BEFORE THE

WORLD TRADE ORGANIZATION

APPELLATE BODY

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

(AB-2002-2)

Third-Participant Submission of the United States

July 19, 2002

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THIRD-PARTICIPANT SUBMISSION OF THE UNITED STATES

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I. Introduction and Executive Summary

1. The United States welcomes this opportunity to present its views to the Appellate Body in this appeal by Chile of certain of the Panel's conclusions in *Chile–Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R (3 May 2002). Chile's appeal raises three issues: first, whether the Panel improperly reached an issue under the second sentence of Article II:1(b) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"); second, whether the Panel correctly found that Chile's price band system is prohibited under GATT 1994 Article II:1(b); and, third, whether the Panel correctly found that Chile's price band system is prohibited under Article 4.2 of the *Agreement on Agriculture*.

2. The United States considers that the Panel properly found that Chile's price band system is prohibited under Article 4.2 of the *Agreement on Agriculture*. The Panel interpreted Article 4.2 according to the ordinary meaning of its terms, in their context, and in light of the Agreement's object and purpose, as well as through supplementary means of interpretation. The Panel noted that, under Article 4.2, prohibited "measures of the kind which have been required to be converted into ordinary customs duties" include "variable import levies," "minimum import prices," or "similar border measures other than ordinary customs duties." The Panel found that the price band system is "similar" to "variable import levies" and "minimum import prices" because it shares "most, but not all, of its characteristics . . . with either or both of a variable import levy and a minimum import price."[1] The Panel also found that the duties imposed by the price band system are not "ordinary customs duties" within the meaning of Article 4.2 or Article II:1(b) of GATT 1994 because it had determined that the price band system was a prohibited "similar border measure" under Article 4.2 and because its examination of Members' Schedules led it to find 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."[2] The Panel's finding that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture* is correct and should be upheld.

3. While Chile claims that the Panel erred by not focusing on the text of Article 4.2, Chile's own interpretation 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 ("EC") 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 EC's variable import levies. Chile has not established that the Panel erred legally in its interpretation of Article 4.2 or in its conclusion that Chile's price band system is prohibited under Article 4.2.

4. The United States also considers that the Panel's analysis of Chile's price band system under GATT 1994 Article II:1(b) was correct. Because Chile's price band system is a prohibited "similar border measure" to both variable import levies and minimum import prices, and such a

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[1] *Chile–Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, paras. 7.46-7.47 (3 May 2002) ("Panel Report").

[2] *Id.*, para. 7.52.

measure "ha[s] been required to be converted to ordinary customs duties," the Panel found that the price band system is not an ordinary customs duty under Article 4.2 or the first sentence of Article II:1(b). Furthermore, pursuant to Article II:1(b) and the Understanding on Interpretation of Article II:1(b), "other duties or charges" may not be levied if not recorded in a Member's Schedule, and Chile has not recorded the price band system as an other duty or charge. Therefore, the Panel determined that the duties imposed by the price band system are inconsistent with Article II:1(b). The Panel's legal analysis of Chile's price band system under the first and second sentences of Article II:1(b) was correct.

5. Chile's criticism of the Panel's conclusion stems first from Chile's view that the term "ordinary customs duties" under the first sentence of Article II:1(b) carries no normative content; therefore, so long as the tariff binding is not exceeded, any kind of duty or charge applied to a product will simply be "ordinary customs duties."[3] Chile's analysis is flawed in two respects. First, it ignores the fact that, while the Panel did interpret "ordinary customs duties" as having a normative content, the Panel also examined on an empirical basis those "ordinary customs duties" in Members' Schedules and concluded that these were all expressed in *ad valorem*, specific, or combination rates. Second, Chile's analysis does not even attempt to interpret the term "ordinary customs duties" in the context of Article 4.2, the only other provision in the WTO scheme in which the term is used.[4] While Article 4.2 does not positively define "ordinary customs duties," it *does* negatively define the term by indicating *measures* that are not "ordinary customs duties." While Chile concedes that "a measure that is prohibited under Article 4.2, whether as a specifically listed measure or a similar border measure, cannot be an 'ordinary customs duty' – and vice versa,"[5] it does not then examine the measures listed in Article 4.2 in interpreting the scope of the term "ordinary customs duties" in Article II:1(b). Chile's approach invites legal error.

6. Chile also claims that the Panel acted inconsistently with DSU Article 11 by making findings under GATT 1994 Article II:1(b), second sentence, for which Argentina did not present arguments or evidence. The United States offers no opinion on the question as to whether Argentina presented arguments or evidence with respect to claims arising under GATT 1994 Article II:1(b), second sentence. However, the United States notes that this would appear to be a burden of proof issue rather than a failure by the Panel to make an objective assessment of the matter before it.

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[3] *See* Chile's Appellant Submission, para. 59.

[4] Chile's discussion of Article 4.2 in the context of its interpretation of "ordinary customs duties" in Article II:1(b) is limited to the following: "Chile does agree with the Panel that the term 'ordinary customs duties' has the same meaning in Article 4.2 as in Article II:1(b)." Chile's Appellant Submission, para. 51. This examination does not suffice.

[5] Chile's Appellant Submission, para. 33.

II. The Panel Properly Concluded That the Price Band System Is Inconsistent with Article 4.2

7. The Panel correctly determined to proceed first with its examination of the consistency of the price band system with Article 4.2 of the *Agreement on Agriculture*. The Panel examined at some length the provision according to the ordinary meaning of its terms, in their context, and in light of the Agreement's object and purpose, as well as through supplementary means of interpretation. The United States believes the Panel's conclusion that the price band system is a measure of the kind of measures which have been required to be converted into ordinary customs duties under Article 4.2 is correct.

8. In its analysis, the Panel reasoned that if the price band system is a "measure" listed in the footnote to Article 4.2, such as "variable import levies," "minimum import prices," or "similar border measures other than ordinary customs duties," and if the price band system is not maintained under balance-of-payments provisions or other general, non-agriculture-specific provisions of GATT 1994 or other WTO Agreements, then it is prohibited by Article 4.2. The Panel found that the price band system is "similar" to "variable import levies" and "minimum import prices" because it shares "most, but not all, of its characteristics . . . with either or both of a variable import levy and a minimum import price."[6] The Panel also found that the duties imposed by the price band system are not "ordinary customs duties" within the meaning of Article 4.2 or Article II:1(b) of GATT 1994 because it had determined that the price band system was a prohibited "similar border measure" under Article 4.2 and because its examination of Members' Schedules found 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."[7] The Panel's finding that Chile's price band system is inconsistent with Article 4.2 of the *Agreement on Agriculture* should be upheld.

9. Chile criticizes the Panel for not performing a proper interpretation under the customary rules of interpretation of public international law, in particular, for not analyzing the text of Article 4.2. For example, Chile claims: "The Panel did not even attempt a textual analysis of the main text of Article 4.2, but rather began its analysis with the footnote to Article 4.2."[8] This assertion is wrong; the Panel specifically interpreted the phrases "measures of the kind" and "maintained" as well as reading "measures of the kind which have been required to be converted" in conjunction with the text of the footnote.[9] The "main text" of Article 4.2 *itself* directs an interpreter through the use of a footnote to examples of those prohibited measures.

[6] Panel Report, paras. 7.46-7.47.
[7] *Id.*, para. 7.52.
[8] Chile's Appellant Submission, para. 87.
[9] Panel Report, paras. 7.18, 7.19, 7.91, 7.93.

Thus, there was no legal error in interpreting the "main text" of Article 4.2 in conjunction with the specific measures disclosed in its footnote.[10]

10. By contrast, Chile's interpretation provides little to no textual analysis (especially of the "main text" of Article 4.2) and does not read the "main text" of Article 4.2 in conjunction with its footnote or relevant context (such as Article 5 and Annex 5 of the *Agreement on Agriculture*). What does appear from Chile's submission is its reliance on the "evidence" that the "EC converted its variable levies by binding those levies in a way that made crystal clear that they would vary . . . but subject also to a high absolute cap. Other members negotiated directly with the EC and accepted this conversion."[11] This argument is crucial because Chile must distinguish the EC's prior variable levy system, which it concedes is a "variable import levy" proscribed by Article 4.2, from the price band system, while presenting a coherent theory of just what is a variable import levy. While it was not entirely clear before the Panel on what basis Chile would distinguish the EC system,[12] Chile now has adopted the view that "it was sufficient to convert a variable levy into an ordinary customs duty if the measure were bound."[13] With this rule in hand, Chile concludes that the Uruguay Round "negotiators did not think that price band systems were measures required to be converted, at least where they were already subject to duty bindings."[14]

11. The United States suggests that this alleged "evidence" regarding the EC's variable import levies can form at most one part of a proper analysis of Article 4.2 under the customary rules of interpretation of public international law. However, even if the EC's Schedule were relevant contextual evidence in interpreting Article 4.2, Chile's analysis of that evidence is deeply flawed. To draw a proper conclusion regarding how "the EC converted its variable levies," it would be necessary to examine (as Chile does not) the EC's Uruguay Round tariff bindings on *all* products previously subject to variable import levies (including sugar, dairy, beef, pork, and poultry products).[15] It is striking that, contrary to Chile's suggestion, the EC's WTO 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. Chile also suggests that the EC's conversion of its

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[10] The Panel also was specifically addressing Argentina's arguments that the Chilean price band system is a variable import levy, minimum import price, or a similar border measure other than ordinary customs duties. Panel Report, para. 7.20.

[11] Chile's Appellant Submission, para. 92.

[12] *See* Panel Report, para. 7.53 (referring to the "argument presented by the European Communities, apparently endorsed by Chile").

[13] Chile's Appellant Submission, para. 93; *see also id.*, para. 96 ("Likewise, it is also highly relevant that the EC, which maintained the best-known variable import levy prior to and during the negotiations, converted that measure in its schedule in a way that continued variability according to exogenous factors, but introduced a binding, without any challenge except that the measure did not have enough variation in its duties.").

[14] *Id.*, para. 100.

[15] The United States notes that Chile only presented evidence on certain of these products, primarily cereals. Chile also presented evidence relating to numerous fruit and vegetable products which were subject to reference price schemes, not variable import levies. *See* Chile's Appellant Submission, para. 92 n.62.

variable import levies "made crystal clear that they would vary (the binding was expressed partly as a duty paid price)"[16] but neglects to mention that the "duty-paid import price" commitments to which it refers[17] are *not* expressed in the ordinary customs duty column; rather, they are inscribed as two headnotes to Section I (on Agricultural Products) of the EC Schedule.[18] Furthermore, Chile implies incorrectly that these duties *must* vary according to a formula (à la Chile's price band system), but these headnotes merely express a cap on the duty that the EC will apply on certain goods.

12. The Panel considered and correctly rejected the suggestion of the EC (and now Chile) that a variable levy can be distinguished from ordinary customs duties simply because the latter is subject to a tariff binding.[19] The Panel rejected the argument in large measure because of its examination of the meaning of the phrase "ordinary customs duty." The Panel interpreted the phrase in light of its context and use in both Article II:1(b) (as distinguished from "all other duties or charges of any kind") and Article 4.2 (as distinguished from "measures of the kind which have been required to be converted," including those listed in the footnote). The Panel also interpreted the phrase in light of its ordinary meaning in English, French, and Spanish and found that "ordinary" carried both an empirical and a normative sense. The Panel found that, as an empirical matter, "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."[20] (Chile and, as noted above, the EC are no exception to this finding.) The Panel also found that, as 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," but "do not appear to involve the consideration of any other, exogenous, factors, such as, for instance, fluctuating world market prices."[21] On the basis of this examination, the Panel determined that "ordinary customs duties" within the meaning of Article II:1(b) and Article 4.2 refer to *ad valorem* and/or specific duties that are not applied on the basis of exogenous factors. Variable import levies, whether or not bound, are therefore not ordinary customs duties.

13. The United States considers the Panel's conclusion to be sound. The Panel might also have noted that there is nothing in the text 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. The footnote to Article 4.2 identifies one of the "measures of the kind" that Members may not maintain, resort to, or revert to as "variable import levies." The text does not limit this prohibition to "unbound" variable import levies. If the Uruguay Round commitment concerning variable import levies was solely to prevent unbound levies, moreover, there would have been no need to include the variable import

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[16] Chile's Appellant Submission, para. 92.

[17] Chile's Appellant Submission, para. 92.

[18] *See* Schedule LXXX–European Communities, Part I, Section I-A (Tariffs), Headnotes 6 & 7.

[19] Panel Report, para. 7.53.

[20] Panel Report, para. 7.52.

[21] Panel Report, paras. 7.49-7.52.

levy mechanism within Article 4.2. Rather, it would have been sufficient to require that all agricultural tariffs be bound. Automatically, variable import levies would have ceased to exist.

14. The Panel's rejection of the assertion that a variable import levy is converted into an ordinary customs duty merely through its binding makes sense of the text and context of Article 4.2. A variable import levy is a measure of the kind which has been required to be *converted* into an ordinary customs duty. The ordinary meaning of the term "convert" is to "[c]hange in nature" or to "[t]urn or change *(in)to* something different."[22] As the Panel noted, when border measures other than ordinary customs duties (such as variable import levies) maintained under Annex 5 of the *Agreement on Agriculture* ("Special Treatment with respect to Paragraph 2 of Article 4") are required to be converted into ordinary customs duties, these "duties shall be established on the basis of tariff equivalents," which are to be "expressed as *ad valorem* or specific rates."[23] The conversion of variable import levies into duties expressed in *ad valorem* or specific rates would, indeed, be a "change in nature" or a "change into something different" as the variability inherent in the measure would be eliminated. 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, 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.

15. Finally, Chile also argues that the Panel reversed the proper order of analysis, erroneously analyzing Argentina's claim under Article 4.2 of the *Agreement on Agriculture* before its claim under GATT 1994 Article II:1(b). According to Chile, this reversal was responsible in part for the Panel's mistaken interpretation of these provisions. However, the Panel carefully considered the issue of the proper order of analysis. The United States believes that the Panel correctly reasoned that the Chilean price band system applies exclusively to agricultural products[24] and that "Article 4.2 of the *Agreement on Agriculture* deals more specifically and in detail with measures affecting market access of agricultural products."[25] In any event, the Panel's decision to proceed first with an assessment of Argentina's claim under Article 4.2 would not be reversible error. Even if the Panel had commenced its work by interpreting GATT 1994 Article II:1(b), the United States believes the Panel would have reached the same conclusions.

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[22] *The New Shorter Oxford English Dictionary*, vol. 1, p. 502 (1993) (emphasis in original).

[23] Panel Report, para. 7.52 n.623; *Agreement on Agriculture*, Annex 5, para. 6; *id.*, Attachment to Annex 5, para. 1.

[24] Panel Report, para. 7.13.

[25] *Id.*, para. 7.16 (emphasis added). The Panel also noted that, given that the phrase "ordinary customs duties" is central to the meaning of both provisions, "neither provision can therefore be interpreted independently from the other." *Id.*

III. The Panel's Analysis of Chile's Price Band System Under GATT 1994 Article II:1(b)

16. The United States considers that the Panel's analysis of Chile's price band system under GATT 1994 Article II:1(b) was correct. As explained above, the Panel found that Chile's price band system is a border measure similar to both variable import levies and minimum import prices. As Chile concedes, "a measure that is prohibited under Article 4.2, whether as a specifically listed measure or a similar border measure, cannot be an 'ordinary customs duty' – and vice versa."[26] Therefore, the Panel correctly found that the Chilean price band system is not an ordinary customs duty under *Agreement on Agriculture* Article 4.2. The Panel also concluded that, given that the phrase "ordinary customs duties" appears in both Article 4.2 and GATT 1994 Article II:1(b), it should be given the same meaning in both provisions. (On this point, at least, Chile and the Panel agree.)[27] The Panel correctly concluded, then, that duties under the price band system are not "ordinary customs duties" under Article II:1(b), first sentence.

17. The Panel's analysis that Chile's price band system has not been recorded in Chile's Schedule as an other duty or charge and therefore could not be maintained under GATT 1994 Article II:1(b), second sentence, was also correct. The Panel properly interpreted Article II:1(b), second sentence, and the Understanding on Interpretation of Article II:1(b), to prohibit the levying of "other duties or charges" unless recorded in a Member's Schedule. The Panel "note[d] that Chile did not record its PBS in the 'other duties or charges' column of its Schedule."[28] It follows that Chile's price band system is not permitted under GATT 1994 Article II:1(b), second sentence, as an other duty or charge.

18. Chile also argues that the Panel acted inconsistently with DSU Article 11 by making a finding under the second sentence of GATT 1994 Article II:1(b) for which Argentina did not present arguments or evidence. The United States expresses no view on the question whether Argentina made arguments to the Panel under GATT 1994 Article II:1(b), second sentence. The United States notes, however, that if Chile has accurately described the arguments presented by Argentina, this would not appear to be an issue under DSU Article 11, pursuant to which a panel is to "make an objective assessment of the matter before it." Rather, it would appear to be a burden of proof issue–that is, a question whether Argentina advanced arguments and evidence sufficient to establish a *prima facie* case under GATT 1994 Article II:1(b), second sentence.[29]

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[26] Chile's Appellant Submission, para. 33.

[27] Chile's Appellant Submission, para. 51.

[28] Panel Report, para. 7.107.

[29] *See United States–Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, para. 114 (11 December 2000) (although claim was within the panel's terms of reference, the EC had not presented arguments or adduced evidence sufficient to satisfy its burden of establishing a *prima facie* case on such claim).

IV. Conclusion

19. The United States thanks the Appellate Body for the opportunity to comment on the important interpretive issues in this appeal.