Check Against Delivery

Opening Statement of the United States of America

as a Third Participant in the Appeal of

Chile – Price Band System and Safeguard Measures

Relating to Certain Agricultural Products

(AB-2002-2)

August 6, 2002

1. Mr. Chairman and members of the Division, the United States appreciates the opportunity to appear today in this appeal by Chile, which goes to one of the fundamental achievements of the Uruguay Round, the prohibition on non-tariff measures on agricultural products. As the Appellate Body is aware, the United States believes the legal interpretations of the Panel in this matter are correct and should be upheld.

2. In this statement, I will not repeat the views of the United States expressed in its written submissions. I do wish to comment on one theory advanced by Chile and the EC. This theory is that a variable import levy is not prohibited under Article 4.2 of the *Agreement on Agriculture* if it is subject to a tariff binding. Put differently, the theory is that the existence of a binding is sufficient to convert a variable import levy into an ordinary customs duty. In paragraphs 13 and 14 of our Third-Participant Submission, the United States provided arguments based on the text and context of Article 4.2 that binding a variable import levy would *not* suffice to convert it into an ordinary customs duty. In response to certain points raised by Third Participants, the United States wishes to add the following.

3. First, there is a fundamental inconsistency between the fact, duly noted by the EC (at paragraph 44 of its submission), that bindings were introduced for all agricultural products in the Uruguay Round through the process of tariffication, and the fact that "variable import levies" are listed in footnote 1 of Article 4.2. Because all agricultural tariffs are bound, according to the EC (at paragraph 45 of its submission) variable import levies simply ceased to exist when Members'

Uruguay Round Schedules came into effect. If this were so, however, there would then have been *no need* to mention "variable import levies" as a measure prohibited by Article 4.2. The theory advanced by Chile and the EC would render inutile the phrase "variable import levy" in Article 4.2, an interpretation to be avoided according to the customary rules of interpretation of public international law.

4. Second, the United States notes that the theory that variable import levies could only exist if they were not subject to a binding does *not* correspond to the understanding of the term "variable import levy" evinced in several GATT documents that use the term. These GATT documents show an understanding that variable levies *could be bound* but would not, for that reason alone, cease to be variable import levies. For example:

- The Executive Secretary of GATT noted: "The General Agreement contains no provision on the use of variable import duties. It is obvious that *if any such duty or levy is imposed on a 'bound' item*, the rate must not be raised in excess of what is permitted by Article II." (Note by the Executive Secretary, L/1636.)
- The EC (at paragraph 43 of its submission) has quoted an intervention by the U.S. delegate in discussions of the Uruguayan recourse to Article XXIII and this Note by the Executive Secretary as saying that variable import levies "in their most extreme form" and "carried to its logical conclusion" could equalize imported and domestic prices, cutting off imports. Presumably, as suggested by the EC (at paragraph 44 of its submission), such variable import levies could have been unbound. However, we note that the U.S. delegate also explicitly referred to "variable levies which were *not* carried to this logical conclusion" and stated that such variable duties would still be subject to "the very serious problem which had been mentioned by the Executive Secretary." (Statement of Mr. Evans of the United States, Nineteenth Session of the Contracting Parties, SR.19/8, p. 118.)
- The Analytical Index notes that in a meeting of the GATT Agriculture Committee in 1984 "it was stated that where a variable levy was applicable to a product in respect of which the *tariff duty was bound*, the bound tariff rate constituted a maximum upper limit *for the levy*." (Analytical Index to the GATT, p. 72 (citing AG/M/3, p. 63.))

- Finally, the Punta del Este Declaration launching the Uruguay Round negotiations directed the negotiating group on agriculture to "use the Recommendations adopted by the CONTRACTING PARTIES at their Fortieth Session" (BISD, 33S/19, p. 24), and these Recommendations specifically state that "[a]ppropriate rules and disciplines relating to . . . variable levies and charges, to unbound tariffs, and to minimum import price arrangements should be elaborated" (BISD, 31S/10, p. 11).

This review of GATT documents reveals that, from the time of the Uruguayan effort to determine the compatibility of variable levies with the General Agreement to the time of the launch of the Uruguay Round negotiations through which these measures were eventually prohibited, there were numerous statements indicating that variable levies could be subject to bindings without *any* suggestion that they would therefore cease to be variable levies. This review of GATT documents also reveals that there were clear distinctions drawn between the problem of unbound tariffs and the problem of variable import levies.

5. Third, the United States notes that proponents of the theory that variable import levies could only exist if they were not subject to a binding claim that *only* if no binding exists could a variable import levy be *effective* in preventing any price competition between imports and domestic products. The suggested link between a tariff binding and the effectiveness of the measure in preventing price competition does not appear to bear scrutiny. For example, if a variable import levy had been in place prior to the *Agreement on Agriculture*, and tariffication resulted in an extremely high binding, would the continued application of the same variable levy measure within the constraints of the new binding be a "variable import levy" for purposes of Article 4.2? As we understand the theory, the answer is *no* because it is subject to a binding, no matter how high, but the answer is also *yes* because the measure could operate so as to prevent any price competition. Under this theory, then, would the prohibition of variable import levies in Article 4.2 only reach levies subject to bindings high enough to prevent price competition, with the same levies becoming perfectly legal when their bindings have been reduced sufficiently through negotiation?

6. In sum, the United States believes this theory that variable import levies or similar border measures are not prohibited if they are subject to a binding is flawed and should be rejected by the Appellate Body. The theory does not appear to be grounded in the text and context of Article 4.2 nor supported by statements of various contracting parties nor preparatory documents we have reviewed.

7. We thank the members of the Division for this opportunity to present comments in this important appeal, and we look forward to your questions.