

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

(WT/DS207)

**STATEMENT OF THE UNITED STATES**  
**AT THE THIRD PARTY SESSION**

**August 2, 2006**

1. Mr. Chairman and Members of the Panel, the United States is pleased to present its views as a third party in this Article 21.5 proceeding.
2. As the Panel knows, the United States was not in a position to make written submissions prior to this meeting. As a result, our statement today is effectively our only opportunity to present our views to the Panel, and it is therefore longer than it might otherwise have been. We thank the Panel and the other delegations present today, in advance, for their attention to these comments.
3. This proceeding concerns the modifications that Chile has made to its price band system, a measure found to have been inconsistent with Article 4.2 of the *Agreement on Agriculture*.<sup>1</sup> Argentina argues that the modified system is inconsistent, as such and as applied to imports of wheat and wheat flour, with three WTO provisions: (1) Article 4.2 of the *Agreement on Agriculture*; (2) the second sentence of Article II:1(b) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”); (3) and Article XVI:4 of the *Marrakesh Agreement Establishing the*

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<sup>1</sup>See Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted as modified 23 October 2002, para. 8.1(a) (hereinafter “Panel Report”); Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted as modified 23 October 2002, para. 288(c)(iii) (hereinafter “Appellate Body Report”).

*World Trade Organization.*<sup>2</sup> The United States would like to offer some observations today on the first two of these claims. As for the third claim, we note simply that it is a derivative claim dependent upon a finding of inconsistency on the basis of one or both of the first two claims.

### **Article 4.2 of the Agreement on Agriculture**

#### ***1. The Proper Interpretive Approach***

4. In this proceeding, as in the original, the central question raised by Argentina’s Article 4.2 claim is whether the measure at issue is “similar” to a “variable import levy” or “minimum import price.” Interpretation of the terms “variable import levy” and “minimum import price” is key to the resolution of the question presented. Pursuant to Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), and as the Appellate Body explained in the original proceeding, these terms must be interpreted using the customary rules of interpretation of public international law,<sup>3</sup> in particular, according to their ordinary meaning, in their context, and in the light of the object and purpose of the WTO agreements.

5. The United States thus cannot support Chile’s assertion that, in the absence of any definition for the terms “variable import levy and/or a minimum import price, the point of departure can *only* be that indicated by the Panel and the Appellate Body with respect to the elements which make up such measures.”<sup>4</sup> It is of course correct that the issue before this

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<sup>2</sup>*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse by Argentina to Article 21.5*, First Written Submission by Argentina, para. 2 (19 April 2006) (hereinafter “Argentina First Written Submission”)

<sup>3</sup>Appellate Body Report, para. 231.

<sup>4</sup>*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse by Argentina to Article 21.5*, Chile Rebuttal Submission, para. 4 (24 May 2006) (hereinafter “Chile Rebuttal Submission”) (emphasis added).

compliance Panel involves the findings of the Panel and Appellate Body in the original proceeding, because Article 21.5 of the DSU concerns the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the Dispute Settlement Body. However, the Appellate Body has also explained, in the *Canada – Aircraft* Article 21.5 proceeding, that “the claims, arguments and factual circumstances which are pertinent to the ‘measure taken to comply’ will not, necessarily, be the same as those which were pertinent in the original dispute.”<sup>5</sup>

6. Chile’s argument appears to be that: (a) in the original proceeding, the Appellate Body identified only “specific (and thus limited) features”<sup>6</sup> of the price band system as being the “fundamental and central aspects” that “made the [system] a measure similar to a variable import levy or minimum import price;”<sup>7</sup> and (b) “Chile dealt with those ‘certain features’ identified, analysed and questioned by the Appellate Body.”<sup>8</sup>

7. The United States disagrees with Chile’s premise (a). To the contrary, the Appellate Body expressly *rejected* any attempt to assess the WTO-consistency of the original price band system based on whether it shared characteristics of a “fundamental” nature with variable import levies and minimum import prices.<sup>9</sup> According to the Appellate Body: “[t]his merely

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<sup>5</sup>Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft: Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, para. 41.

<sup>6</sup>Chile Rebuttal Submission, para. 19.

<sup>7</sup>Chile Rebuttal Submission, para. 28.

<sup>8</sup>Chile Rebuttal Submission, para. 6.

<sup>9</sup>Appellate Body Report, para. 226.

complicates matters, because it raises the question of how to distinguish ‘fundamental’ characteristics with those of a *less than* ‘fundamental’ nature.”<sup>10</sup>

8. The Appellate Body endorsed, instead, a comprehensive analysis, using as the point of departure the ordinary meaning of the terms “variable import levies” and “minimum import prices” in their context, and in light of the object and purpose of the WTO agreements.<sup>11</sup> The Appellate Body’s analysis resulted in a finding that though there were “some dissimilarities between Chile’s price band system and the features of ‘minimum import prices’ and ‘variable import levies’ . . . *the way Chile’s system is designed, and the way it operates in its overall nature*, are sufficiently ‘similar’ to the features of both those two categories of prohibited measures to make Chile’s price band system – in its particular features – a ‘similar border measure’ within the meaning of footnote 1 to Article 4.2.”<sup>12</sup>

9. An assessment of the modified measure in this Article 21.5 proceeding requires the same comparison of the price band system, as it is designed and as it operates in its overall nature, to variable import levies and minimum import prices. It is not sufficient merely to compare the original and modified price band systems to determine whether Chile has addressed the “certain features” of the former that allegedly are “fundamental.”

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<sup>10</sup>Appellate Body Report, para. 226 (emphasis in original).

<sup>11</sup>Appellate Body Report, para. 232.

<sup>12</sup>Appellate Body Report, para. 252 (emphasis added).

**2. *The Modified Price Band System Appears to be “Similar” To A Variable Import Levy and a Minimum Import Price Within the Meaning of Article 4.2 of the Agreement on Agriculture***

10. Although Chile asserts that it has changed the price band system in such a way as to render it WTO-consistent, it appears that Chile’s modified price band mechanism continues to vary the applicable duty based on the difference between a floor price and a calculated reference price. Chile appears just to have modified somewhat the way in which those parameters are determined. The price band system with these modifications would therefore still appear to be a measure similar to variable import levies and minimum import prices within the meaning of footnote 1 to Article 4.2 of the *Agreement on Agriculture*.

**a. *Variable Import Levy***

11. Examining the ordinary meaning of the term “variable import lev[y]” in light of its context, and the object and purpose of the agreements, the Appellate Body explained that a “variable import levy” is a “duty, tax, charge or other exaction” “assessed upon importation” that is “liable to vary.”<sup>13</sup> Further, given the context in which the term is used in footnote 1 of Article 4.2, the Appellate Body clarified that the variability must be intrinsic to the measure itself, for example, because of the incorporation into the measure of a “scheme or formula that causes and ensures that levies change automatically and continuously.”<sup>14</sup> Apart from these elements, the Appellate Body noted that a common feature of variable import levies is “a lack of transparency and lack of predictability in the level of duties that will result from such measures.”<sup>15</sup> The

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<sup>13</sup>Appellate Body Report, paras. 232-233.

<sup>14</sup>Appellate Body Report, paras. 233.

<sup>15</sup>Appellate Body Report, para. 234 (emphasis added).

Appellate Body indicated that a measure “similar” to variable import levies would also share that feature.<sup>16</sup>

12. Chile’s modified price band system would appear to be a measure similar to variable import levies under this reasoning. The price band duty under the modified system is a “duty, tax, charge or other exaction” “assessed upon importation.” Moreover, Chile’s Law No. 19.897 sets out a formula that must be applied by the Chilean Executive every two months to establish a new amount of duty under the price band system. In the case of wheat, this duty is the (positive) difference between a reference price and the floor price “multiplied by a factor of one (1), plus the general *ad valorem* duty in force” for wheat.<sup>17</sup> In the case of wheat flour, it is the duty determined using the formula for wheat multiplied by a factor of 1.56.<sup>18</sup> The price band duty is, thus, “liable to vary” because of an intrinsic “formula that causes and ensures that levies change automatically and continuously.”

13. Chile has argued that the price band duty has ceased varying “continuously” because it now changes once every two months, rather than once every week as it did under the original price band system. We cannot discern, nor has Chile identified, a basis for such a distinction to be drawn.

14. Similarly, the fact that Chile has added a new administrative requirement that the Chilean Executive publish the amount of the price band duty in a Ministry of Finance Decree at the start

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<sup>16</sup>Appellate Body Report, paras. 234 and 246-252.

<sup>17</sup>*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products: Recourse by Argentina to Article 21.5*, First Written Submission by Chile, para. 17 (3 May 2006) (hereinafter “Chile First Written Submission”)

<sup>18</sup>Chile First Written Submission, para. 17.

of every two-month period does not alter the conclusion that the price band duty varies “automatically” because of the formula set out in Law No. 19.897. Chile correctly notes the Appellate Body’s clarification that “[t]o vary the applied rate of duty in the case of ordinary customs duties will always require *separate* legislative or administrative action, whereas the ordinary meaning of the term ‘variable’ implies that *no* such action is required.”<sup>19</sup> However, it is not clear how simply interjecting a layer of clerical tasks could break the link between the formula established as part of the price band system and the level of the duties automatically calculated through its application.

15. As for the Appellate Body’s observation that a common feature of variable import levies is “a lack of transparency and lack of predictability *in the level of duties that will result from such measures*,”<sup>20</sup> we note that it is not just any “lack of transparency” and “lack of predictability” that is of concern. Rather, it is a “lack of transparency” or “lack of predictability” regarding “the level of duties that will result from such measures.” It is not clear to us that this aspect of “transparency” is being addressed in the debate between the parties on issues of transparency relating to other aspects of the price band system.

16. When one looks at Chile’s modified price band system and variable import levies from the standpoint of an exporter, the measures do seem to be similar in the lack of transparency and predictability in the level of the duties resulting from their application. In both cases, the lack of transparency and predictability results from the complex nature of the mechanism applied to

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<sup>19</sup>See Chile Rebuttal Submission, para. 100 (quoting Appellate Body Report, para. 233)

<sup>20</sup>Appellate Body Report, para. 234 (emphasis added).

determine the level of the duties and the fact that it may be difficult to ascertain – if not impossible to know ahead of time – all of the elements necessary to determine the precise level of duties.

17. To illustrate, consider the fact that to determine the level of the duty under Chile’s modified price band system, it is necessary to know the reference price that will be compared to the price band threshold. The reference price consists of “the average of the daily international wheat prices recorded in the markets most relevant to Chile over a period of 15 calendar days counted backwards from the [bi-monthly] date set out in Regulation No. 831 for each decree establishing specific duties.”<sup>21</sup> Unless an exporter sells, ships, and lands the shipment within the current two-month window – which would be unusual, according to Argentina, as a “majority of sales are made under forward contracts”<sup>22</sup> – the exporter will simply not know the level of the duty that will apply to its exports.<sup>23</sup>

18. Chile attempts to minimize this result by arguing that wheat traders could use futures contracts prices and their “own skills in predicting prices” to try to determine what the reference prices might be in the future.<sup>24</sup> The same assertion, however, could be made about variable import levies – and yet, all agree that those measures are within the ambit of Article 4.2 of the *Agreement on Agriculture*. The United States submits that the question is not whether a trader can attempt to make an educated guess as to what the level of the duty might be. Rather, the question is whether a trader can “*know and . . . reasonably predict* what the amount of duties will

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<sup>21</sup>Chile First Written Submission, para. 30.

<sup>22</sup>Argentina First Written Submission, para. 275 (emphasis in original).

<sup>23</sup>Argentina First Written Submission, para. 275.

<sup>24</sup>Chile First Written Submission, paras. 158-163.



be” in much the same way as if an ordinary customs duty were in place.<sup>25</sup> As the Appellate Body explained, in the absence of that kind of transparency and predictability about the level of the duties, there is a danger that exporters will not ship to the market in question, which will impede the transmission of international prices to the domestic market.<sup>26</sup>

***b. Minimum Import Price***

19. Turning next to the question of whether the modified price band system is similar to a minimum import price, it would appear that there has been little change to the price band system that would make it any *less* similar to a minimum import price now than it was before.

20. Chile asserts that “minimum import price schemes generally operate in relation to the actual transaction value of . . . imports.”<sup>27</sup> However, neither the original price band system nor the modified system calculates duties by reference to actual transaction prices. Rather, both use as the reference price the price for a certain quality of wheat in the foreign “markets of concern.” Chile argues that because “the reference price [in the modified price band system] has nothing to do with the transaction value” the system is “neither a minimum import price nor similar to one.”<sup>28</sup> However, this distinction did not preclude a finding of “similarity” in the original proceeding,<sup>29</sup> and it is not clear why it would do so now.

21. We also question whether the analysis of similarity to a minimum import price system is affected by the fact that the price band thresholds are expressed in Law No. 19.589 in “FOB

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<sup>25</sup>Appellate Body Report, para. 234 (emphasis added).

<sup>26</sup>Appellate Body Report, para. 234.

<sup>27</sup>Chile Rebuttal Submission, para. 139.

<sup>28</sup>Chile Rebuttal Submission, para. 160.

<sup>29</sup>Appellate Body Report, para. 248, 252.

terms,” rather than as a “minimum import price,” “a CIF price,” or “an entry price.”<sup>30</sup> If so, a Member could avoid the obligations of Article 4.2 of the *Agreement on Agriculture* by maintaining a minimum import price (or a measure similar to one) and simply labeling the threshold price as something other than a “minimum import price,” “a CIF price,” or “an entry price.”

***c. “Sustaining” an entry price, internal price, or an administratively determined price above the domestic price***

22. Finally, Chile makes a general argument regarding the alleged “fundamental characteristics” of variable import levies and minimum import prices that we would like to address. Specifically, Chile argues that a “fundamental characteristic” of these measures is the intent “to sustain a price and that that price is measured as an entry price, as an internal price, as a value linked to the internal price, or as an administratively determined price which is above the domestic price.”<sup>31</sup> Chile cites, as the basis for this assertion, a listing of “fundamental characteristics of variable import levies and minimum import price” from the Panel Report in the original proceeding, which the Panel said it had “distilled from the pre-Uruguay Round notifications and examination thereof by the GATT Contracting Parties.”<sup>32</sup>

23. Chile argues that since the two prices compared to determine the price band duty – the modified floor and reference price – are not the exact same as the ones used in the case of variable import levies and minimum import prices according to the Panel’s list, “the current parameters do not possess any of the fundamental characteristics which the WTO itself has

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<sup>30</sup>Chile Rebuttal Submission, para. 140.

<sup>31</sup>Chile Rebuttal Submission, para. 117.

<sup>32</sup>Panel Report, para. 7.37-7.37.

defined and discussed for” those two categories of measures.”<sup>33</sup> Chile concludes that, “[t]herefore, the Chilean system established by Law 19.897 and its Regulations is not inconsistent with . . . Article 4.2.”<sup>34</sup>

24. We note that the Appellate Body agreed with the arguments that Chile advanced in the original proceeding, that it is not useful to endorse certain characteristics “as being of a ‘fundamental’ nature.”<sup>35</sup> Instead of endorsing the kind of assessment that Chile is now urging of “fundamental characteristics,” the Appellate Body conducted an analysis involving an examination of the ordinary meaning of the terms “variable import levy” and “minimum import price” in their context, and in light of the object and purpose of the agreements.<sup>36</sup> There is no reason why the same approach should not be used here.

#### **Article II:1(b) of the GATT 1994**

25. The Appellate Body has explained that, if the price band system is found to be inconsistent with Article 4.2 of the *Agreement on Agriculture*, it is not necessary to consider whether the price band system also results in a breach of Article II:1(b) of the GATT 1994. “This is because a finding that Chile's price band system as such is a measure prohibited by Article 4.2 would mean that the duties resulting from the application of that price band system *could no longer be levied*—no matter what the level of those duties may be. Without a price band system, there could be no price band duties.”<sup>37</sup> Applying this reasoning, we believe that this

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<sup>33</sup>Chile Rebuttal Submission, para. 123.

<sup>34</sup>Chile Rebuttal Submission, para. 123.

<sup>35</sup>Appellate Body Report, para. 230.

<sup>36</sup>Appellate Body Report, para. 231.

<sup>37</sup>Appellate Body Report, para. 190.

Panel can properly end its analysis in this proceeding with a finding under Article 4.2 of the *Agreement on Agriculture*.

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26. This concludes the oral statement of the United States. Thank you for your attention.