

**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*

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

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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").<sup>1</sup>

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup>

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*").<sup>7</sup> On 4 July 2002, Chile filed its appellant's submission.<sup>8</sup> On 19 July 2002, Argentina filed an appellee's submission.

<sup>2</sup> 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.

<sup>3</sup> Panel Report, para 8.1(a).

<sup>4</sup> *Ibid.*, para 8.1(b).

<sup>5</sup> *Ibid.*, para. 8.2.

<sup>6</sup> 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*.

<sup>7</sup> WT/DS207/5, 26 June 2002.

<sup>8</sup> Pursuant to Rule 21(1) of the *Working Procedures*.

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

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*.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

## 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.<sup>14</sup> 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.<sup>15</sup>

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<sup>9</sup> Pursuant to Rule 22 of the *Working Procedures*.

<sup>10</sup> Pursuant to Rule 24 of the *Working Procedures*.

<sup>11</sup> Japan and Nicaragua were third parties in the Panel proceedings.

<sup>12</sup> Pursuant to Rule 27 of the *Working Procedures*.

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

<sup>14</sup> 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.

<sup>15</sup> 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.<sup>16</sup> 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").<sup>17</sup> 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.<sup>18</sup> 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.

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

<sup>17</sup> 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.

<sup>18</sup> 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."

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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 ...".<sup>19</sup> (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.<sup>20</sup>

*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.<sup>21</sup> 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*

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

<sup>20</sup> 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.

<sup>21</sup> 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.<sup>22</sup> The bands that apply to *wheat* and *wheat flour* are determined for the period 16 December – 15 December<sup>23</sup> and the band for *edible vegetable oils* corresponds to the period 1 November – 31 October.<sup>24</sup>

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:<sup>25</sup>
- (i) in the case of *edible vegetable oils*, the price used is that of crude soya bean oil<sup>26</sup>, free on board (f.o.b.) Illinois, quoted on the Chicago Exchange;<sup>27</sup>
  - (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.<sup>28</sup>

<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> This overview does not cover the price band for sugar.

<sup>25</sup> "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.

<sup>26</sup> We note, however, that edible vegetable oils cover 25 tariff lines.

<sup>27</sup> 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.

<sup>28</sup> 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

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- (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.<sup>29</sup>

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

- (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.<sup>31</sup>

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.

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

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

<sup>30</sup> Panel Report, para. 7.44.

<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> It seems, however, that the markets and qualities chosen are intended to be representative of products actually "liable" to be imported to Chile.<sup>35</sup>

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.<sup>36</sup>

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."<sup>37</sup> 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.<sup>38</sup> We also

<sup>32</sup> The reference price is thus unrelated to the transaction price of the particular shipment.

<sup>33</sup> Chile's response to question 9(a) of the Panel.

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

<sup>35</sup> Chile's response to questioning at the oral hearing.

<sup>36</sup> 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.

<sup>37</sup> 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.

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

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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*).<sup>39</sup>

- (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.<sup>40</sup> Once the reference price that ap-

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<sup>39</sup> Chile's bound MFN tariff rate is at 31.5 per cent.

<sup>40</sup> Panel Report, para. 4.20.