*INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS: RECOURSE TO ARTICLE 21.5 OF THE DSU BY INDIA*

**(DS430)**

# CLOSING ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE SUBSTANTIVE MEETING OF THE PANEL

**December 7, 2017**

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## I. INTRODUCTION

1. Mr. Chairman and members of the Panel, I want to thank you for your thoughtful attention to this case. I also want to take the opportunity to thank the Secretariat staff assisting you for their work.

2. Over the last three days, we have had extensive discussion on various points. We recognize that with the extensive back and forth between the Parties, it could be very easy to lose track of those aspects of the Parties' interventions and statements that are critical to the Panel's work. In order to try to bring focus to the discussion we have had, we think it is helpful to recall certain basic factual and legal frameworks that comport with WTO dispute settlement in order to efficiently and effectively assess that discussion.

## II. INDIA'S ALLEGATIONS ARE NOT SUPPORTED WITH NECESSARY EVIDENCE

3. With respect to resolving factual issues, the framework we emphasize is to properly distinguish and examine the discussion in terms of allegation and evidence. An allegation is simply a statement that something is so – or not so. Evidence is information that either tends to establish or disprove the allegation. In other words, an allegation become relevant in dispute settlement only if there is indeed evidence that substantiates it.[1] The principal allegations over the last three days can be broken down into two areas.

4. *First*, there are the various allegations concerning how India's veterinary requirements conform to the OIE Terrestrial Code. For example, India says that S.O. 2337(E) explicitly references the OIE Terrestrial Code – and all Members thus know that the OIE Terrestrial Code reflects India's veterinary requirements. Accordingly, *ipso facto*, India is in conformity with the relevant international standard.

5. The evidence, however, does not support this. It is established that India's prior interpretation of the OIE Terrestrial Code was explicitly contrary to its actual content. India has told us that because of the panel report in the original proceeding, it now knows otherwise – and applies a proper interpretation. But where is any instrument, document, or communication indicating that India has in fact revised its interpretation per its allegation?

6. On this point, the evidence is not simply silent on India's allegation; it contradicts it. The text of S.O. 2337(E) says India allows importation per the OIE Terrestrial Code *and subject* to paragraph 3 of that document, which concerns recognizing *disease free areas*. The text of the measure on its face thus explicitly indicates India applies conditions in addition to the OIE Terrestrial Code. Moreover, in S.O. 2337(E) India has transposed Article 10.4.3 of the OIE

[1] *US – Wool Shirts & Blouses (AB)*, p. 14.

Terrestrial Code concerning regaining freedom from avian influenza generally, but not Article 10.4.4 which concerns freedom from HPAI. Likewise, India's regionalization questionnaire speaks to freedom from avian influenza, not freedom from HPAI. Accordingly, the relevant evidence – the text of India's instruments consistently referring to freedom from avian influenza writ large, *i.e.*, both LPAI and HPAI – does not sustain India's allegation.

7. *Second*, there are various assertions concerning the existence – and ability to use – model certificates for trade. The assertions made in India's interventions include these:

- The certificates existed, but could not be used since the United States had an outbreak of HPAI in spring and summer of 2017, so there was no point in India noting their existence to the United States;
- The certificates existed and could be used, but were not on DADF's website because DADF was updating them to reflect the new edition of the OIE Terrestrial Code; and
- The certificates existed and could be used, but the process only involves importers and traders, so there was no reason the United States would need to know about certificates.

We think those assertions appear to contradict one another. Moreover, there is an issue of common sense. If you have just been through a major WTO dispute where your veterinary requirements were at issue, what reason do you have to conceal new veterinary requirements if you truly believe they are WTO consistent? Why not share such requirements prior to initiating an Article 21.5 proceeding? These failings notwithstanding, the way to evaluate these allegations – and make the most objective assessment – is to see if there is any evidence for them.

8. Assertion 1: *The certificates existed, but could not be used since the United States had an outbreak of HPAI in spring and summer of 2017, so there was no point in India noting their existence.* The evidence is that the certificates were removed at least as early as fall of 2016 – when the United States was not afflicted with HPAI – and that they were still missing on DADF's website in June of 2017. Specifically, you can look at the record of the October 22, 2016 DSB meeting.[2] That record reflects that the United States raised it concerns that the certificates were removed from DADF's website, and our view that they were "essential" in understanding India's measure. You can also look at the web archive site's record we provided that confirms that at least as of June 2017, certificates were still missing from DADF's website.[3]

[2] Exhibit USA-10.

[3] WT/DSB/M/387, para. 6.2 (Exhibit USA-8).

The evidence thus indicates that India's silence on the certificates is not related to HPAI outbreaks that took place this spring and summer, because India was well aware that U.S. concerns for the missing certificates predated the HPAI outbreaks.

9. Assertion 2: *The certificates existed and could be used, but were not on DADF's website because DADF was updating them to reflect the new edition of the OIE Terrestrial Code.* The evidence is that the OIE updates its Terrestrial Code in May of each year – and had no major updates to its avian influenza recommendations in recent years. You know that because the OIE Terrestrial Code has been provided to you and it is clear that the new edition is finalized at the May conference each year. Accordingly, the actual timing of when the current edition of OIE Terrestrial Code is promulgated negates India's allegation that it took these certificates down for that reason – and why there were missing until only a few weeks ago.

10. Assertion 3: *The certificates existed and could be used, but the process only involves importers and traders, so there was no reason the United States would need to know about certificates*. The evidence is that India requires veterinary certificates to be fulfilled by the competent authority of its trading partners, not by a trader. In other words, a certificate is useless to a private trader unless the competent authority in the country of export is aware of the certification requirements – and is able to confirm that it can fulfill them. That is why the United States sent its own model certificates to India on March 21, 2017. India responded on May 15, 2017[4] by noting that it would provide a "preliminary assessment" in 4-8 weeks on the U.S. *regionalization proposal*. India said nothing on the certificates, including whether it had model certificates that the United States might be already able to fulfill. In other words, the evidence highlights that the United States was indeed involved in certification– and that India never raised that model certificates were already available for use.

11. In short, India has made many allegations. The consideration of any them can be kept relatively brief because they lack any supporting evidence. Allegations that remain unsupported by evidence are simply speculation – and have no place in the resolution of this dispute.

## III. INDIA CANNOT EXPAND ITS PANEL REQUEST

12. With respect to the legal framework in assessing our discussions, we think that consideration of the *measure at issue* will help to focus the discussions. Under the DSU, the measure at issue is the act (or omission) attributable to the Member upon which the Panel will make its findings. Specifically, under DSU Articles 6.2 and 7.1, it is the measure identified in a panel request, as it exists on the date a panel is established. As the Appellate Body found in *EC – Chicken Cuts*, a panel is not making findings on measures that come into existence after the

[4] IND-16.

panel is established.[5] For our purposes, this means the measure at issue is the measure India referred to in its in Panel Request – the Revised Avian Influenza Measure – as it existed on May 22, 2017, the date the Panel was established. This framework focuses our discussion in two respects.

13. *First*, it confirms that India was in control of the timing of this proceeding. India decided what to refer – and when to refer it. If India had not adopted and implemented a measure that achieved compliance yet, it should have not sought an Article 21.5 proceeding. Any discussion by India of what it does through measures adopted after the Panel was established, or what it might do through measures adopted in the future, does not change that the findings are limited to the Revised Avian Influenza Measure as it existed on May 22.

14. The Panel has raised the issue of whether there are practical difficulties in trying to substantiate immediately that a ban has been lifted. It is a good question. We too have been a responding party, and have needed to consider the issue of illustrating how our actions have brought us into compliance. The answer is that a Member must make sure its acts and work are transparent. If you claim compliance, you make sure that it is clear what pieces are in place, what they mean – and that they actually function. Here, if India declined to do that, then India must accept the consequences.

15. *Second*, it confirms that we need to consider the discussion from the perspective of establishing the content of the Revised Avian Influenza Measures. We are not suggesting this means the Panel cannot look at anything else that might be a measure. For example, in the original dispute, the Panel considered the National Action Plan 2012 not because it made findings on that measure, but because it considered it as evidence that established that the import ban arbitrarily and unjustifiably discriminated against foreign products. The point is that whatever we look at, we need to consider whether it relates to the Revised Avian Influenza Measure.

16. Here, India has emphasized that its proposed counter-offer from December 4 is relevant evidence that the Panel should consider. It is not. It does not tell us anything about the content of the Revised Avian Influenza Measure. We know that because India explicitly stated that it "hurried" to get this proposal out in time for this proceeding. That indicates the proposal does not reflect the operation of the Revised Avian Influenza Measure, but another consideration that weighs on India – dispute settlement.

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[5] *EC – Chicken Cuts (AB)*, para. 156.

17. Members of the Panel, I again want to thank your careful consideration of this matter. We look forward to receiving the interim report.