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

(DS430)

OPENING ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE SUBSTANTIVE MEETING OF THE PANEL

December 5, 2017

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I. INTRODUCTION

1. Good morning. Mr. Chairman, members of the Panel – on behalf of the United States, I want to thank you, and the Secretariat staff assisting you, for your ongoing work in this proceeding. We look forward to working with you over the next few days as you carry out your work. That work of course is to assess whether India has met its burden of showing that its "Revised Avian Influenza Measure" has brought India into compliance with its WTO obligations under the SPS Agreement.[1]

2. To recall, the panel and the Appellate Body in the original proceeding issued findings that the original measure breached several core obligations under the SPS Agreement. We would be very pleased if India carefully considered those findings and rendered its regime WTO consistent, thereby securing a positive solution to this matter.[2] For more than ten years,[3] India has maintained avian influenza measures that restrict U.S. exports. The United States has pursued every available avenue to have India lift these restrictions, including bilateral engagement, the WTO SPS Committee, WTO dispute settlement, and in further technical discussions following the expiration of the reasonable period of time for India to comply with the panel and Appellate Body findings.

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[1] Agreement on the Application of Sanitary and Phytosanitary Measure.

[2] Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 3.7.

[3] *India – Agricultural Products (Panel)*, para. 2.34

3. As we will further explain today, the Revised Avian Influenza Measure regrettably falls far short of compliance. It simply uses new dressing in an unsuccessful attempt to conceal its inconsistencies with the SPS Agreement. Specifically, India maintains at least three WTO-inconsistent barriers that continue to block trade:

- a requirement that the exporting territory be free of avian influenza before a sanitary import permit, or SIP, be granted;
- a requirement that a consignment be accompanied by a veterinary certificate, which is impossible to fulfill because India did not issue veterinary certificates; and
- to the extent the Panel examines new measures adopted after panel establishment, a post-import testing requirement whereby each consignment must be tested at the importer's expense for avian influenza.

The existence of these barriers is proved by the evidence on the record in this dispute, including the text of the Revised Avian Influenza Measure, India's own statements and actions, and trade data. We begin by summarizing this evidence before turning to some of the key legal issues.

II. THE REVISED AVIAN INFLUENZA MEASURE HAS THREE LEVELS OF RESTRICTIONS

A. India Persists in Maintaining Avian Influenza Freedom As a Condition of Entry

4. India maintains avian influenza freedom as a condition of entry. Or put another way, India bans trade from any country reporting avian influenza.

5. The baseline by which we measure the steps taken by India to comply is that at the end of the original proceeding. At that time, India insisted on avian influenza freedom as a condition of entry, and insisted that such a condition was warranted in India's view by the OIE Terrestrial Code.

6. In the original dispute, India told the panel "a ban is the natural outcome of implementing the [OIE] recommendations."[4] Furthermore, India explained how it implemented this ban, or condition of entry. In response to Question 21 in the original proceeding, India stated it "uses the OIE's World Animal Health Information System (WAHID) to ascertain the disease status of the exporting country…"[5] And that was not the first time India claimed that such a restriction was justified under the OIE Terrestrial Code. India has been claiming so for *years*. For example, the minutes from the SPS Committee Meeting that took place in June 2009 – when India's restrictions were even broader than at the time of the original proceeding – recorded India's position as follows: "The measures were based not only on OIE guidelines, but on relevant scientific literature."[6]

7. India has not shown that its revised measure departs from this baseline. Of course, India asserts in its submission that the condition of entry has been abandoned, but assertions are not evidence. Indeed, India only points to one aspect of the evidence that supposedly supports its claim: paragraph 2(4) of S.O. 2337(E). This paragraph, however, does not prove India's position. Rather, the paragraph discusses how avian influenza freedom status can be regained in the event of an outbreak.[7]

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4 India's Second Opening Statement in Original Proceeding, para. 12.

5 India's Response to Question 21 in the Original Proceeding.

6 G/SPS/R/55, para. 45.

7 India's Second Written Submission, para. 17.

8. The text does not provide that India abandoned its insistence on avian influenza freedom. Indeed, a logical reading of the text is that it should be considered in conjunction with the subsequently excised text in paragraph 2(1) of S.O. 2337(E) allowing import from areas "free from avian influenza," i.e., free from both LPAI and HPAI. In other words, the reason paragraph 2(4) explicitly talks about avian influenza freedom is because paragraph 2(1) is intended to only allow import from those territories that are indeed free from avian influenza.

9. In contrast, the evidence that India continues to maintain avian influenza freedom as a requirement is more compelling:

- India issued a statement of compliance asserting trade could be permitted from areas "*free from avian influenza* in accordance with the relevant international standard, i.e. the OIE Terrestrial Code."[8]
- S.O. 2337(E) as promulgated stated that import would be allowed from "the country, zone or compartment *free from avian influenza*…"[9]
- India issued another statement of compliance stating that that "import of poultry and poultry products shall be allowed from country, zones/compartments *free from avian influenza virus* in accordance with the relevant international standard";[10]
- India stated the deletion of the phrase "free from avian influenza" through an amending S.O. was simply for clarification;[11]
- India did not issue any instructions to government agencies, including border authorities;

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8 WT/DS430/15 (emphasis added) (Exhibit USA-3).

9 Exhibit IND-3 (emphasis added).

10 WT/DS430/18 (emphasis added) (Exhibit USA-5).

11 WT/DS430/19 (Exhibit USA-7).

- S.O. 2337(E), as amended, still provides that importation in addition to satisfying the recommendations in the OIE Terrestrial Code must satisfy the recognition for disease free areas provided for in paragraph 3 of that document;

- India says in its first written submission that:

  "it checks the OIE website to determine whether there is (or has been within the last three months) an outbreak of AI in that country. If there has not been an outbreak of AI anywhere in the exporting country, the DADF will accept the SIP application and allow imports" – i.e., India does not grant a SIP if there is an outbreak;[12]

- There is no evidence, such as trade data, that India has actually allowed any trade from a country reporting avian influenza.

There are three principal points to take away from this evidence.

10. First, although requiring avian influenza freedom as a condition of entry was a central feature of the measure considered in the original proceeding, India has continued to issue multiple statements affirming the existence of that condition. India has not explained why we should give more credence to the unsupported assertions in its submissions that it has abandoned avian influenza freedom as a condition of entry as opposed to the text India originally had in the Revised Avian Influenza Measure itself, India's statements concerning compliance, and its explanation of how it grants SIPs.

11. We note that India has stated it is "difficult to understand" why the United States keeps raising this type of evidence, such as the language in S.O. 2337(E) as originally drafted that referenced "free from avian influenza."[13] We can elucidate further. We raise it because it

[12] India's First Written Submission, para. 38.

[13] India's Second Written Submission, para. 17.

appears that the original text correctly captures the actual operation of the Revised Avian Influenza Measure, and its subsequent deletion was purely cosmetic. If India has been requiring avian influenza freedom for a decade, then says it will continue to allow importation on that basis – not once, not twice, but three times – and also has issued nothing substantive to undermine that interpretation, then one must conclude that India is continuing to require avian influenza freedom.

12. Second, the reference in the Revised Avian Influenza Measure to the product recommendations in the OIE Terrestrial Code does not indicate that the condition of entry has been eliminated. For India, applying those very recommendations has meant that it could maintain avian influenza freedom as a condition of entry.[14]

13. Finally, India has not pointed to even one instrument that demonstrates that the Revised Avian Influenza Measure has led to an end of the condition of entry requirement. In the original proceeding, India pointed to Memorandum No. 109-21/2007, which noted that the ban would continue in light of S.O. 1663(E). That memorandum communicated the continuation of the ban to the Department of Commerce, the Central Board of Excise and Customs, and offices of Animal Quarantine and Certification Services at assigned ports.[15] While we were uncertain of the memorandum's significance to the issues in the original dispute, we certainly see significance now. If India's domestic legal regime dictates that DADF issue a memorandum simply to inform

[14] *See, e.g.*, India's Response to Panel Question 8 in the Original Proceeding.

[15] India's First Written Submission in the Original Proceeding, para. 26.

its border authorities that a long-standing ban continues as expected, why is there not a similar instrument to indicate that the ban has been lifted, and that India has a completely new interpretation of the OIE Terrestrial Code?

B. India Did Not Issue Veterinary Certificates

14. The second barrier to trade under the Revised Avian Influenza Measure is that India did not issue veterinary certificates at the time India made its claim of compliance. And without certificates, a potential exporter from a territory reporting avian influenza simply cannot ship products to India. India's Panel Request, of course, does not identify veterinary certificates among the instruments that comprise the Revised Avian Influenza Measure. Moreover, based on available evidence, no such certificates existed at the time India requested a panel or the Panel was established. We have been through two rounds of written submissions. Yet, India has avoided addressing if, and *when*, it adopted and issued certificates that can be used for trade.

15. Again, we think it is helpful to consider the baseline in evaluating India's purported claim of compliance. Previously, India had veterinary certificates posted on DADF's website. India has not suggested that under its regime, anyone can *sua sponte* provide their own certificate and have it accepted by India's authorities. Instead, in order for a certificate to be accepted, it has to be recognized and issued by India's authorities. As our first written submission explained, veterinary certificates for the products subject to the original measure were removed from the website. There is no evidence that any replacement certificates were issued and capable of being utilized by the time the Panel was established.

16. India has responded with three arguments. None are convincing. First, India claims it has required veterinary certificates for import since 2001.[16] This just proves our point – India admits it has long required veterinary certificates, but failed to have any OIE consistent certificates in existence at the time it claimed compliance.

17. Second, apparently in response to our screenshot confirming that India had removed its existing certificates for the relevant products from DADF's website,[17] India presents the curious argument that India does not have an obligation to make its certificates public![18] This argument fails in at least three respects. First, it is India's burden to prove any factual assertion – India cannot meet its burden by positing the existence of a secret document. Second, the evidence belies the hard-to-accept contention that India might maintain secret veterinary certificates – the screenshot we have provided confirms that the certificates for other products were publicly posted DADF's website. Third, India has not explained how or why an authority would maintain secret veterinary certificates. The point of these certificates is to facilitate trade while guarding against SPS risks. The certificates cannot serve this role if they are not publicly available.

18. The third argument India makes is that on October 30, 2017, India accepted a proposed certificate from Spain.[19] Again, this just proves our point that no such certificate existed at the

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16 India's Second Written Submission, para. 10.

17 Exhibit USA-10.

18 India's Second Written Submission, para. 10.

19 India's Second Written Submission, para. 25.

time of panel establishment. This example only reinforces that on the relevant date – May 22, 2017, the date the Panel was established – India did not have veterinary certificates that could be used for trade. And, as India notes, it will not allow trade without veterinary certificates.[20]

C. Post Import Testing Is Not Consistent With the OIE Terrestrial Code

19. As the United States has explained, India's regulatory activity after panel establishment is not relevant to the legal matter at issue here: namely, whether the measure referred to the panel at the time of panel establishment was consistent with WTO rules. Nonetheless, the United States does not accept India's contention that India's latest actions, and in particular purported new veterinary certificates, are consistent with WTO rules. As explained in our second written submission, the certificates India has submitted, including the one it had purportedly adopted with respect to Spain, imposes a requirement for post import testing for avian influenza.[21] This is not a requirement that has any basis in the OIE Terrestrial Code, nor is there any evidence that India applies a similar requirement domestically. In other words, while India may claim it has adopted new sanitary import requirements and that these conform to the OIE Terrestrial Code, the documents upon which India relies contain requirements that are at odds with the OIE Terrestrial Code.

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[20] India's Second Written Submission, para. 10.

[21] Exhibit USA-24.

III. THE REVISED AVIAN INFLUENZA MEASURE IS NOT CONSISTENT WITH THE SPS AGREEMENT

20. In the remainder of this opening statement, the United States will highlight key points regarding certain legal issues in this dispute.

A. The Revised Avian Influenza Measure Breaches Article 3.1

21. There are two points in particular we wish to emphasize about India's claim that it is no longer in breach of Article 3.1 of the SPS Agreement.

1. India Has Failed to Prove that Import Requirements Are Based on the OIE Code

22. First, India's assertion of conformity cannot be substantiated because India has not established through evidence its precise import requirements. The panel report in this dispute was clear that the OIE Terrestrial Code distinguishes between LPAI and HPAI and uses risk mitigation conditions to facilitate importation:

> We have found a number of product-specific recommendations in Chapter 10.4 that envisage allowing the importation of relevant poultry products from countries reporting LPNAI or even regardless of the countries' NAI status, provided that appropriate risk mitigation conditions are fulfilled.[22]

Nowhere in India's two written submissions does India point to *evidence* showing that the Revised Avian Influenza measure is based on the OIE Terrestrial Code, including that it make appropriate distinctions for importation with respect to LPAI and HPAI. Instead, India summarily asserts that the "revised AI measure *expressly*" allows such importation.[23] There is

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[22] *India – Agricultural Products*, para.7.252.

[23] India's Second Written Submission, para. 4.

nothing in the Revised Avian Influenza Measure that provides for such importation, expressly or otherwise.

23. In fact, the only statement India cites is paragraph 2(1) of S.O. 2337 (E), as amended.

> The import of poultry and poultry products into India shall be allowed from the country, zone or compartment ~~free from avian influenza~~ in accordance with the product specific recommendations of the Terrestrial Animal Health Code of World Organization for Animal Health and subject to fulfilment of requirements in paragraph 3 of this notification.

But this excerpt from the measure does not establish that India is going to distinguish between HPAI or LPAI, or even what India's precise veterinary requirements are. Rather, it simply says India will allow trade consistent with the OIE Terrestrial Code *and* subject to fulfilling the recognition of disease free areas in paragraph 3 of the measure. As we have explained, there is no evidence that India has changed its interpretation of the OIE Terrestrial Code, which was inconsistent with the interpretation accepted by the panel and the Appellate Body in the original proceeding.

24. For example, with its first written submission, India provided a chart appended to S.O. 2337(E) that referenced various OIE Code Recommendations.[24] We have explained that a chart referencing various provisions does not suggest India's interpretation of those provisions has

[24] Exhibit IND-3.

changed.[25] After the United States noted this chart was not actually a part of S.O. 2337(E), India asserted that it was not "integral" in any event.[26] Indeed, India explicitly said that this chart was "not to illustrate how India would operationalize the recommendations of the OIE Terrestrial Code."[27] Thus, the chart has no relevance for the purposes of this dispute.

25. Accordingly, India has failed to meet its burden – and its claim of consistency with Article 3.1 must fail as well.

2. India Contradicts the OIE Terrestrial Code by Imposing Requirements Only on Foreign Products

26. Additionally, the Revised Avian Influenza Measure contradicts the OIE Terrestrial Code. Our submissions explain in detail the various ways the Revised Avian Influenza Measure contracts the OIE Terrestrial Code. One of those reasons is a threshold point: the OIE Terrestrial Code disclaims imposing any form of control for a disease that is not subject to control domestically. Specifically, Article 5.1.2.2 of the OIE Terrestrial Code provides:

> The international veterinary certificate should not include requirements for the exclusion of pathogens or animal diseases which are present in the importing country and are not subject to any official control programme.[28]

There is no dispute between the Parties that the Revised Avian Influenza Measure is applying controls for LPAI with respect to foreign products. Article 5.1.2.2 is clear that a Member

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[25] United States' First Written Submission, paras. 59-60.

[26] India's Second Written Submission, para. 24.

[27] India's Second Written Submission, para. 24.

[28] OIE Terrestrial Code Chapter 5.4 (Exhibit USA-15).

"should not" impose controls unless it imposes controls for the disease domestically. To impose controls in the face of this admonition is a clear contradiction. Thus, the fact that India does not control for LPAI domestically means not only that India breaches Article 2.3 of the SPS Agreement, but also that its measures contradict the OIE Code and thus breach Article 3.1 for this additional reason.

B. The Revised Avian Influenza Measure Breaches Articles 5.1, 5.2, and 2.2

27. With respect to India's claim of consistency with respect to Articles 5.1, 5.2, and 2.2, the United States addresses just one point. Specifically, India has claimed that regardless of whether its measure is presumed to be consistent with the relevant portions of the SPS Agreement under Article 3.2, its measure is nonetheless consistent with Articles 5.1 and 5.2 because Chapter 10.4 of the OIE Terrestrial Code reflects "the latest scientific evidence."[29]

28. India misconstrues the relevant obligations in Article 5.1 and 5.2. These obligations are not satisfied by simply having a risk mitigation measure that is supported by recent scientific evidence. Article 5.1 requires that the measure be supported by an assessment of risk. In assessing those risks, Article 5.2 requires a Member to take into account various factors, including scientific evidence, processing and production methods, inspection, sampling and testing methods, disease prevalence, etc. In other words, the measure reflects that it has appropriately taken into account the relevant risks. That is different than simply taking into account recent scientific evidence.

[29] India's First Written Submission, para. 101.

C. The Revised Avian Influenza Measure Breaches Articles 5.6 and 2.2

29. With respect to India's claim of consistency under Articles 5.6 and 2.2, it rests entirely on the notion that India's measure in fact conforms to the OIE Terrestrial Code. As we have explained in our submissions, that is not so. If India's post import testing is found to be in the terms of reference for this dispute, the United States recalls there is a less trade restrictive measure that is technically and economically feasible, and would meet India's appropriate level of protection: the use of OIE consistent veterinary certificates alone. Such certificates would identify the precise risk mitigation conditions applied to the product, and thus confirm that the product is indeed safe with respect to avian influenza. Accordingly, India's maintenance of such a requirement is in breach of Article 5.6 of the SPS Agreement, and Article 2.2 as well since the Revised Avian Influenza Measure is applied more than the extent necessary to protect animal health.

D. The Revised Avian Influenza Measure Breaches Articles 6.1 and 6.2

30. With respect to India's claim that the Revised Avian Influenza Measure is consistent with Articles 6.1 and 6.2 of the SPS Agreement, our submissions have explained in detail that India cannot claim consistency because India lacks veterinary certificates and insists on freedom from avian influenza as a condition of entry.[30] Instead of repeating those points, we will focus on two discrete points made by India.

[30] United States' First Written Submission, Sections V.D.2 & 3.

31. First, India has failed to meets it burden. India relies principally on the statement in the Revised Avian Influenza Measure concerning how its determination "shall be made in accordance with the requirements of the World Trade Organization Agreement on Sanitary and Phytosanitary Measures and the guidelines issued by the Central Government."[31] This is not evidence that India is fulfilling its obligations. With respect to the reference to the SPS Agreement, a reference to the SPS Agreement does not *ipso facto* satisfy India's WTO obligations under Article 6 of the SPS Agreement. All WTO Members have taken on the obligations of *all* the provisions in the covered agreements. By India's logic, does this mean that we should assume the Revised Avian Influenza Measure is less consistent with respect to any WTO obligation that it has not explicitly identified? What India needed to provide was evidence regarding what India considers the obligation to consist of and how it intends to fulfill it. India did not do so.

32. Likewise, the reference to the guidelines is not evidence that India in fact grants an effective opportunity to Members to have their territory recognized as disease-free. In particular, the guidelines do not provide any criteria or explanations concerning how India will recognize disease-free areas and consequently adapt its measure. The guidelines simply reiterate DADF's ability to request information; not what India will use such information for or when India will deem it adequate.[32]

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[31] India's Second Written Submission, para. 74.

[32] Exhibit IND-7.

33. Second, India has referenced how its questionnaire is similar to questionnaires used by other Members.[33] It is irrelevant that other Members ask these types of questions. If India simply asks for information that other Members also request in regionalization determinations, that does not mean that it grants an opportunity and will adapt its measure. It simply means that India asks questions. In this respect, the United States notes that India has not provided evidence of how it will evaluate any of the particular information in the questionnaire. Under these circumstances, all the Revised Avian Influenza Measure does with respect to regionalization is enable a Member to make a proposal to India. Simply allowing a request though is very different than having that request meaningfully considered and actually acting upon it.

34. With respect to India's statement today that it has recognized our zones yesterday, we will of course evaluate it. If it does lead to recognition of disease free areas – and trade – we will welcome it. This dispute, however, concerns the Revised Avian Influenza Measure as it existed on May 22, 2017 – the date the Panel was established. This dispute does not involve evaluation of ongoing bilateral efforts. Neither common sense nor the DSU require or permit the panel to assess a moving target. Neither side can move the target in a way that tries to favor its interests – only an examination of the measure at the time of panel establishment is consistent with the DSU and neutral to the parties' interests.

[33] India's First Written Submission, para. 31.

E. The Revised Avian Influenza Measure Breaches Article 2.3

35. Concerning India's claim of compliance under Article 2.3, the United States raises just one point concerning India's claim that it now controls for LPAI domestically: there is no evidence that such surveillance is taking place. In its first written submission, India did not even acknowledge that the National Action Plan 2015 even existed. After the United States submitted this document, India argued that it cannot understand how the United States can deny it controls for LPAI in light of the document.[34] We maintain such a position because we do not see any controls in the NAP 2015, or more critically, in any other evidence that establishes that active surveillance for LPAI is actually taking place in India.

36. The experts in the original dispute noted that before a claim of active surveillance could be substantiated, you would expect to see certain information: "the demography of poultry production in India, where it's located, the poultry type, the number of holdings containing the poultry, and how they're selected for surveillance, actively, at what frequency, and by region."[35] The only evidence on the record concerning India's domestic surveillance – NAP 2015, which was provided by the United States – does not contain such evidence. Accordingly, there simply is no evidence that India controls for LPAI domestically. Since India demands its trading partners control for the disease under the Revised Avian Influenza Measure, however, India remains in breach of Article 2.3 of the SPS Agreement.

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[34] India's Second Written Submission, paras. 44-45.

[35] Transcript of Expert Panel's Meeting with the Experts and Parties (Dec. 16, 2013), para. 1.275.

F. The Revised Avian Influenza Measure Breaches Article 7 and Annex B

37. The point we ask the Panel to take way concerning Article 7 and Annex B is a straightforward one: there is no reason that India could not promulgate the Revised Avian Influenza Measure in a manner that was consistent with these provisions. For example, India has not provided one reason why it could not precisely identify the products that were subject to the proposed measure in its notification or why India could not provide a reasonable period of time for Members to submit comments.

IV. CONCLUSION

38. Mr. Chairman, Members of the Panel, as I noted at the outset, the United States would be very happy if it could say that India has complied with the findings from the original proceeding. To that end, we have carefully considered many of the questions we have raised today, such as:

- Has India issued any documents proving that it has reversed its prior interpretation of the OIE Terrestrial Code?
- Has India issued any documents indicating that its ban is finally over?
- Had India issued any veterinary certificates by the time the Panel was established?
- Has India issued any documents reflecting its precise sanitary requirements for the various products that were at issue in the original proceeding?
- Has India issued any documents indicating the criteria or circumstances under which it will recognize disease-free areas?
- Is there any evidence that trade is taking place from areas reporting avian influenza?; and
- Is there any evidence that India is engaged in active surveillance for LPAI domestically?

The answer to all of these questions is regrettably no, and the necessary conclusion is that India has failed to show that it has brought its measure into compliance. We thank the Panel for its attention and look forward to discussing this matter further over the coming days.