

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

(DS430)

CLOSING ORAL STATEMENT OF THE UNITED STATES OF AMERICA

December 1, 2017

1. Mr. Chairman, members of the Arbitrator, the United States again thanks you, and the Secretariat staff assisting you, for your ongoing work in this arbitration, and the time and attention you have given to this meeting.
2. The purpose of this arbitration is to determine a level of suspension of concessions that is equivalent to the level of nullification or impairment resulting from India's WTO-inconsistent import ban. That level should be based on a reasoned estimate, relying as much as possible on credible, factual, and verifiable information. It does not need to be perfect.
3. But even though it does not need to be perfect, it still must be based on reason, and supported by evidence. That presents a challenge in this proceeding given the issues with identifying readily available, reliable data about the Indian poultry market.
4. The United States confronted that challenge by developing an economic model that works with the available data. Where the evidence presented a range of options, the conservative one was chosen. Accordingly, while there necessarily are assumptions in the model, they have a basis in evidence and reality. The model thus provides a reasoned estimate for purposes of the DSU. Indeed, the United States tried to develop other models that took into account additional variables, but those efforts were unsuccessful because the data simply were not there. So, rather than speculate or offer unsupported assertions, the United States used the partial equilibrium model described in the Methodology Paper, relying on the exhibits that supported the assertions on which the model was based to determine a reasoned estimate for CLQs. The United States provided plausible evidence in support of the model, which showed that the level of nullification or impairment for 2016 was no less than \$478.1 million.
5. A reasoned estimate is not based on speculation. And unfortunately there has been a lot of speculation at this meeting that should be disregarded. We heard speculation that frozen chicken is not used in further processed products. But this is not true. In fact, a previous WTO dispute involved a situation where the United States shipped frozen chicken to China, where it was processed and then shipped back to the United States.¹
6. We also heard speculation that it is hard to enter a market for the first time, and that this will prevent the United States from exporting its product to India. But numerous times in the past, the United States has entered a new market and U.S. exports quickly thrived. For example, U.S. CLQs were excluded from South Africa between 2001 and 2015. The first U.S. CLQs were shipped in March 2016, and CLQs captured 11% of the import market that year. During the first 9 months of 2017, U.S. CLQ exports to South Africa increased 224% compared to the same period in 2016, and the U.S. import market share increased to nearly 36 percent.

¹ Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, para. 2.18.

7. We heard speculation about food safety, and speculation about shipping logistics, and speculation about transportation through India. But none of it should be used in determining the level of nullification or impairment. Reasoned estimates cannot rely on speculation.

8. But speculation is fundamentally different from the need to draw reasoned inferences from the evidence presented. Indeed, given the lack of direct evidence regarding India's poultry market, such reasoned inferences are essential. For example, the United States made the reasoned inference that Indian consumers will react to lower-cost imported CLQs the same way consumers in Haiti and Cameroon did: by purchasing them in large quantities. Similarly, it is reasonable to infer that the processed poultry sector in India will grow substantially faster than the Indian economy as a whole based on a number of industry sources, not the least of which being the prediction from Exhibit IND-47: “soon, it'll be processed chicken on every plate.”

9. The United States recognizes that the model is not able to represent in perfect detail the Indian chicken market—no model can achieve that. But, for all the reasons stated in writing and orally, the model is as precise as can be reasonably achieved, and thus qualifies as a reasoned estimate for purposes of the DSU.

10. Moreover, the use of a formula will help ensure that the level of suspension remains equivalent to the level of nullification or impairment. The simple fact is that the level of nullification or impairment from India's ban is projected to grow each year. India argues that a formula is not appropriate here. But its argument is contrary to the text of the DSU, which requires equivalence, and is contrary to past arbitrator decisions that expressly note nothing in the DSU prohibits the use of an equation. Indeed, as far as the United States is aware no arbitrator has ever rejected a request from a complaining party to determine the level of suspension of concessions using an equation. There is no reason for the Arbitrator here to depart from that approach.

11. Thank you.