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

(AB-2007-2)

THIRD PARTICIPANT ORAL STATEMENT OF THE UNITED STATES

March 15, 2007

1. Members of the Division, good morning. In our written submission, the United States set forth its views on the two central issues raised in this appeal – the consistency of Chile's amended price band system with Article 4.2 of the *Agreement on Agriculture* and whether the Appellate Body should make a separate finding on the consistency of that system with the second sentence of GATT 1994 Article II:1(b). We would be pleased to answer any questions the Division might have on these topics. As the United States has noted, it is not necessary for the Appellate Body to go any further than Article 4.2 in its review of the Panel's analysis.

2. However, in its contingent appeal Argentina has requested that the Appellate Body, if it were to reverse the Panel's finding under Article 4.2 of the *Agreement on Agriculture*, make a separate finding under the second sentence of GATT 1994 Article II:1(b). Should the Appellate Body need to reach this issue, in light of the disagreement between the parties, the Appellate Body would need to consider whether such a claim is within the scope of this proceeding. Thus, in today's statement, the United States would like to address what the Panel itself admitted was an *obiter dicta* analysis of when a claim may be properly brought under DSU Article 21.5.

3. Since it was *obiter dicta* it is moot and of no legal force or effect. Indeed, it is not

appropriate for panels to engage in *obiter dicta* since under the DSU[1] a panel's role is limited to making findings to assist the DSB in making recommendations and rulings under the relevant covered agreements. *Obiter dicta* does not assist the DSB in making its recommendations and rulings. However, neither participant has appealed the Panel's *obiter dicta* so the Appellate Body is not in a position to declare it moot and of no legal effect.

4. In any event, the Panel's three-part test,[2] while it may reflect a very useful approach in some disputes, does not appear helpful in the context of this particular dispute. The difficulty is that the Panel's test addresses the situation where Argentina's claim under the second sentence of GATT 1994 Article II:1(b) relates to a particular aspect of Chile's price band system that *has changed*. Yet the claim really appears to relate to Chile's measure taken to comply *as a whole* which, as noted by the Panel, is "formally a *new and different measure* from the one that was the object of the original proceedings."[3] Given the circumstances in the present case and the obligation set out in the second sentence of GATT 1994 Article II:1(b), the United States fails to see how a claim under that Article would relate to a particular aspect of Chile's price band system rather than to the system as a whole.

5. In reaching this conclusion, it is necessary to consider the part of Chile's measure that is implicated by a claim of breach of Article II:1(b) – the duty ultimately levied by Chile. That duty is generated through the operation of the price band *system*. No one particular aspect of the

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[1] See for example Articles 7.1 and 11 of the DSU.

[2] Panel Report, *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/R, circulated 8 December 2006 ("*Chile - Price Band (21.5)*"), para. 7.151.

[3] Panel Report, *Chile - Price Band (21.5)*, para. 7.146. (Emphasis added).

system is responsible for producing it. In order to comply with the DSB recommendations and rulings that the original price band system was a measure of the kind Members agreed not to "maintain, resort to, or revert to," Chile changed the price band system, and has claimed that the duties it generates are qualitatively "new" measures for purposes of the Panel's review. For example, whereas duties were once calculated on a weekly basis, they are now calculated on a bi-monthly basis, and whereas reference prices were linked to unspecified markets they are now tied to specific markets. Chile cannot at the same time argue that its measures are new and qualitatively different at the same time it relies on "unchanged aspects" of the measure as a means to shield a claim under Article II:1(b) from review under Article 21.5 of the DSU. And if Chile's measure is not qualitatively different, then the analysis can end with Article 4.2 of the *Agreement on Agriculture* and the Appellate Body need not reach Article II:1(b) of the GATT 1994. These facts suggest that the Panel's test is not in the end applicable.

6. These issues highlight the importance of panels focusing on resolving legal questions implicated by the facts at hand, rather than developing legal tests in the abstract.

7. We would be pleased to address any questions that the Division might have on these or other issues raised in this proceeding. Thank you.