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

(WT/DS207)

ANSWERS OF THE UNITED STATES TO QUESTIONS BY THE PANEL

October 4, 2001

Question 1: *The term "ordinary customs duties" appears in both Articles II:1(b) of GATT 1994 and 4.2 of the Agreement on Agriculture. Please state whether or not in your view a duty can at the same time be considered an "ordinary customs duty" within the meaning of Article II:1(b) of GATT 1994 and "a measure of the kind which have been required to be converted into ordinary customs duties" within the meaning of Article 4.2 of the Agreement on Agriculture.*

1. The United States is of the view that a duty can *not* at the same time be considered an "ordinary customs duty" within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and "a measure of the kind which have been required to be converted into ordinary customs duties" within the meaning of Article 4.2 of the Agreement on Agriculture.

Question 2: *If your reply to Q1 is in the affirmative, please explain why the term "ordinary customs duties" should be given a different meaning in Articles II:1(b) of GATT 1994 and 4.2 of the Agreement on Agriculture.*

2. Not applicable.

Question 3: *Article II:1(b) of GATT 1994 consists of two sentences. According to the first sentence, "products described in Part I of the Schedule [. . .] shall [. . .] be exempt from ordinary customs duties in excess of those set forth and provided therein." According to the second sentence, "[s]uch products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date."*

(a) Please indicate how, in your view, the term "ordinary" in "ordinary customs duties" should be defined.

3. Pursuant to the customary rules of interpretation of international law, which are reflected in Article 31(1) of the *Vienna Convention on the Law of Treaties*, the duty of a treaty interpreter is to determine the meaning of a term in accordance with the ordinary meaning to be given to the

term in its context and in light of the object and purpose of the treaty.[1] Accordingly, the term "ordinary" should be defined in accordance with its ordinary meaning in its context in Article II:1(b). The dictionary definition of "ordinary" is "belonging to the regular or usual order or course; . . . occurring in the course of regular custom or practice; regular, normal, customary, usual."[2] In its context as an adjective of "customs duty," the term can be understood to refer to those types of customs duties that have been the customary, usual types of customs duties used by Members.

4. The regular, normal forms of customs duties used in international trade (both now and at the time of the Uruguay Round) are the *ad valorem* duty and the specific duty (or compound rates based on combinations of the two). A review of Members' domestic tariff schedules (including Chile's) would reveal that the "regular, normal, customary, usual" forms of customs duties expressed therein are *ad valorem* or specific duties. The United States notes that this understanding of "ordinary customs duties" was apparently expressed during the process of tariffication in the Uruguay Round in which border measures other than ordinary customs duties were converted into tariff equivalents.[3] Thus, "ordinary customs duties" are *ad valorem* and/or specific customs duties inscribed in a country's domestic tariff schedule with a rate expressed for each individual tariff heading.[4]

5. Finally, the United States notes that Chile's domestic tariff schedule confirms that the levy imposed through Chile's price band mechanism is not an "ordinary customs duty." For all Chilean products, even those on which it imposes price bands, under the column labeled "Duties," the Chilean tariff schedule shows *only* an *ad valorem* rate.[5] For products subject to

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[1] This approach accords with Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), as recognized by the Appellate Body. *See, e.g.*, Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 17.

[2] *The Oxford English Dictionary*, p. 912 (2d edition).

[3] *See Framework Agreement on Agriculture Reform Programme, Draft Text By the Chairman*, Multilateral Trade Negotiations, The Uruguay Round, Group of Negotiations on Goods, Negotiating Group on Agriculture, MTN.GNG/NG5/W/170, 11 July 1990, p. 8 (specifying that non-tariff barriers that were to be converted into "ordinary customs duties" pursuant to Article 4.2 of the Agreement on Agriculture "would be expressed as *ad valorem or specific rates*") (emphasis added).

[4] *See GATT Analytical Index*, § II.A.2(3), p. 78 (1995 ed.) ("The word 'ordinary' was used to distinguish between the *rates on regular tariffs shown in the columns of the schedules* . . . and the various supplementary duties and charges [imposed on imports] such as primage duty.") (emphasis added; footnote omitted).

[5] The United States attaches the pages of the most recent (apparently from 1998 or earlier) Chilean domestic tariff schedule it was able to obtain for wheat (heading 10.01), wheat flour (heading 11.01), and edible vegetable oils (headings 15.07 through 15.15). *See* U.S. Exhibit-1. Chile's 2001 general tariff rate, applicable to all products including wheat, wheat flour, and edible vegetable oils, is 8 percent. *See* First Submission of Argentina, Annex ARG-6 (Law 19.589 of 28 October 1998).

price bands, however, the product description following the tariff number indicates a footnote. The footnote text discloses that an additional "Specific Duty" is imposed (no rate is specified) and refers to the Decree then in effect. However, such Decrees only establish the price band mechanism, that is, a list of international reference prices with the corresponding additional duty to be charged.[6] An importer seeking to ascertain what duty would be imposed on imports would also have to know the Chilean customs authority's weekly determination of the current international reference price.[7] Thus, the rate of customs duty imposed through the price band mechanism is neither disclosed by Chile's national tariff schedule nor disclosed by the Decree establishing the price band mechanism. This complicated levy mechanism differs importantly from "ordinary customs duties" in its lack of transparency and definiteness.

(b) Please discuss the distinction between ordinary customs duties and other duties or charges of any kind.

6. The United States suggests that the category of "all other duties and charges of any kind" cannot usefully be defined "positively," *i.e.*, by describing positive attributes of "other" duties or charges, other than the explicit requirement of Article II:1(b), second sentence, that the duty or charge be imposed "on or in connection with the importation" of a product. The very use of the term "all other" means that this category of duties and charges must be described "negatively," that is, in terms of what it is not. This category consists of *all* import duties and charges "of any kind" that are *not* "ordinary customs duties." As discussed above in the answer to Question 3(a), "ordinary customs duties" are *ad valorem* and/or specific customs duties inscribed in a country's domestic tariff schedule with a rate expressed for each individual tariff heading. Thus, duties or charges "of any kind" other than such *ad valorem* or specific duties would be encompassed by the term "all other duties or charges of any kind" in GATT 1994 Article II:1(b), second sentence. The United States further notes that "all other" duties or charges are generally[8] prohibited under Article II:1(b), second sentence, and the Understanding on the Interpretation of Article II:1(b) of the GATT 1994[9] unless they have been separately inscribed in a Member's Schedule in

[6]*See* First Submission of Argentina, Annex ARG-5 (copies of Exempt Decree No. 128 (27 April 2000) and Exempt Decree No. 127 (27 April 2000) setting price bands in effect for 2001); First Submission of Chile, paras. 14, 15(i).

[7]First Submission of Chile, para. 15(j), (k) ("It is important to note that the corresponding duty or rebate is fixed with respect to the price reported by Customs, which is determined on a weekly basis by those authorities.").

[8] There are some exceptions, but these are not implicated in this dispute. See for example Article II:2 of the GATT 1994.

[9]*See* Understanding on the Interpretation of Article II:1(b) of the GATT 1994, para. 7 ("'Other duties or charges' omitted from a Schedule at the time of deposit of the instrument incorporating the Schedule in question into GATT 1994 . . . shall not subsequently be added to it . . . .").

accordance with the Understanding.[10]

> *(c) If "similar border measures other than ordinary customs duties" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture cannot be considered "ordinary customs duties" within the meaning of Article II:1(b), first sentence, of GATT 1994, please state whether in your view some of those measures could be considered "other duties or charges of any kind" within the meaning of Article II:1(b), second sentence, of GATT 1994.*

7. It is conceivable that some "similar border measures" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture might in some circumstances be considered "other duties or charges of any kind" within the meaning of Article II:1(b), second sentence, of GATT 1994, provided that any such measure constitutes a duty or a charge and is imposed "on or in connection with the importation" of a product. However, the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 requires such a "similar border measure" that is an "other duty or charge" to be inscribed in a Member's Schedule. In this regard, it is relevant to note that Chile has not recorded any such "other duty or charge" for wheat, wheat flour, or edible vegetable oils.[11]

> *(d) The Understanding on the Interpretation of Article II:1(b) of the GATT 1994 ("the Understanding") provides, in paragraph 1, that "the nature and level of any 'other duties or charges' levied on bound tariff items [. . .] shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. Paragraph 2 of the Understanding provides that "[t]he date as of which 'other duties and charges' are bound, for the purposes of Article II, shall be 15 April 1994." (emphasis added) Thus, at the end of the Uruguay Round, pursuant to the Understanding, other duties or charges were for the first time bound in the Schedules, in a separate column. In light of the Understanding, are "other duties or charges of any kind" in your view inconsistent with Article II:1(b) of GATT 1994 because they exceed the bound tariff rate recorded in the bound rate column of the Schedule, or, rather, because they exceed the bound rate in the "other duties and charges" column of the Schedule?*

8. The plain text of Article II:1(b) of GATT 1994 and the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 establish that "other duties or charges of any kind" are inconsistent with Article II:1(b) whenever they exceed the bound rate in the "other duties and charges" column of a Member's Schedule, regardless of whether they independently or in cumulation with "ordinary customs duties" exceed the bound tariff rate in the bound rate

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[10]*See id.*, paras. 1, 2, 3, 4, 7.

[11]*See* First Submission of Argentina, Annex ARG-10 (Chile's WTO Schedule VII).

column of the Schedule. In particular, Article II:1(b) second sentence states that imports "shall be exempt from" any other duty or charge in excess of the specified ones. In other words, a Member generally may not impose an "other duty or charge" at all unless it is bound in the Member's schedule. The Understanding requires that the "nature and level" of each "other duty or charge" levied on bound tariff items be recorded in a Member's Schedule.[12] If such a duty or charge is omitted from a Schedule at the time of deposit with, until the entry into force of the WTO Agreement, the Director-General to the CONTRACTING PARTIES to GATT 1947 or thereafter with the Director-General of the WTO, a Member may not subsequently add such duties or charges to its Schedule.[13] Because "other duties or charges of any kind" are not limited in the form they can take (as opposed to "ordinary customs duties," which are limited to *ad valorem* and specific duties), the Understanding's requirement that the "nature" of any "other" duty or charge be specifically recorded in a Member's Schedule is essential to preserving "the security and predictability of the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade."[14]

Question 4: *Please provide your views on the following proposition: "Article 4.2 of the Agreement on Agriculture prohibits certain measures independently of whether such measures may or may not involve a breach of any tariff binding on the product concerned under Article II of the GATT."*

9. The United States agrees with this proposition. The plain text of Article 4.2 and its footnote prohibits certain measures, many of which could not involve a Member's tariff bindings (*e.g.,* quantitative import restrictions, discretionary import licensing, and non-tariff measures maintained through state-trading enterprises). For measures prohibited by Article 4.2 that involve the assessment of a charge on imports, such as variable import levies, Article 4.2 does not make its prohibition contingent on the breach of a tariff binding. It would be anomalous, particularly in the absence of clear language to the contrary, to interpret the broad language of Article 4.2's prohibition ("Members shall not maintain, resort to, or revert to measures . . . includ[ing] . . . variable import levies . . . .") as applicable only in the event of a breach of a tariff binding when the prohibited measure can operate within and outside a binding equally well. The relation of Article 4.2 to tariff bindings is discussed further in the answer to Question 5.

Question 5: *The EC asserted in para. 38 of its oral statement that:*

> *a measure that would meet the test set out by the Appellate Body in Argentina - Footwear, Textiles and Apparel, and would therefore not be contrary to Article II of*

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[12] *See* Understanding on the Interpretation of Article II:1(b) of the GATT 1994, para. 1.

[13] *Id.*, para. 7.

[14] *See* Appellate Body Report, *European Communities–Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, para. 82.

> *GATT 1994, would not be subject to any further obligation in Article 4.2 of the Agreement on Agriculture. This conclusion stands even if the measure in question resulted in the application of a "duty that varies" - inasmuch as this "variation" is maintained below the ceiling written in the Member's tariff binding. Thus, the decisive element which distinguishes an "ordinary customs duty" from "variable levy" is the existence of a ceiling in the tariff binding. (emphasis added)*

Do you agree with this statement? Please explain why (not).

10. The United States disagrees with the EC's statement. The implied assertion in the EC's oral statement is that a measure that is not inconsistent with Article II of GATT 1994 cannot be prohibited under Article 4.2 of the Agreement on Agriculture. That is, Article II would delimit the scope of Article 4.2. However, this reverses the proper order of the analysis. Article 4.2 must be interpreted *first* as the *lex specialis* applicable to "measures of the kind which have been required to be converted into ordinary customs duties" that are applied to agricultural products.[15] Because price bands are a "variable import levy" or "similar border measure," they are prohibited under the terms of that provision, which makes no reference to the existence of a tariff binding.

11. The EC asserts that Article II of GATT 1994 is relevant because the Chilean price band system is "maintained" under Article II:1(b) and footnote 1 to Article 4.2 of the Agreement on Agriculture contains an exception from its general prohibition for "measures maintained under . . . general, non-agriculture-specific provisions of GATT 1994."[16] According to the EC's argument, so long as the price bands result in duties at or below Chile's tariff ceiling, such measures would be considered "ordinary customs duties."[17] Article II:1(b) allows a Member to assess ordinary customs duties not in excess of the level bound in its Schedule. However, as discussed in the answer to Question 3(a), the levies assessed by the Chilean price bands are not "ordinary customs duties." Therefore, the EC's assertion that the Chilean price bands are being "maintained" under Article II of GATT 1994 cannot be credited.

12. The EC's interpretation also does not adequately distinguish a variable import levy from

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[15]*See* Appellate Body Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 204.

[16]Footnote 1 to Article 4.2 reads, in relevant part: "These measures [of the kind which have been required to be converted into ordinary customs duties] include . . . variable import levies . . . and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payment provisions or under other general, non-agriculture specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement."

[17]Third-Party Oral Statement of the European Communities, paras. 37, 38.

an ordinary customs duty,[18] which would deprive Article 4.2 and footnote 1 of their full meaning. As noted, the EC asserts that the existence of a tariff binding renders a variable import levy simply an ordinary customs duty. Because the tariffication exercise of the Uruguay Round resulted in the binding of all agricultural tariffs, such an interpretation would mean that there could no longer be any variable import levies. However, this would render inutile Article 4.2's ongoing prohibition of variable import levies. Contrary to the EC's assertion that a tariff binding is all that separates a variable import levy from an ordinary customs duty, the Agreement on Agriculture draws a marked distinction between the two. Article 4.2 sets the scope of its prohibition as "measures of the kind which have been required to be converted into ordinary customs duties," and footnote 1 identifies one such measure as the "variable import levy." Thus, any valid interpretation of Article 4.2 must make sense of that distinction.

13. Finally, the United States notes that the Appellate Body report in *Argentina–Footwear, Textiles and Apparel* does not support the EC's argument. Because that case dealt with a non-agricultural product, only Article II of GATT 1994 was at issue. The Appellate Body never addressed the interplay between Article II of GATT 1994 and Article 4.2 of the Agreement on Agriculture. Moreover, the EC imputes far too much to the Appellate Body ruling. The Appellate Body simply examined Argentina's DIEM regime, which yielded a "specific" duty for the products at issue, and determined that the regime violated Article II of GATT 1994 because it resulted in duties in excess of Argentina's bound *ad valorem* rate for those products. The Appellate Body's ruling has no relevance whatsoever for deciding whether variable import levies, or any other duties which are not "ordinary customs duties," are inconsistent with Article 4.2 of the Agreement on Agriculture.

Question 6: *The prohibition in Article 4.2 of the Agreement on Agriculture applies to the measures specifically mentioned in the footnote thereto as well as to "similar border measures other than ordinary customs duties." Please provide your views on the following:*

> *(a) what are the essential features that a measure would have to possess in order to characterize it as a "variable levy" or as a "minimum import price"?*

14. A variable levy is an "assessment, duty, or tax" that has "different values in different instances or at different times" as determined by an administrative, formulaic mechanism.[19] This mechanism defines parameters based on any number of exogenous factors, such as a target price (*e.g.*, historical world prices) and a current price (*e.g.*, a reference price), to set the levy. The levy at any particular point in time is determined on the basis of those exogenous factors so as to prevent or ameliorate price variability in the domestic market caused by movements in import prices.

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[18] The United States elaborates this distinction in its answer to Question 8.

[19] *See* Third-Party Oral Statement of the United States, paras. 3, 4.

15. A minimum import price is a similar mechanism whereby the price of each import shipment is compared to an officially-established "minimum import price," often based on an internal domestic support price. Where the declared value (*i.e.*, transaction value) of the specific shipment is lower than the minimum import price, a penalty, additional charge, or duty is often then assessed, which may be equal to the difference between the minimum import price and the declared value.

(b) what degree of "similarity" with one or other of the measures specifically mentioned in the footnote to Article 4.2, or similarity with the practical effects of such measures would be required in order to characterize a measure as a similar border measure other than [an] ordinary customs duty?

16. The United States considers it neither essential nor necessarily helpful to designate a degree of similarity that is required to be met in order for a measure to qualify as a "similar border measure." The notion of degree of similarity is, the United States believes, intrinsic to the term itself and is to be taken into account in the determination of whether something is "similar" or not similar. We note that the plain text of footnote 1 does not further modify the term similar, *e.g.*, "very similar" or "somewhat similar." The ordinary dictionary meaning of "similar" is "having a marked resemblance or likeness; of a like nature or kind."[20] Thus, a measure at issue should "resemble" the mechanics, structure, and operation of a listed measure. Whether the measures share sufficient characteristics with each other to qualify as being "similar" to each other is a matter that must be determined on a case-by-case basis according to a Panel's best judgement.[21]

17. In interpreting the term "similar border measures," it is important to look to the object and purpose of Article 4.2 and footnote 1. Article 4.2 prohibits *any and all* measures that have been required to be converted into ordinary customs duties, regardless of the degree to which such measures disadvantage imports. Two of the goals of Article 4.2's tariffication process were the achievement of transparency in import barriers and the advantage of fixed tariffs for the promotion of trade in agricultural products. Thus, when determining whether a measure is a "similar border measure," it is enough that the measure is similar to a listed measure in its mechanics, structure, and operation, regardless of its efficacy.

18. Finally, the United States notes that footnote 1 states that "these measures *include*" the listed measures and "similar border measures." Thus, the identified measures and "similar"

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[20] *The Oxford English Dictionary*, p. 490 (2d edition).

[21] *Cf.* Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pp. 20- 21 (explicitly endorsing a case-by-case approach to determining whether imported and domestic products are "like" for purposes of Article III of GATT 1994 and noting that panels can only apply their best judgement in determining whether in fact products are "like").

border measures of footnote 1 are not an all-inclusive list of the measures that have been required to be converted into ordinary customs duties. Measures that are not "similar" to the specifically listed measures could still be prohibited by Article 4.2.

Question 7: *According to Chile, the application of the safeguard measures concerned was based on what the import trend and the condition of the domestic industry would have been in the absence of such measures. Please indicate whether or not, in your view,*

> *(a) to justify a safeguard measure, a Member can first impose that measure, or impose a measure of equivalent effect with the safeguard measure, and thereafter conduct an investigation.*

19. No. As initially imposed, the measure would be inconsistent with the Safeguards Agreement, even if subsequent legal proceedings might authorize[22] imposition of an equivalent measure at a later date.

20. Under the Safeguards Agreement, a Member may take measures otherwise inconsistent with the WTO Agreement (such as tariffs higher than bound rates or quantitative restrictions inconsistent with Article XI of GATT 1994) under certain conditions. If those conditions – which include a finding of serious injury or threat of serious injury by the competent authorities – do not exist, the Member does not have authority to impose such a WTO-inconsistent measure. Thus, the measure posited by the Panel would be inconsistent with the WTO Agreement at the time it was initially taken.

21. The text of the Safeguards Agreement provides further support for this conclusion. Article 6 authorizes provisional safeguard measures only under specific conditions. If a Member could impose a measure before even initiating an investigation, the obligations under Article 6 would become a nullity.

> *(b) this kind of analysis allows consideration of whether the measure as such, and not the need to maintain the measure, is justified.*

22. This analysis does not satisfy the requirements of the Safeguards Agreement. Article 4.1(b) defines the "threat of serious injury" as "serious injury that is clearly imminent." Thus, the competent authorities must base their analysis on what the condition of the industry *is likely to be*

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[22] The question discusses whether a Member may "justify" a safeguard measure through particular actions. We understand these references to refer to the process through which the Member, by satisfying the prerequisites in the Safeguards Agreement, becomes authorized to take a safeguard measure. We do not understand them to refer to "justification" in the sense of the Article 5.1 obligation to provide a "justification" for any safeguard measure in the form of a quantitative restriction that reduces the quantity of imports below the level of in a recent three-year representative period.

in the imminent future.[23] To the extent that the Chilean competent authorities projected what conditions during the investigation period *would have been*, they did not provide the future-oriented analysis required under the Safeguards Agreement.

23. In addition, Article 2.1 requires that the product "*is* being imported" in such increased quantities as to cause or threaten to cause serious injury.[24] A finding of threat of serious injury based on what imports *would have been* absent the measure would not satisfy this requirement.[25]

24. A proper threat analysis begins with *existing* imports and the *existing* condition of the domestic industry during the investigation period and uses them to project the likely condition of the domestic industry in the near future.[26] Any imminent changes in market conditions, including the planned removal of existing import restrictions, would obviously be relevant to that evaluation.

25. A proper threat analysis would allow a conclusion as to whether imports, rather than the removal of the measure, threatened to cause serious injury. However, Chile seems to admit that it did not perform this analysis.

Question 8: *It has been argued that an ordinary customs duty may vary to lesser or greater extent without necessarily constituting a "variable import levy [. . .] or similar border measure" within the meaning of footnote 1 of the Agreement on Agriculture. What criteria should the Panel consider to distinguish between such a "variable import levy [. . .] or similar border measure" and an "ordinary customs duty."*

26. As discussed in the answer to Question 3(a), "ordinary customs duties" are "regular,

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[23] The Appellate Body concluded that "a fact-based evaluation, under Article 4.2(a) of the *Agreement on Safeguards*, must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future." *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, 1 May 2001, para. 136.

[24] As one panel concluded:

> if only a threat of increased imports is present, rather than actual increased imports, this is not sufficient. Article 2.1 requires an actual increase in imports as a basic prerequisite for a finding of either threat of serious injury or serious injury. A determination of the existence of a threat of serious *injury* due to a threat of increased *imports* would amount to a determination based on allegation or conjecture rather than one supported by facts as required by Article 4.1(b).

Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/R, 25 June 1999, para. 8.284.

[25] Of course, if a Member properly imposed a provisional measure under Article 6 of the Safeguards Agreement, it certainly would be consistent with the Agreement for the Member to give limited weight to import levels and industry conditions subsequent to imposition of the measure.

[26] The Appellate Body concluded in *Lamb Meat* that "[t]he likely state of the domestic industry in the very near future can best be gauged from data from the most recent past." *Id.*, para. 137.

normal, customary, or usual" duties, that is, *ad valorem* and/or specific duties inscribed in a country's domestic tariff schedule with a rate expressed for each individual tariff heading.[27] As discussed in the answer to Question 6(a), a "variable import levy" is a duty on imports that has "different values in different instances or at different times" as determined by an administrative, formulaic mechanism. This mechanism defines parameters based on any number of exogenous factors, such as a target price (*e.g.*, historical world prices) and a current price (*e.g.*, a reference price), to set the levy. Because the amount of the levy is determined on the basis of current values of those exogenous factors, the variable import levy and similar border measures are neither definite nor transparent, in marked contrast to ordinary customs duties. The Panel must examine the structure and operation of the Chilean price band system and determine under which definition it best fits.

27. The United States considers that Members have the right to alter their ordinary customs duties on items so long as those duties do not exceed the relevant tariff binding. Thus, a Member may decide on a specific or *ad valorem* duty rate, based on a consideration of various exogenous factors, and may alter that duty when those factors change.[28] This is different, however, from a variable levy, where the value of the levy is not set and then altered in succession. Rather, only the *mechanism* by which the duties are determined is set, with the level of the duty at any particular time determined through a pre-set administrative mechanism based on exogenous factors (*i.e.*, historical price data and recent market prices) that vary over time. In this respect, a variable levy system frees Members of the difficulty of setting and then altering ordinary customs duties as the relevant exogenous factors change. Because such a mechanism creates impediments to trade *regardless* of whether a tariff binding is exceeded, Members agreed in the Agreement on Agriculture to refrain from maintaining, resorting to, or reverting to variable import levies and similar border measures.

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[27]The rate for an *ad valorem* duty is expressed as a set percentage of the value of the imported product. The rate for a specific duty is expressed as a set amount due for a certain physical quantity or measure of the imported product.

[28]This might conceivably create an *effect* on imports that would be similar to that of a variable import levy. Given the political economy of most Members, however, it is unlikely that successive changes could in fact be made quickly and sensitively enough to achieve a protective effect similar to a variable import levy.

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

(WT/DS207)

ANSWERS OF THE UNITED STATES TO QUESTIONS
FROM ARGENTINA TO THIRD PARTIES

October 4, 2001

Question to the European Communities, Venezuela, Colombia, Ecuador, and the United States:

Question 1: *Is it possible to consider "an ordinary customs duty" an additional duty in which the transaction price is irrelevant in its application, whereas the relevant price for the determination of the amount of the levy has an unknown origin as far as the market of origin and the methodology of calculation and, besides, has an extremely high frequency of variation, given the fact that [it] is fixed on a weekly basis?*

1. The United States does not consider such an "additional duty" to be an "ordinary customs duty." Ordinary customs duties are *ad valorem* or specific duties inscribed in a country's domestic tariff schedule with a rate expressed for each individual tariff heading. The United States refers Argentina to the United States' answer to the Panel's Question 3(a).