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

(WT/DS207)

Third-Party Submission of the United States

August 9, 2001

TABLE OF CONTENTS

I. Introduction 1

II. Chile's Price Band System Is Inconsistent with Article 4.2 of the Agreement on Agriculture 1

- A. *Article 4.2 Prohibits Variable Import Levies and Similar Border Measures, Whether or Not Those Measures Actually Were Converted During the Uruguay Round* 1
- B. *Chile's Price Band System Is a Variable Import Levy under Footnote 1 to Article 4.2* 4
- C. *Conclusion* 7

III. Chile's Price Band System Is Inconsistent with GATT 1994 Article II 8

IV. Analysis of the Chilean Safeguard Measures under the Agreement on Safeguards 9

- A. *Articles 2.1 and 4.2(a) Do Not Require a Particular Methodology for the Evaluation of Increased Imports* 9
- B. *The Agreement on Safeguards Does Not Allow the Use of Evidence Outside the Record of the Competent Authorities to Either Challenge or Defend a Safeguard Measure* 10
- C. *Under Article 6, the Competent Authorities Must Satisfy a High Evidentiary Standard Before Imposing a Provisional Safeguard Measure* 11
- D. *Article 7.2, and Not the Increased Imports Requirement of Articles 2.1 and 4.2, Sets the Substantive Requirements for Extension of a Safeguard Measure* 12

V. Conclusion 14

I. Introduction

1. The United States welcomes this opportunity to present its views to the Panel in this proceeding. The United States would like to comment first on Argentina's claim that the price band system is inconsistent with Article 4.2 of the Agreement on Agriculture. The United States believes that the Chilean price band system is inconsistent with Article 4.2 and that, in its attempt to defend the measures, Chile has advanced an erroneous reading of Article 4.2 that, if credited, would undermine one of the crowning achievements of the Uruguay Round, the prohibition of barriers other than ordinary customs duties to trade in agricultural goods. Second, the United States briefly presents its views on the consistency of the price band mechanism with Article II of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Finally, while taking no position on the consistency of the Chilean safeguard measures with the Agreement on Safeguards, the United States presents its views on certain interpretive issues under the Agreement on Safeguards that may assist the Panel in its review.

II. Chile's Price Band System Is Inconsistent with Article 4.2 of the Agreement on Agriculture

2. The United States disagrees with the interpretation of Article 4.2 of the Agreement on Agriculture advanced in Chile's first submission. Chile's argument is two-fold: (1) the price band regime is not a "variable import levy" within the meaning of Article 4.2 and, therefore, is not proscribed by Article 4.2 and (2) even if it is a variable levy, the system was not "required to be converted into ordinary customs duties" during the Uruguay Round tariffication exercise and, hence, is not in violation of Article 4.2. As discussed below, both arguments fail.

A. *Article 4.2 Prohibits Variable Import Levies and Similar Border Measures, Whether or Not Those Measures Actually Were Converted During the Uruguay Round*

3. Chile's argument raises a fundamental interpretive issue regarding Article 4.2. Chile argues that Article 4.2 only prohibits those non-tariff measures that pre-existed the Agreement on Agriculture and were *actually* replaced with tariff equivalents in WTO Members' schedules of tariff concessions.[1] That is, Chile effectively reads Article 4.2 as only prohibiting Members from using "any measures that have been converted into ordinary customs duties." According to this argument, if an agriculture-specific non-tariff barrier existed at the time of the Agreement on Agriculture's entry into force, but was not "converted" into a tariff at that time by a Member, then the measure must not "have been required to be converted" and, accordingly, falls outside the scope of Article 4.2's prohibition. This strained reading of Article 4.2 ignores key parts of the text as well as the object and purpose of the provision.

4. Article 4.2 provides that "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties," and "[t]hese

[1] *See, e.g.*, First Submission of Chile, para. 57 ("El artículo 4.2 se refiere lógicamente a las medidas del tipo de las que *a la fecha de entrada en vigencia de la OMC* 'se ha prescrito'que se conviertan.") (emphasis added).

measures include . . . variable import levies."[2] Read according to its ordinary meaning, Article 4.2 imposes a *general requirement* to eliminate and refrain from using or readopting *any* agriculture-specific non-tariff barriers and to use a system of tariff-only protection.[3] Therefore, if Chile's price band regime is a variable import levy, as Chile concedes for purposes of this argument, it (and *all* other variable import levies) is prohibited by the express language of Article 4.2 and its accompanying footnote, regardless of whether Chile actually tariffied the levy in its Schedule of tariff commitments.

5. Chile's interpretation of Article 4.2 fails to give all of the terms of that provision "meaning and effect"[4] and does not read those terms according to their ordinary meaning. One phrase that Chile quotes but then disregards is "of the kind."[5] According to its ordinary meaning, "kind" refers to a "class, sort, or type,"[6] indicating that Article 4.2 prohibits general classes, sorts, or types of non-tariff measures, not simply those particular, country-specific measures that were actually tariffied in the Uruguay Round. Chile's interpretation not only denies meaning to the phrase "of the kind," it also renders inutile the verb "maintain." If the only measures that Article 4.2 prohibits are non-tariff barriers that *were, in fact, tariffied* in the Uruguay Round, then the language in Article 4.2 that Members shall not "revert to" such measures would suffice. Thus, Chile's reading contravenes the general rule of treaty interpretation that no terms of a treaty (in this case, "maintain" and "resort to") shall be reduced to redundancy or inutility.[7] The requirement that a Member shall not "maintain" (or "keep vigorous, effective, or unimpaired"[8]) a

---

[2] Agreement on Agriculture, Art. 4.2 & n.1.

[3] Members were also given one opportunity to raise their bound tariffs without offering compensation, the process generally known as "tariffication." *See* Panel Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/R, adopted as modified (WT/DS69/AB/R) on 23 July 1998, para. 281 ("The object and purpose of Article 5.1(b) is to provide additional protection against [a] significant decline in import prices during the implementation period of the Agreement on Agriculture after all agricultural products have been 'tariffied' under Article 4.2."). *See also 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. 4 ("[P]articipants agree to negotiate commitments on *all* border measures on the basis of country lists covering all products subject to these measures. . . . These country lists shall be . . . built on the following parameters: (a) conversion of *all* border measures other than normal custom duties into tariff equivalents; the modalities of such a conversion should be based on . . . the guidelines contained in Annex I . . . .") (emphasis added). Annex I to the *Framework Agreement* is entitled *Guidelines for tariffication. Id.*, p. 8.

[4] *See* Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted on 20 May 1996, p. 23 ("One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty.").

[5] *See* First Submission of Chile, para. 56.

[6] *The New Shorter Oxford English Dictionary*, vol. 1, p. 1489 (Oxford Univ. Press 1993).

[7] Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, p. 23 ("An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.") (footnote omitted).

[8] *The New Shorter Oxford English Dictionary*, vol. 1, p. 1669.

prohibited measure contemplates that there could be some measures "which have been required to be converted into ordinary customs duties" that *were not, in fact, converted*. Such measures, even if they had not been converted, would still be prohibited and actionable under Article 4.2. This is precisely the meaning that Chile strains to avoid finding in Article 4.2 since it would encompass Chile's ongoing use of the price band system.[9]

6. Chile's argument is not rendered any more plausible upon consideration of Article 4.2's object and purpose, as reflected in panel reports. For example, the Panel in *European Communities—Measures Affecting the Importation of Certain Poultry Products*, in clarifying the interpretation of the terms of Article 5.1(b), noted that "Article 5.1(b) must be construed narrowly, so as not to frustrate the attainment of the security and predictability in trade *through the tariffs-only regime under Article 4.2*."[10]

7. The United States also disagrees with Chile's assertions that its measures are immunized from challenge because (1) its price band system has not previously been challenged and (2) other Members allegedly use similar measures. According to paragraph 3 of the Marrakesh Protocol, there is no waiver of Members' rights to challenge Chile's variable import levy merely because Chile submitted its Schedule for multilateral examination.[11] Past WTO and GATT Panels have found, moreover, that "the mere fact that [a] complaining part[y] ha[s] not invoked

---

[9] Chile's reading, moreover, inappropriately reads out (both literally and logically) the verb "resort to." *See* First Submission of Chile, para. 56 (explaining the measures that shall not be maintained or reestablished (in the Spanish, "las medidas que no deben mantenerse ni restablecerse") but not utilizing verb "resort to" (in the Spanish original of Article 4.2, "adoptará")). The ordinary meaning of "resort to," that is, to "have recourse *to* something for aid, assistance, or as the means to an end," does not imply that the "something" was preexisting. *See The New Shorter Oxford English Dictionary*, vol. 2, p. 2565 (italics in original). Again, if the only measures that Article 4.2 prohibits are non-tariff barriers that actually were tariffied, then the language in Article 4.2 that Members shall not "revert to" (which acts upon pre-existing objects) such measures would suffice. Thus, Chile's interpretation would also render meaningless the term "resort to" since new non-tariff measures would be permitted.

[10] Panel Report, *European Communities—Measures Affecting The Importation of Certain Poultry Products*, para. 280 (emphasis added). Similarly, the panel in *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef* reasoned that "when dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, *a violation of Article XI of GATT . . . would necessarily constitute a violation of Article 4.2* of the Agreement on Agriculture and its footnote." WT/DS161/R, WT/DS169/R, adopted as modified (WT/DS169/AB/R) on 10 January 2001, para. 762 (emphasis added). Article XI prohibits all quantitative restrictions, including quantitative measures instituted after the Uruguay Round or continuing from that time. A violation of Article XI, therefore, would not "necessarily" constitute a violation of Article 4.2 unless Article 4.2 also proscribed such measures.

[11] Paragraph 3 of the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 provides:

> The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement.

The Agreement on Agriculture is, of course, one of the listed Agreements.

[its] rights under the General Agreement in the past ha[s] not modified these rights and [does] not prevent [it] from invoking these rights now."[12] Nor does Chile's (or other Members') use of WTO-inconsistent measures rise to the level of "subsequent practice" that establishes the parameters of Article 4.2's prohibition. The Appellate Body has explained that "the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant."[13] The alleged use of versions of price band mechanisms by some WTO Members does not establish a discernable pattern nor does such use establish a unanimous agreement by all WTO Members on the proper scope of Article 4.2's prohibition.[14]

B. *Chile's Price Band System Is a Variable Import Levy under Footnote 1 to Article 4.2*

8. The United States submits that Chile's price band regime clearly falls within the ordinary meaning of the term "variable import levies" as used in footnote 1 to Article 4.2 when interpreted

---

[12] *See* Panel Report, *EEC—Member States' Import Regimes for Bananas*, DS32/R, issued 3 June 1993 (unadopted), para. 362 ("The decision of a contracting party not to invoke a right vis-a-vis another contracting party at a particular point in time can therefore, by itself, not reasonably be assumed to be a decision to release that other contracting party from its obligations under the General Agreement. The Panel noted in this context that previous panels had based their findings on measures which had remained unchallenged for long periods of time. The Panel therefore found that the mere fact that the complaining parties had not invoked their rights under the General Agreement in the past had not modified these rights and did not prevent them from invoking these rights now.") (footnote omitted). The Panel in *EEC—Quantitative Restrictions Against Imports of Certain Products from Hong Kong* recognized "that restrictions had been in existence for a long time without Article XXIII ever having been invoked by Hong Kong in regard to the products concerned, but concluded that this did not alter the obligations which contracting parties had accepted under GATT provisions. Furthermore, the Panel considered it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties." L/5511, adopted on 12 July 1983, BISD 30S/129, para. 28.

[13] Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted on 1 November 1996, p. 13 (footnotes omitted).

[14] *See* Panel Report, *EEC—Member States' Import Regimes for Bananas*, para. 363 ("With respect to subsequent practice of the CONTRACTING PARTIES, the Panel considered that the mere fact that the EEC had notified these restrictions to the CONTRACTING PARTIES, and that such measures had not been acted upon by them until now had not changed the obligations of the EEC under the General Agreement. Any action of the CONTRACTING PARTIES on these notifications would normally have resulted from a request for such action by individual contracting parties. Since, for the reasons set out in the preceding paragraph, the mere failure to make such a request could not be interpreted as a decision to abandon the right to make such a request, the mere inaction of the CONTRACTING PARTIES could not in good faith be interpreted as the expression of their consent to release the EEC from its obligations under Part II of the General Agreement.").

in light of its context, object and purpose.[15] The price band mechanism varies the import levy assessed depending on the relationship between historical and current world prices. Chile has not offered any interpretation of the ordinary meaning of "variable import levy" that demonstrates that its price band regime is not encompassed by this term.[16]

9. The United States does not fully subscribe to Argentina's definition of a variable import levy as an import surcharge that "ensures" that the domestic market price "remains unchanged regardless of price fluctuations in exporting countries."[17] Variable import levies may be effected through a number of possible mechanisms, which may or may not "ensure" a specific domestic price. A variable levy, however it is designed, prevents or ameliorates price variability in the domestic market caused by movements in import prices.[18] Chile's price band regime does exactly that by calculating the import levy as the difference between a preset "target" price and a current world price. Thus, a variable import levy offers an additional measure of protection to domestic producers at those times when international prices are low or declining.

10. Chile's principal argument—its price band mechanism cannot be a variable levy because it is not *identical* to the EC's pre-Uruguay Round variable levy regime—is not only unpersuasive but in fact serves to highlight the price band system's operation as a variable import levy.[19] The main distinctions that Chile points to are that its system uses a moving 5-year average "band" of past world prices to establish a minimum (and maximum) target price, whereas the EC's prior

---

[15] Article 31(1) of the Vienna Convention reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[16] *See, e.g.*, G. Harrison, et al., *Chile's Regional Arrangements and the Free Trade Agreement of the Americas*, p. 5 n.14 (World Bank Publ., 6 April 2001) ("Chile applies a variable levy system on imports of wheat and sugar and, less importantly, edible oils.").

[17] First Written Submission of Argentina, para. 52.

[18] A variable levy can be generally described as a "tariff subject to alterations *as world market prices change*. The alterations are designed to assure that the import price after payment of the duty will equal a predetermined 'gate' price." U.S. Department of Commerce, *A Comprehensive Guide to International Trade Terms*, p. 237 (2nd ed. 1994) (emphasis added). *See also* J. Jackson, *World Trade and the Law of GATT*, § 20.2, p. 521 (Bobbs-Merrill Co. 1969) (noting that variable levy "involves a tariff duty that varies from time to time so as to make the selling price of imports into the [domestic market] assume a level that will, in general, protect domestic agricultural products from foreign competition").

[19] Chile raises a host of lesser arguments to support its contention that the price band system is not a variable import levy. For example, Chile argues that price bands could not have been intended to be prohibited non-tariff measures because they were not specifically listed in footnote 1 to Article 4.2, although they were widely used in Latin America and well known during the Uruguay Round. An argument that price bands are not "variable import levies" because they are called "price bands" simply begs the question of whether Chile's "price band" regime falls within the general category of variable import levies. Chile also claims that if price bands were variable import levies, then Members would have required Chile to have tariffied its price bands in its Uruguay Round Schedule. As the United States has previously discussed with respect to Chile's reading of Article 4.2, the fact that WTO Members did not object to Chile's Schedule or request dispute settlement proceedings against the price band system earlier in no way prejudices Members' rights to challenge the price band system now. *See supra* para. 7.

variable levy system used an internal EC price to set the target price, and that the price band system uses a current international reference price, whereas the EC system used a shipment-specific invoice price.[20] While the United States disagrees that the EC variable levy system used a shipment-specific invoice price,[21] in any event, these are distinctions without a difference. *How* Chile sets its target price and current price does not fundamentally distinguish its regime. Rather, it is the fact that the levy varies based on exogenous factors, such as world prices, not the particular factors used to determine the levy amount, that defines the price band mechanism as a variable levy.

11. Another distinction Chile draws is that, unlike the prior EC variable levy regime, the price band system permits low-cost foreign producers to compete on the basis of price.[22] While it is technically true that the system does not *completely* eliminate price competition, the United States submits that this does not fully capture the economic impact of Chile's price band regime. When international prices decline, the variable levy assessed under Chile's price band regime exacts a higher duty, on an *ad valorem* basis, on low-cost goods than it does from high-cost goods. Thus, the prohibition on variable import levies in Article 4.2 serves to eliminate the disproportionate impact of these measures on low-cost producers.

12. Finally, Chile argues that its price band regime is merely an "ordinary customs duty" in the form of a specific duty that fluctuates on the basis of external factors (current international prices versus historical international prices) and is subject to the disciplines of Article II of GATT 1994.[23] However, Chile's definition of "ordinary customs duty" would also capture the EC's prior variable import levy, which was a specific duty that fluctuated, in part, on the basis of external world price factors. Thus, Chile's definition cannot be accepted as it does not distinguish the very EC measure that Chile has conceded is a prohibited "variable import levy."[24] The United States submits that the term "ordinary customs duties" is generally recognized to refer to specific duties that are based on a physical quantity or measure of imported product or *ad*

[20] First Submission of Chile, paras. 48, 40.

[21] *See, e.g.*, Council Reg. (EEC) No. 1766/92 (30 June 1992), OJ No. L 181 (1 July 1992), Art. 10.

[22] First Submission of Chile, para. 45.

[23] *Id.*, paras. 45, 47.

[24] *Id.*, paras. 49, 38, 45.

valorem duties that are based on a fixed percentage of the value of the imported product.[25] Such ordinary customs duties do not vary based on world and/or domestic prices.[26]

13. Even if the Panel were to conclude that Chile's price band mechanism is not a "variable import levy," the United States submits that the price band regime is a "similar border measure" that is prohibited under footnote 1 to Article 4.2.[27] As explained above, Chile's price band system operates very similarly to measures that Chile concedes are "variable import levies," with the principal difference being only the particular factors used to determine the levy amount. Because of the similarities in both structure and effect between Chile's price band system and such measures, the Chilean regime must at least be a prohibited "similar border measure."

C. *Conclusion*

14. In conclusion, the United States observes that the object and purpose of the Agreement on Agriculture included "establish[ing] . . . strengthened and more operationally effective GATT rules and disciplines" and "achieving specific binding commitments" in the area of "market access."[28] The continuation of price band measures eliminates two of the hoped-for advantages of tariffication: its contribution to transparency in import barriers and the advantage of fixed tariffs for the promotion of trade in agricultural goods.[29] Allowing Members to operate price band regimes would create an unprincipled loophole in Article 4.2's general prohibition on non-tariff barriers and would eviscerate the specific substantive prohibition of "variable import levies."

---

[25] *See* P. Krugman & M. Obstfeld, *International Economics: Theory and Policy*, p. 187 (Addison–Wesley Pub. Co. 1997) ("A tariff, the simplest of trade policies, is a tax levied when a good is imported. Specific tariffs are levied as a fixed charge for each unit of goods imported (for example, $3 per barrel of oil). Ad valorem tariffs are taxes that are levied as a fraction of the value of the imported goods (for example, a 25 percent U.S. tariff on imported trucks).")

[26] For example, Article 4.2 prohibits border measures other than "ordinary customs duties" but specifically excludes from its ambit measures "otherwise provided for in Article 5 and Annex 5." Article 5.1, the "special safeguard" provision, allows a Member to impose an "additional duty" to imports when, *inter alia*, prices of imports fall beneath a "trigger price." Under Article 5.5, the amount of the additional duty varies depending on the difference between the c.i.f. import price of the shipment and the trigger price. Thus, a specific exclusion from the prohibition of Article 4.2 was necessary to allow the special safeguard mechanism to operate, a measure that varies the levy imposed on the basis of the import price. *See also* Agreement on Agriculture, Art. 5.4 (distinguishing "additional duty" imposed under Article 5 from "ordinary customs duty").

[27] Agreement on Agriculture, Art. 4.2 n.1 (non-tariff measures of the kind that have been required to be tariffied "include . . . variable import levies . . . and similar border measures other than ordinary customs duties.")

[28] Preamble to Agreement on Agriculture.

[29] *Cf.* J. Jackson, *World Trade and the Law of GATT*, § 20.2, p. 521 ("Yet beyond the amount of the particular duty imposed on a given product at a certain time, there is an additional protective effect [to a variable import levy] by virtue of the fact that the duty varies. If traders and producers cannot plan on a certain degree of profitability for their products, they will be hesitant to exercise the effort required to introduce those products into a foreign market.") (footnote omitted).

III. Chile's Price Band System Is Inconsistent with GATT 1994 Article II

15. The United States agrees with Argentina's claim that Chile's price band system, as implemented through laws, regulations, and "complimentary provisions and/or amendments,"[30] is inconsistent with Article II:1(b) of the GATT 1994. To this claim, Chile responds with two arguments, neither of which addresses the GATT-inconsistency of the measures.

16. Chile argues that the specific duties applied to imports under the price band system are not in and of themselves inconsistent with Chile's obligation under GATT 1994 Article II:1(b) not to apply "ordinary customs duties in excess" of its bound rate of 31.5 percent *ad valorem.* However, Argentina's argument is *not* that Chile cannot apply specific duties under Article II. Rather, Argentina claims that the price band system may result, and has resulted, in applied duties that exceed the 31.5 percent *ad valorem* binding.

17. As Argentina notes, the Appellate Body has concluded that a Member "act[s] inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994, [if its customs] regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of customs duties in excess of the bound rate" in the Member's GATT Schedule.[31] This appears to be the case for the Chilean price band system as there is no legislative or regulatory "ceiling" or "cap"[32] that would prevent the specific duty applied from exceeding the bound rate of 31.5 percent *ad valorem.* In fact, the regulations currently in force establish specific duties to apply to a range of international reference prices that would result in a breach of the tariff binding.[33] Chile concedes in its First Submission that the price band system will result in a breach of its tariff bindings if international prices are sufficiently low[34] (exactly as Argentina argues) but seeks to excuse the breach on the basis that "the Government of Chile consciously took the decision to allow the price bands to

---

[30] *See* Request for Establishment of a Panel by Argentina, WT/DS207/2 (19 January 2001).

[31] Appellate Body Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel, and Other Items*, WT/DS56/AB/R, adopted on 22 April 1998, para. 55 ("*Argentina—Footwear*").

[32] *See id.*, para. 54 ("We note that it is possible, under certain circumstances, for a Member to design a legislative 'ceiling' or 'cap' on the level of the duty applied which would ensure that, even if the type of duty applied differs from the type provided for in that Member's Schedule, the *ad valorem* equivalents of the duties actually applied would not exceed the *ad valorem* duties provided for in the Member's Schedule.").

[33] For example, for the period 1 January 2001 to 31 October 2001, Exempt Decree No. 128 (27 April 2000) established a specific duty of U.S. $0.44910/kg for an f.o.b. reference price of U.S. $200/ton for edible vegetable oils. Assuming that the international reference price is equivalent to the transaction price of a particular shipment, this specific duty-price pair results in an *ad valorem* tariff equivalent of 224.55 percent. Similarly, for the period 1 January 2001 to 15 December 2001, Exempt Decree No. 127 (27 April 2000) established a specific duty of U.S. $0.08925/kg for an f.o.b. reference price of U.S. $50/ton for edible vegetable oils. Again, assuming that the international reference price is equivalent to the transaction price of a particular shipment, this results in an *ad valorem* equivalent of 178.5 percent. *See* First Submission of Argentina, Annex ARG-5.

[34] First Submission of Chile, para. 24.

operate in full, no longer fulfilling its [GATT 1994 Article II] obligation."[35] This concession should itself suffice for the Panel to find a breach of Article II. However, the United States notes that the *deliberateness* of the breach is irrelevant because Article II is concerned not with good or bad intentions but with the "treatment" accorded to the commerce of another Member.[36] Under Article II:1(b), the application of ordinary customs duties in excess of the bound rate will *always* be treatment "less favorable" than that provided for in the Member's Schedule.[37] Thus, because violations of Chile's bound rates may occur and have occurred precisely because of the "structure and design" of the price band system, such as Chile's failure to cap the specific duties that could be applied to particular shipments, the price band system is inconsistent with Chile's obligations under Article II.

18. Chile also argues that, because GATT 1994 Article XIX and the Agreement on Safeguards allow a WTO Member to suspend temporarily certain concessions, there can be no violation of its tariff bindings while the safeguard measures are in place. However, Argentina is not alleging a violation of GATT 1994 Article II *as a result of* the application of safeguards. Rather, it is the price band system, which Chile concedes is not a safeguard measure,[38] that operates to impose specific duties that result in the violation of Chile's tariff bindings. The price band system is mandatory, does not impose any *ad valorem* cap on the duties that can be collected on a particular shipment, and continues in effect to this day. Thus, regardless of the operation or legal status of Chile's safeguard measures, Chile continues to apply measures that are inconsistent with its tariff bindings under Article II.

IV. Analysis of the Chilean Safeguard Measures under the Agreement on Safeguards

A. *Articles 2.1 and 4.2(a) Do Not Require a Particular Methodology for the Evaluation of Increased Imports*

19. The United States takes no position on the question of whether the data for imports into Chile of edible vegetable oil, wheat flour and wheat actually satisfy the increase in imports required by Article XIX.1(a) of the GATT 1994 and Articles 2.1 and 4.2(a) of the WTO Agreement on Safeguards. The United States, however, wishes to make several general observations regarding the "increased imports" requirement for applying a safeguard measure.

---

[35] *Id.*, para. 25 ("En consecuencia, el Gobierno de Chile conscientemente adoptó la decisión de permitir que la banda de precios operara en plenitud, *dejando de cumplir su obligación*.") (emphasis added).

[36] GATT 1994 Art. II:1(a) ("Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.").

[37] *Argentina—Footwear*, para. 45.

[38] *Replies by Chile to the Questions Posed by Guatemala Regarding the Notifications of Chile*, G/SG/Q2/CHL/5, 27 September 2000, p.4 (response to Query 19)("The price band mechanism is not and should not be seen as a safeguard measure, in WTO terms, since it is not triggered per se by the requirements of Article XIX of the GATT or those of the Agreement on Safeguards.").

20. The Agreement on Safeguards is silent regarding the methodology and analytic framework for evaluating increased imports. Article 2 states that imports must be occurring "in such increased quantities, absolute or relative to domestic production . . . as to cause or threaten to cause serious injury to the domestic industry." Article 2 further states that the determination is to be made "pursuant to" the other provisions set out in the Agreement. Article 4.2(a) likewise does not specify any particular methodology or analysis, but requires that competent authorities evaluate all relevant factors of an "objective and quantifiable nature" having a bearing on the situation of the industry, including "the rate and amount of increase in imports of the product concerned in absolute and relative terms."

21. The Appellate Body considered the question of the temporal focus of a safeguards investigation most recently in *United States—Safeguard Measures on Imports of Fresh, Chilled, or Frozen Lamb Meat from New Zealand and Australia* ("*United States—Lamb*"). The Appellate Body noted that "in principle, within the period of investigation as a whole, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry." However, the Appellate Body explained that "competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation." The Appellate Body explained further that "in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period."[39]

22. In sum, the United States believes that competent authorities must base their determination concerning increased imports on objective (i.e., unbiased) data and that they should consider carefully data from the more recent past in the context of examining the entire period of investigation.

B. *The Agreement on Safeguards Does Not Allow the Use of Evidence Outside the Record of the Competent Authorities to Either Challenge or Defend a Safeguard Measure*

23. Both Argentina and Chile appear to be relying in their submissions on information that was not in the record compiled and considered by the Chilean competent authorities.[40] Such extra-record information should not be considered by the Panel in this dispute.

---

[39] WT/DS177/AB/R, WT/DS178/AB/R, adopted on 16 May 2001, paras. 137, 138 (footnote omitted).

[40] For example, in Section III.B.7.(iv), para. 39 of it First Submission Argentina relies on Chilean wheat import data that have been "obtained from other sources" and are apparently not on the record of the Chilean authorities' investigation. An example of Chile's reliance on extra-record information appears in para. 149 of its First Written Submission, where it relies on information from Chilean government sources other than its competent authorities. Again, this is information that apparently was not on the record of the Chilean authorities' investigation.

24. Under Article 3 of the Agreement on Safeguards, it is a Member's competent authorities that investigate the facts. It is well established that a panel must make an objective assessment of the facts of the case and of the applicability and conformity with the relevant covered agreements. With regard to fact-finding, "the applicable standard is neither *de novo* review as such, nor 'total deference.'"[41]

25. Several panels have had the opportunity to articulate how this standard functions in the context of the review of injury determinations made by national authorities. For example, in the adopted portion of *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, the panel concluded that "it is for the [U.S. competent authorities] to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determinations of serious injury and causation." The panel added: "It is not our role to collect new data, or to consider evidence which could have been presented to the [U.S. competent authorities] by interested parties in the investigation, but was not."[42]

26. The principle that has emerged is that the review of the serious injury determination of a competent authority is to be conducted based on the information that was before the authority at the time of its investigation. Information not before the competent authority is simply not germane to a review of the consistency of the determination with applicable WTO obligations. By relying on new information that was never before the Chilean competent authorities, both Argentina and Chile would have this Panel become another authority before which evidence could be submitted on the underlying facts. This process would be exactly the *de novo* review condemned by the Appellate Body.

27. Therefore, the Panel should decline to consider evidence not included in the Chilean competent authorities' record for purposes of reviewing the safeguard measure at issue in this case, whether such extra-record evidence is relied on by Argentina to attack the measure, or by Chile to defend it.

C. *Under Article 6, the Competent Authorities Must Satisfy a High Evidentiary Standard Before Imposing a Provisional Safeguard Measure*

28. In considering Argentina's claims regarding Chile's provisional safeguard measure, the Panel should keep in mind that Article 6 of the Agreement on Safeguards places a special obligation on a party imposing a provisional safeguard – that there be "*clear evidence* that increased imports have caused or are threatening to cause serious injury" (emphasis added).

---

[41] Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted on 13 February 1998, para. 116 n. 111.

[42] Panel Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted as modified (WT/DS166/AB/R) on 19 January 2001, para. 8.6. *See also* Panel Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, para. 7.7, issued 28 February 2001 and modified (WT/DS184/AB/R) (unadopted).

"Clear" means "[e]asily seen (*lit. & fig.*); distinctly visible; intelligible, perspicuous, unambiguous; manifest, evident."[43] Thus, if the Panel concludes that the evidence upon which Chile relied for its provisional measure was unambiguous, the Panel should find that measure to be inconsistent with the Agreement on Safeguards.

29. In performing this evaluation, the Panel should note that the Article 6 standard is different from, and distinctly higher than, the standard Article 4 requirements for imposition of a definitive safeguard measure. Article 4.2(b) states that the determination of serious injury "shall not be made unless this investigation [by the competent authorities] demonstrates, on the basis of *objective evidence*, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof" (emphasis added). "Objective" means "presenting facts uncolored by feelings, opinions, or personal bias; disinterested."[44] Thus, the evidence supporting the injury determination for a definitive safeguard must be unbiased. However, it need not be "unambiguous." The Appellate Body found in *United States—Lamb* that "the Panel then observed, correctly, that the competent authorities are not required 'to show that each listed injury factor is declining' but, rather, they must reach a determination in light of the evidence as a whole."[45] Thus, mixed evidence might be sufficient to support a definitive safeguard measure, but still be insufficient to support a provisional measure.

D. *Article 7.2, and Not the Increased Imports Requirement of Articles 2.1 and 4.2, Sets the Substantive Requirements for Extension of a Safeguard Measure*

30. Article 7.2 of the Agreement on Safeguards authorizes a Member to extend a safeguard measure imposed under Article 5 under certain conditions. This simple fact demonstrates flaws in the arguments raised by both Argentina and Chile.

31. Article 7.2 states that the initial duration of a definitive safeguard measure:

> May be extended provided that the competent authorities of the importing Member have determined, in conformity with the procedures set out in Articles 2, 3, 4 and 5, that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting . . . .

The ordinary meaning of this text is that an extension prolongs the *pre-existing* measure. Chile contends that extending the measure "constitutes a new measure, which continues maintaining its character as new, although it maintains its status as well-founded or not with the definitive

[43] *The New Shorter Oxford English Dictionary*, vol. 1, p. 414. The entry for the adjective "clear" contains 15 definitions. The quoted text is the definition most clearly applicable to "evidence."

[44] *Id.*, vol. 2, p. 1964. This is the only definition in the entry that is applicable to evidence.

[45] *United States—Lamb*, WT/DS177/AB/R, para. 144.

measure that preceded it."[46] It then reasons that the extension removed the original measure and, thus, expunged any inconsistency with WTO obligations that the measure may have incurred.

32. This view disregards the ordinary meaning of the text. "Extend" as used in Article 7.2 means "[p]rolong in duration."[47] The context of the term reinforces this conclusion, since it is the "period" of the measure that specifically is extended. Thus, for purposes of the Agreement on Safeguards, an extension does not create a new safeguard measure – it expands the duration of the original measure. If that measure was initially invalid, it remains invalid upon extension unless the Member takes action to bring the measure into conformity with WTO obligations.

33. However, Argentina's arguments against the extension of the measure also fail. As noted above, Article 7.2 governs the extension of a safeguard measure. Argentina's request for establishment of a panel does not reference Article 7, or the extension of the safeguard measure.[48] Therefore, the Panel's terms of reference, which cross-reference the request for Panel establishment, do not include inconsistencies with Article 7.[49]

34. Argentina argues that the extension of Chile's safeguard measure violated Articles 2.1 and 4.2 because imports did not increase in the period immediately preceding the extension.[50] However, the existence of increased imports is a *substantive* requirement of those articles. Article 7.2 specifies that the *procedural* requirements of Articles 2 through 5 apply to the investigation applicable to an extension. Article 7.2 itself provides the substantive requirements – that the safeguard measure continues to be necessary to prevent or remedy serious injury and that there is evidence that the industry is adjusting. Thus, the increased imports requirement of Articles 2.1 and 4.2(a) does not apply to extension of a safeguard measure.

35. We also note that Argentina's arguments in this regard disregard the reasons for imposing a safeguard measure in the first place. Article 5.1 specifically allows a safeguard measure involving a quota that reduces imports to their level during a previous representative period. If Article 7.2 incorporated the Article 2.1 requirement of an increase in imports, it would be nearly impossible to extend such a measure. As a general matter, an effective safeguard measure could easily result in a decrease in imports during the period while the domestic industry is adjusting. Interpreting the Agreement on Safeguards to allow extension only if imports had previously increased would, therefore, often preclude extension of safeguard measures that are effective in preventing serious injury that would otherwise be occurring.

36. In sum, Chile is mistaken in treating the extension as an entirely new measure. However,

---

[46] First Submission of Chile, para. 82.

[47] *The New Shorter Oxford English Dictionary*, vol. 1, p. 893.

[48] WT/DS207/2 (19 January 2001).

[49] WT/DS207/3 (23 May 2001).

[50] Written Submission of Argentina, paras. 131-140, 148-155, and 160-171.

Article 7.2 also establishes that Articles 2 through 5 regulate the *procedures* used in an extension proceeding. Article 7.2 itself provides the substantive standard, which conflicts in important ways with the substantive requirements of Articles 2 through 5. Thus, Argentina errs in arguing that Chile was obligated to satisfy the substantive requirements of Articles 2.1 and 4.2 of the Agreement on Safeguards that imports be increasing before extending its safeguard measures.

V. Conclusion

37. The United States thanks the Panel for providing an opportunity to comment on the important interpretive issues at stake in this proceeding.