

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

(WT/DS/207)

Recourse by Argentina to Article 21.5 of the DSU

Third Party Session

Oral Statement by Australia

**Geneva
2 AUGUST 2006**

Mr Chairman

1. Australia has read with interest the submissions of the parties to this dispute and the points raised by third parties.
2. Australia joined the original dispute as a third party in view of our systemic interests in the questions under consideration. We retain a systemic interest in the issues being considered in the current proceedings brought by Argentina under Article 21.5 of the DSU.
3. Our systemic interest in these proceedings concerns the consequences of the Price Band System (PBS). In particular, Australia wishes to draw the Panel's attention to the continued potential of the PBS to distort trade, and to the reasons why Australia agrees with Argentina that the new PBS is inconsistent with Article 4.2 of the Agreement on Agriculture.
4. Australia makes this oral statement, however, in a constructive spirit bearing in mind our excellent bilateral relations with Chile, especially as a fellow Cairns Group member, and Chile's commendably low general tariff structure.
5. Australia notes that on 23 October 2002 the DSB adopted the Appellate Body Report on *Chile Price Band System and Safeguard Measures Relating to Certain Agricultural Products* and the Panel Report as modified by the Appellate Body Report. The Appellate Body recommended that the DSB request Chile to bring its price band system, as found to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement (paragraph 289 AB report).
6. Chile claims to have complied with this recommendation by adopting Law number 19.897/2003 and Decree number 831/2003. Argentina states in its rebuttal submission that Chile's modified PBS is still 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.
7. In Australia's view, the question before the Panel is whether the new amendments are sufficient to convert the PBS into a measure that does not have the restrictive features that characterise border measures prohibited under footnote 1 of Article 4.2. Australia respectfully submits that despite Chile's best efforts, they are not. Although we concede that the amendments do go some way to ameliorate the more obviously inconsistent aspects of the measure, we are nevertheless of the view that inherent inconsistencies remain unchanged.
8. The Panel will recall that the *raison d'être* of Article 4.2 is improved market access for agricultural imports by permitting only the application of ordinary customs duties. To this end, border measures that are trade distorting, such as those listed in the footnote to Article 4.2, are prohibited. As the Appellate Body noted, this is because they have the objective and effect of "restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties

do...[they]...disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market” (paragraph 227). Fundamentally therefore, any measure that is consistent with Article 4.2 must necessarily be shown to be absent of this trade restrictive objective and effect. This is made clearer by the Appellate Body’s deliberations in paragraphs 260 and 261 where it explains that the effect of a measure is relevant, that is whether a measure creates “intransparent and unpredictable market access” and “prevent[s] enhanced market access for imports”.

9. In Australia’s opinion, the Chilean revised PBS for wheat and wheat flour remains a system which distorts the price of imports of agricultural products in a different way from ordinary customs tariffs and continues to insulate the Chilean domestic market from international price fluctuations. As such, we submit that it must be found to be akin to a “variable import levy” and inconsistent with Article 4.2.

Variability

10. The meaning of the term “variable import levy” was considered by the Appellate Body and it is instructive to recall its comments. It decided that a “necessary condition” for a variable levy is the presence of a formula causing automatic and continuous variability of duties. In contrast ordinary customs duties are as set out in paragraph 233: “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.”

11. Chile in its first submission states that under Law 19.897, the duty (or rebate or neither) is now fixed by legal directive in the form of a decree issued by the Ministry of Finance, and then remains unchanged for two months until a subsequent administrative act (paragraph 93). Chile’s submission claims that the effect of this change is that the new system is no longer “variable” as decided by the Appellate Body.

12. With respect, Australia submits that this argument is misplaced. It is correct that the new Chilean system has moved to require separate executive action to instigate each variation in applicable duties. However this only partially meets the conditions that the Appellate Body noted are required to convert such a levy into an ordinary customs duty. The Appellate Body also noted that ordinary customs duties cannot simply reflect changes mechanically determined by an underlying scheme or formula, which we consider remains the case with the Chilean Law.

Transparency and predictability

13. As Chile notes in its submission, the Appellate Body stated in paragraph 232 that “variability” was a necessary but by no means “sufficient” condition for a

particular measure to be a “variable import levy”. In addition, lack of transparency and predictability that flow from such measures are also important.

14. Chile submits that the revised PBS is both more transparent and more predictable than its predecessor. Under the old PBS, the reference price was changed every week. Under Law 19.897 it is now changed every two months. In addition the price bands were previously adjusted on a yearly basis. Now they are in place for eleven years. On this basis, Chile argues that these changes provide stable conditions to afford better predictability to exporters.

15. That much is correct. The material question however is whether it is sufficient. Australia does accept that these changes give greater transparency and stability. However, the underlying structure of the measure remains the same. Even though this instability is partially offset by the introduction of 11 year periods of application for price bands, fluctuations in the reference price cannot be predicted. More broadly, this mechanism in itself has the effect of insulating the Chilean market from international price fluctuations as it is less flexible. Accordingly, it cannot be said that predictability for exporters has improved. As such, the trade distorting aspects of the PBS have not been remedied.

16. In conclusion, Australia submits that despite the changes to the Chilean PBS, they are insufficient to achieve consistency with Chile’s rights and obligations under Article 4.2 of the Agriculture Agreement. It continues to preserve an underlying structure of variability and unpredictability that is non-transparent and contrary to the object and purpose of the Agreement on Agriculture.

17. Australia would respectfully encourage the Panel to find the Chilean Price Bands System continues to be inconsistent with Article 4.2 of the *Agreement on Agriculture* and that Chile has therefore not complied with the recommendations and rulings of the Appellate Body in this dispute.