circumstances which imply that the claim is new insofar that it is directed against a different set of measures under a different set of “relevant facts”. Therefore, the fact that a similar claim may have been brought against a similar measure in the original dispute should be held as irrelevant.
20. Further, the EC contends that in any case, it is not a claim from the original dispute where Argentina would have “failed to establish a prima facie case”, pursuant to the standard retained by the Appellate Body in the *EC - Bed Linen (Article 21.5 India)*<sup>6</sup> and therefore the right to bring such a claim should not be excluded on the basis of such a precedent. Nevertheless, since the EC believes

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<sup>5</sup> See para. 79 of the Appellate Body’s report.

<sup>6</sup> Para. 96.

that the PBS system should be considered an ordinary customs duty, the EC has some difficulty in identifying a substantive breach of the second sentence of Article II.1(b).

**IV. CONCLUSION**

21. Mr. Chairman, Distinguished Members of the Panel, the EC is grateful for this opportunity to present its views and trusts they will be taken into account as you draw your own conclusions in this dispute. The EC will, of course, be happy to answer any questions which you may have. Thank you.

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