INDIA – MEASURES CONCERNING THE IMPORTATION
OF CERTAIN AGRICULTURAL PRODUCTS:
RECOURSE TO ARTICLE 22.6 OF THE DSU BY INDIA

(DS430)

COMMENTS OF THE UNITED STATES OF AMERICA
ON INDIA'S RESPONSES TO THE ARBITRATOR'S QUESTIONS

January 9, 2018

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1. The United States appreciates this opportunity to comment on India's Replies to Questions from the Arbitrator. Many of the points that India raises have already been addressed by the United States in its prior written and oral submissions or are not relevant to the analysis submitted by the United States and the Arbitrator's determination of the level of nullification or impairment. In the comments below, the United States focuses principally on points that India raises that may be pertinent and have not been addressed in prior U.S. submissions. The absence of a U.S. comment on an aspect of India's response to any particular question should not be understood as agreement with India's response. To assist the Arbitrator, the United States notes that it will not be providing comments on India's responses to the following questions: 2–4, 6–7, 10–13, 15–17, 19–21, 24.

QUESTION 1

Regarding data on US exports and imports to India of products in the tariff line HS 020714:

- ***a. (India): Please provide data on India's imports of HS 020714 from all countries for the five years (or longer) preceding the entering into force of the measure at issue.***
- ***b. (United States): Please provide data on US exports of HS 020714 to all countries for the five years (or longer) preceding the entry into force of the measure at issue.***
- ***c. (India and United States): Please explain to what extent these data provide support to your calculation of the value of the imports that would occur in the counterfactual scenario.***

2. In response to this question India provided data for the period 2006 through 2011, which shows India imported no goods under HS 020714 during that period. India then argues that because there were no imports under HS 020714 during this period, there would continue to be no imports under HS 020714—including no imports of U.S. CLQs—if India were to remove its WTO-inconsistent poultry ban.[1] This analysis is highly misleading, and in error. As discussed in detail in the U.S. submissions in the panel proceeding, India's import ban began in *2006*, not 2011.[2] India cannot use a lack of U.S. imports during a time when it was banning imports under its predecessor measures to support its argument that there would be no imports of U.S. poultry if India were to comply with its WTO obligations.

[1] India's Replies to Questions from the Arbitrator ("India November 15 Replies"), paras. 1–8. India made a similar argument in its closing statement to the Arbitrator. Closing Statement of India, para. 4.

[2] April 10, 2013, First Written Submission of the United States of America, *India – Measures Concerning the Importation of Certain Agricultural Products*, paras. 73–87.

3. India further argues that because other countries, which were not subject to India's import ban, did not export poultry to India during this time period, the United States will not be able to export if India's ban were removed. But this is not correct. As discussed in the November 15, 2017 Responses of the United States of America to the Advance Questions from the Arbitrator (the "U.S. November 15 Responses"), a number of factors, including Indian consumer preference for dark meat, the U.S. price advantage for CLQs, and Brazil's focus on value-added boneless cuts, suggest that the United States would export substantial quantities of CLQs to India to meet demand if the ban were removed.[3]

QUESTION 5

> ***Please provide estimates of the Indian income elasticity of CLQs or, in its absence, of the Indian income elasticity of frozen poultry, or processed poultry or poultry.***

4. In response to this question India provides data from the FAPRI database that purports to estimate Indian income elasticity for poultry at 0.5. But, as India is forced to admit later in its responses, "[t]here is no documentation that explains how the elasticities in that [FAPRI] model were estimated."[4] Without that documentation, it is impossible to determine whether the FAPRI elasticity estimate should be relied upon. For example, there is no way to determine the applicable time period, evaluate whether the method used to make the estimate was generally accepted or executed properly, whether the estimates are statistically significant, or whether any assumptions were reasonable. As a result, the estimate of 0.5 should not be relied upon.

5. India uses the remainder of its response to attack the propriety of the values estimated by a 2004 USDA study of India's poultry sector.[5] India labels the estimates of income and price demand elasticity from the 2004 USDA Study as "mere guesses."

6. India's position is incorrect. Maurice Landes, the principal author of the study, declared that he and his co-authors "determined the Elasticity Value through economic analysis of the Indian poultry market at the time, combined with our reasoned consideration and experience as economists."[6] Rather than being "mere guesses," this is the exact kind of "reasoned estimate" that is appropriate in Article 22.6 proceedings such as this one.[7] Indeed, the very quotes from Exhibit US-59 India cites show that rather than haphazardly and without analysis selecting demand and income elasticities—something India itself has done for purposes of this

[3] U.S. November 15 Responses, paras. 7–12.

[4] India November 15 Replies, para. 44.

[5] Exhibits US-11, US-59 (collectively "2004 USDA Study").

[6] Exhibit US-59, para. 4.

[7] *EC – Hormones (US) (Article 22.6 – EC)*, para. 41.

arbitration[8]—Mr. Landes and his co-authors derived elasticity estimates based on available data and sound economic analysis. Specifically, the study authors determined which elasticity values best aligned with "known changes in per capita income and prices during historical periods," as well as "estimates of actual consumption" that were the purpose of the study in the first instance.[9]

7. India further argues that the elasticity estimates in Exhibit US-47 are "questionable." But this argument too is misplaced. The authors of the study in Exhibit US-47 show their due diligence by providing a thorough sensitivity analysis of the estimated elasticity parameters. The study employs standard rigorous methods on a sample size of over 100,000 Indian households. The Quadratic-Almost Ideal Demand System used in the study is a non-linear model, widely accepted by the literature for estimating price and expenditure elasticities.[10] Given the many expenditure, price, and cross-price parameters estimated, one would expect the parameter values to vary across model specifications. Nevertheless, the elasticity parameters are highly robust. In all six specifications, the expenditure elasticities are significant at the 1% level, are of the correct sign, within a reasonable range, and capture both spatial (rural and urban) and temporal variations. Taken together, the study points to high expenditure elasticity for India poultry hovering around the range of 2, implying that consumption demand for poultry in India is highly elastic. Exhibit US-47 also can be relied upon as confirmation that the -1.5 market demand elasticity value used in the model is both reasonable and conservative.

QUESTION 8

An important point of contention between the parties is the competitiveness of EU exporters relative to U.S. producers. The parties have provided data using different data sources, different reference periods, and different definitions of the EU as follows:

a. Data sources: India relies on UN Comtrade and FAS-USDA data while the United States relies on Eurostat and U.S. Department of Commerce (Bureau of Census) data.

b. Reference period: India uses data from July 2016-June 2017 while the United States uses data from 2016.

c. EU: India only includes data from 27 members while the United States uses data from all 28 members.

[8] First Written Submission of India, para. 72; Exhibit IND-29, pp. 8–9.

[9] Exhibit US-59, paras. 5–6, 10.

[10] The QUAIDS model is based off the work of Banks, Blundell, and Lewbel (1997) which currently has over 1,600 citations on *Google Scholar*.

Using data on all 28 members and with calendar year 2016 as the reference period, please provide unit export prices for HS 020714 using the following sources of data.

a. UN Comtrade data for both the U.S. and EU-28; and

b. U.S. Department of Commerce (Bureau of Census) data for the U.S. and Eurostat for the EU-28.

8. The United States reiterates that, for all the reasons explained in its responses to Questions 2 and 8, a comparison of the overall price of exports from the United States and the EU under HS code 020714 does not accurately analyze the price advantage of U.S. frozen CLQs over EU equivalents.[11]

9. But, beyond discussing the (incorrect) per unit HS 020714 price data from the EU, India also argues that the experience of Cameroon from 1996 through 2005 shows that the EU can be price competitive with the United States.[12] While it is true that in certain circumstances the EU might be price competitive with the United States, that is not always the case. And Cameroon is not a helpful proxy for determining whether the EU will be price competitive with the United States in exporting CLQs to India.[13]

10. India supports its argument with reference to unsourced data.[14] Actual reported trade data show that the EU increased frozen chicken part exports to Cameroon from 446 metric tons in 1996 to 17,222 metric tons in 2004.[15] While this is a substantial increase, the volumes are still relatively small. Moreover, Cameroon is not a major market for any U.S. agricultural exports, including CLQs. For example, in 2004, Cameroon was the 135th largest export market for U.S. agricultural products in terms of dollar value, at $7.6 million, with grains and vegetable oil as the predominant exports.[16] This low export total makes comparisons between EU and U.S. competitiveness in that market inapt.

[11] November 15 Responses, paras. 9–10, Exhibits US-55, US-56; Responses of the United States of America to Questions from the Arbitrator, paras. 11–13.

[12] India November 15 Replies, para. 14.

[13] Which is not to say that Cameroon is not a helpful proxy for analyzing how Indian consumers will respond to the availability of lower-cost frozen CLQs. Cameroon is a good proxy for that, and its experience shows that it can safely be expected that Indian consumers will purchase substantial quantities of frozen U.S. CLQs once they are made available.

[14] Exhibit IND-53.

[15] Exhibit US-92.

[16] Exhibit US-93. India was 39th in 2004 and has risen to 20th in 2016.

11. Haiti, by contrast, is a competitive market for both U.S. and EU products. Haiti is a former French colony and a traditional EU trading partner. But it is also geographically close to and economically tied with the United States. In 1996, the EU exported 0 metric tons of frozen chicken cuts to Haiti. The first EU exports under HS 020714 to Haiti occurred in 1997 at 43 metric tons, increasing to 334 metric tons in 1998 and falling to 74 metric tons in 1999, with no further exports reported between then and 2004.[17] U.S. frozen chicken parts, by contrast, increased from 0 in 1995 to 5,593 metric tons in 1996. By 1999, the volume had nearly quadrupled to 19,024 metric tons. U.S. exports to Haiti under HS 020714 have averaged roughly 35,000 metric tons a year, reaching a high of 75,112 metric tons in 2016, compared to 3,152 metric tons from the EU.[18]

12. Nor is Haiti the only country to which the United States exports a substantial quantity of frozen CLQs while the EU exports little to none. As shown in Exhibit US-96, of the top seven destinations for U.S. CLQs in 2016, three imported *no* frozen poultry cuts from the EU, and none of the other four imported more than 3,605 metric tons.

13. Simply put, the United States can export substantial quantities of CLQs to countries where the EU does not. As a result, the fact that the EU does not currently export frozen chicken to India does not suggest that the United States would not be able to do so if India were to lift its import ban.

QUESTION 9

> ***Both parties have used the term "processed poultry." To ensure consistency in the use of the terminology please provide a description and examples of the types of products in this category. Can frozen CLQs be transformed into "processed poultry"?***

14. India continues to argue that CLQs cannot be used in further processed poultry products. India continues to be wrong.

15. First, India argues that frozen CLQs cannot be used in further processed poultry products because a Food and Agriculture Organization ("FAO") report from 1991 notes that it "is preferred" to cut and debone meat sections prior to freezing because "deboning after thawing . . . 'causes hygienic and exudative problems.'"[19] But this is a risk with deboning in general, and not specific to deboning after thawing, because "dressing operations inevitably produce microbial contamination . . . through contact with equipment, tools, hands and clothes, despite all

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[17] Exhibit US-94.

[18] Exhibit US-95. EU exports to Haiti under HS 020714 were negligible between 1999 and 2015 when they reached 489 metric tons.

[19] India's Replies to Question from the Arbitrator, para. 19. India's response incorrectly quotes the source document. But India's response incorrectly uses the document for reasons other than the mis-quote.

precautions."[20] Further, since the time that the FAO issued this document in 1991, there have been substantial advances in processing technology that allow companies to improve processing safety and therefore lessen these risks. For example, microwave tempering and pulse technology systems are routinely used by large processors that make further processed products from frozen meat products.[21] These controlled atmosphere systems eliminate additional microbial contamination from occurring during this processing process. Additionally, several academic studies suggest that freezing has little to no effect on microbiological pathogen growth.[22] Given these advances in technology and understanding, it is unclear why thawing frozen poultry would present a greater microbiological or food safety risk than present when processing fresh or chilled poultry.

16. Second, India argues that because the United States correctly noted that mechanically separated meat ("MSM") should not be used when comparing U.S. prices to EU prices, somehow the United States has admitted that "CLQs are not to be further processed into other products."[23] Nothing in the U.S. discussion of the uses of MSM suggests this. The United States simply explained that it is not appropriate to compare the per unit export values of HS 020714 for the United States and the EU because the EU includes MSM in 020714, while the United States includes MSM under a different code.[24] Similarly, given the different uses for chicken meat and MSM in further processed products,[25] explaining that MSM is not a substitute for CLQs is no different from saying that aluminum is not a substitute for vinyl, even though both can be used in making a car.

17. Third, India presents only one example of a further processed quick service restaurant product that purportedly would not use frozen CLQs.[26] This is highly misleading. While certainly there is nothing that would prevent a frozen CLQ from being deboned and used to manufacture chicken nuggets, it is just as likely that an institutional consumer would simply cut

[20] IND-55, p. 1.

[21] An example of such technology is located at http://www.machlett.com/products/tempering-system.html.

[22] Exhibits US-97 and US-98.

[23] India's Replies to Question from the Arbitrator, para. 20.

[24] Opening Oral Statement of the United States of America, para. 52.

[25] Responses of the United States of America to Questions from the Arbitrator, para. 12; Exhibit US-79.

[26] India argues that McDonalds chicken nuggets are made from breast meat, not the dark meat of CLQs. India's Replies to Question from the Arbitrator, para. 22; Exhibits IND-57 and IND-58. But these exhibits do not indicate in which market the white meat chicken nuggets will be sold, so it is unclear whether white meat only nuggets are sold by McDonalds *in India*. For example, IND-58 describes the process that McDonalds follows for production of chicken nuggets in Canada, but does not state that those nuggets are then sent to India, or that nugget production in India uses the same recipe or even follows the same process. Given the Indian consumer preference for dark meat, Exhibit US-11 at 8, India does not explain why McDonalds would send white meat nuggets from Canada to the Indian market.

the CLQ into smaller pieces (either bone-in or boneless) and then use these smaller pieces in curry, boti, tikka or biranyani dishes. CLQ meat can also be minced and turned into other dishes. Asian food outlets are very popular in India and CLQs could be used in applications for other Asian cuisines from Thailand, China, Japan, and Singapore. According to Euromonitor's 2017 report on fast food in India, there were more than 89,000 chained and independent units of this type in India in 2016.[27] There are also more than 1,200 outlets dedicated to serving just chicken.

18. Indeed, existing Indian businesses would use frozen U.S. poultry if it were available. For example, an Indian meat processor that currently focuses on importing frozen pork and processing it into a range of pork products is interested in using "frozen quality poultry products from USA."[28]

QUESTION 14

> ***Assume for the sake of argument that the Arbitrator agrees with the United States that the level of nullification or impairment will not be static but can vary over time. Assume also that the Arbitrator decides that the future level of nullification and impairment will be made to depend on the magnitude of the gap between the domestic Indian price and the landed price of U.S. CLQs plus the cost of the MFN tariff. (After all, this is the basis of the United States' proposed approach to determining the level of nullification and impairment in the year 2016, an approach which India does not take issue with given that the partial equilibrium model has been used in previous cases.) To determine the level of nullification and impairment in year t + 1, it will suffice to:***
>
> ***a. Calculate the price gap for year t using information on the Indian wholesale price, U.S. export price, landing cost, cost of transport and applied MFN tariff;***
>
> ***b. Calculate the size of the Indian processed/frozen poultry market in year t;***
>
> ***c. Calculate the counterfactual volume of imports based on the model and set of parameters (demand and supply elasticities) adopted by the Arbitrator;***
>
> ***d. Multiply that volume with the U.S. export price.***
>
> ***The Arbitrator shall decide on the sources of data for the size of the Indian processed/frozen poultry market, Indian wholesale price, U.S. export price, landing cost, cost of transport, applied MFN tariff and on the values of the parameters based on the submissions and arguments of the parties. The spreadsheet on which these calculations are to be performed could be located in a secure site to which only the parties shall have password-protected access.***

[27] Exhibit US-99 at 2.

[28] Exhibit US-101.

We would like to obtain parties' views on this approach and please make sure to address the following questions:

a. Would the United States still prefer a variable to a fixed award?

b. Would India still prefer a fixed to a variable award?

c. What are the drawbacks to this approach whether from a theoretical or practical perspective?

19. In its response to this question India, among other things, urges the Arbitrator to follow in the footsteps of the *EC-Hormones* arbitrator by determining the level of nullification or impairment by "focus[ing] on trade flows."[29] And the United States has demonstrated what the trade flows would be in the absence of India's WTO-inconsistent measure.

20. India also argues that "[i]t is unrealistic for the model to project that the United States would export USD 478 million to India its first year," because that would represent "nearly 55% of its exports to the world."[30] But India is wrong to assert that this is "unrealistic." As the United States noted both in its closing statement[31] and its Responses,[32] the United States has shown on multiple occasions that it can quickly gain substantial market share when new opportunities are made available, and that it has the capacity to provide multiple hundreds of thousands of metric tons to any given country.

21. India's response to Question 14 also continues its effort to identify variables that would unnecessarily complicate the model. Starting with its November 15 Replies, India keeps attempting to identify variables that it believes should be included in the equation.[33] First it was variables such as "price of corn in the United States," "price of energy (oil)."[34] Now it is "variations in exchange rates."[35] Assigning values to all of these for purposes of determining the level of nullification or impairment would be inherently speculative. As a result, it is unnecessary to include them in the model. Rather, as the United States explained in its opening statement:

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[29] India Replies to Questions from the Arbitrator, para. 29.

[30] *Id.*

[31] Closing Oral Statement of the United States of America, para. 6.

[32] Responses of the United States of America to Questions from the Arbitrator, paras. 35–37.

[33] India November 15 Replies, para. 49.

[34] *Id.*

[35] India's Replies to Questions from the Arbitrator, para. 26.

> The DSU does not require absolute precision in setting the level of nullification or impairment, only a "reasoned estimate" in the words of the *EC – Hormones* arbitrator. There is sufficient data that the Arbitrator can use the U.S. model to determine a reasoned estimate, but adding more variables to the model could require the Arbitrator to make additional assumptions, with little or no empirical data to support them, that would make the model's results less reliable.[36]

22. Also, like many of India's other attempts to make the model more complicated, India fails to quantify the purported effect that exchange rates might have on the level of nullification or impairment. As result, the variable should not be used.[37] India failed to quantify the purported effect because there is nothing to suggest that adding an exchange rate variable would *lower* the level of nullification or impairment. For example, a Scotiabank exchange rate forecast anticipates mild appreciation of the Euro and India rupee relative to the U.S. dollar,[38] meaning that U.S. CLQs would become more competitive over time vis-à-vis both Indian domestic production *and* exports from the EU.

QUESTION 18

> ***Neither party has raised the cost of distribution and logistics in India — the cost of moving imported CLQs from the port to final consumers. How important an issue is in explaining the price gap? Would the parties be able to provide evidence on the magnitude of these costs?***

23. India's response does not assist the Arbitrator in determining the level of nullification or impairment. Even if the information sought by the question were relevant to the calculation—as explained in the Responses of the United States, it is not—India does not attempt to quantify these costs that it claims would "most likely be prohibitive" to the sale of CLQs in some parts of India. Arbitrators routinely ignore those things that "cannot be quantified,"[39] and India's unsupported assertion should be ignored here as well. India did not quantify this point because, as noted on numerous occasions,[40] the model already takes into account a number of issues by limiting its analysis to just the processed poultry market. Potential limitations, such as transportation costs, already limit the processed poultry market, so by definition they are already accounted for in the model.

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[36] Opening Oral Statement of the United States of America, para. 8.

[37] See Paragraph 23, *infra*.

[38] Exhibit US-100.

[39] *US – 1916 Act (EC) (Article 22.6 – US)*, para. 5.70.

[40] *See, e.g.*, Written Submission of the United States of America, paras. 26–28.

QUESTION 22

> ***Could India please provide documentation of how the elasticities in FAPRI's database, and in particular the Indian price elasticity of demand for poultry, have been estimated?***

24. India admits that "[t]here is no documentation that explains how the elasticities in that [FAPRI] model were estimated." As discussed above in Paragraph 4, *supra*, this makes it improper to rely on these estimates for any purpose.

QUESTION 23

> ***The United States claims that Brazil and Thailand, and to a lesser degree the EU-28, were not subject to the measure at issue because, neither low pathogenic nor high pathogenic avian influenza were reported in their poultry populations. Further, these countries did not export frozen chicken cuts or offal to India in 2016.***
>
> ***a. Could India please confirm the accuracy of these two U.S. claims?***
>
> ***b. If both claims are correct, do they not suggest that the EU will be unable to compete with the United States in the Indian market if the measure at issue is removed?***

25. India argues that the "idiosyncratic features" of its poultry market prevent major poultry exporters such as the EU from exporting poultry to India, and that those features will similarly prevent the United States from doing so. India is wrong.

26. As discussed above in Paragraphs 9–13, *supra*, lack of EU poultry exports to a country do not prove that the United States will be unable to export to that country. There is no reason to believe that the purported "idiosyncratic features" of the Indian poultry market that India claims are preventing Brazil and the EU from exporting will similarly affect the United States.