INDIA – MEASURES CONCERNING THE IMPORTATION

OF CERTAIN AGRICULTURAL PRODUCTS

FROM THE UNITED STATES

(AB-2015-2 / DS430)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE ORAL HEARING

March 18, 2015

Good morning Presiding Member and Members of the Division:

1. The United States welcomes the opportunity to appear before you today, and we thank you for your work on this matter.

2. The U.S. Appellee Submission set out in full the U.S. response to the arguments raised by India in its appeal. In our statement, we will briefly summarize the main points.

3. But before turning to India's arguments with respect to each of the U.S. claims, the United States would like to make an overarching point. India in its appeal makes only a few arguments regarding issues of law, and instead primarily presents alleged claims of error under Article 11 of the DSU. In order to establish a valid claim of error under Article 11 of the DSU, an appellant has a heavy burden: generally, it must establish the existence of an egregious error that calls into question the objectivity of the panel. India cannot meet that burden here. To the contrary, the record shows that the Panel carefully addressed the relevant facts presented by the parties to the dispute. Based on this review of the record evidence, the Panel made findings that were not just reasonable in light of the evidence, but were the only ones the evidence could have supported.

4. Furthermore, the record shows that the Panel provided India multiple opportunities to explain the legal and factual bases for India's response to the U.S. claims. For example, with respect to India's defense to the U.S. claim under Article 5.1 of the SPS Agreement, the Panel asked India at least four times whether India's measure was based on a risk assessment, and if so, to point to that risk assessment in the record evidence. Thus, contrary to India's arguments that the Panel failed to make an objective assessment of the matter before it, the record shows that the Panel strived to provide India with every opportunity to present its defense to the U.S. claims.

5. With this overarching point in mind, we will proceed with a brief summary of the U.S. response to India's arguments on appeal, beginning with those made concerning the Panel's findings that India breached Article 3.1 of the SPS Agreement by not basing its measures on the OIE Terrestrial Animal Health Code ("OIE Code").

I. SPS Agreement Article 3.1

A. The Panel Properly Evaluated the OIE Code

6. The gravamen of India's complaint concerning these findings is that the Panel erred by not accepting India's position that the OIE Code is a treaty that falls within the scope of the *Vienna Convention on the Law of Treaties* ("Vienna Convention"), and thus must be interpreted in accordance with the principles of treaty interpretation reflected in the Vienna Convention. But the OIE Code is not a treaty, and thus India's argument has no merit. The OIE Code is a set of "standards, guidelines and recommendations developed under the auspices of the [OIE]," to use the terminology in the SPS Agreement. And it is not, to use the terms of the Vienna Convention, "an international agreement concluded between states in written form and governed by international law."[1] Indeed, India has provided no evidence or explanation to support its position.

7. Although the specific rules of treaty interpretation do not apply to the interpretation of the OIE Code, the Panel – as the parties requested – did undertake a thorough analysis of the OIE Code, based on similar common sense principles to those reflected in the Vienna Convention.[2] Most notably, the panel analysis focused on the plain text of the OIE Code. Thus, India has not

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[1] Vienna Convention, Article 2.1(a).

[2] *See e.g.,* Panel Report, paras. 7.220, 7.224, 7.229-7.230, 7.255-7.256, 7.259.

shown, and cannot show, that the Panel's analysis would have differed under the principles reflected in Article 31 and 32 of the Vienna Convention.

B. The Panel did not Err in Deciding to Consult with the OIE

8. India also complains about the Panel's consultations with the OIE concerning the meaning of the OIE Code. India, however, has not shown that this consultation was inconsistent with any WTO rule or was in any other way improper.

9. First, Article 13 of the DSU and Article 11.2 of the SPS Agreement provide panels with broad discretion in SPS disputes to consult with experts about scientific and technical matters, and Article 11.2 explicitly allows for consultation with "relevant international organizations" – which the OIE certainly was in this dispute. Indeed, given that the OIE was the drafter of the OIE Code, the OIE was uniquely in a position to shed additional light on the proper understanding of the OIE Code. To be sure, the view of the United States was that the OIE Code was clear on its face, and that no consultations with the OIE were necessary. But the Panel's decision to consult with the OIE was fully within the Panel's discretion, and thus completely appropriate.

10. Second, the recommendations in the OIE Code are based on the underlying science regarding the animal diseases addressed in the Code, and the OIE has expertise in these scientific issues. The fact that the OIE Code is based on scientific evaluations regarding various animal diseases is plain from the role of the OIE and the text of the Code. Nor is this in dispute. Indeed, India recognized that the underlying science can be relevant in a proper understanding of the OIE Code. In criticizing the U.S. point that the OIE Code prescribes how to allow for the

safe import of products from territories reporting Low Pathogenic Notifiable Avian Influenza (LPNAI), India noted the following:

> If the science on the issue gave rise to no doubt about the safety of eggs and fresh meat of poultry from LPAI countries, it is difficult to imagine why the OIE would have formulated the standards that it did.[3]

Thus, as India itself acknowledges, the OIE Code is drafted to reflect science. The decision by the Panel to pose questions to the OIE was therefore appropriate since understanding the underlying science regarding the various provisions of the OIE Code could help the Panel become better aware of this science and thus arrive at a more accurate understanding of the OIE Code.

11. Third, WTO panels routinely consult with the relevant international organizations regarding instruments established under their auspices. The United States recalls, for example, that panels engaged in such consultations in *US – Section 110(5)* (DS160), *China – Auto Parts* (DS342), *India – Quantitative Restrictions* (DS90), and *EC – Chicken Cuts* (DS269). India has not explained why the consultation with the OIE in this dispute is different from consultations in prior disputes, nor has India presented any basis for a claim of legal error.

C. India's Evidence Concerning Other Members' AI Measures was Irrelevant

12. India's argument concerning the purported relevance of other Member's avian influenza control measures is equally without merit.[4] Assuming *arguendo* that India's representations regarding the practices of other countries is correct, India has not explained why it has any bearing on the meaning of the OIE Code – under Vienna Convention principles or otherwise. If

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[3] India, First Written Submission, para. 246.

[4] India, Appellant Submission, paras. 109-110.

certain other Members have adopted AI control measures that are more stringent than those set out in the OIE Code, it may be that those measures were the result of a scientific risk assessment particular to that Member's situation and in accordance with that Member's level of protection. Or, perhaps, certain Members – as India may have done here –adopted certain measures for trade policy reasons. Furthermore, even under the principles of treaty interpretation that India argues are applicable to the OIE Code, the actions of a handful of countries could not "establish the *agreement* of the parties"[5] to the OIE Code regarding its interpretation. For these reasons, India's evidence concerning the content of other Member's measures is not instructive on the meaning of the OIE Code.

II. SPS Agreement Articles 5.1, 5.2, and 2.2

13. India's arguments concerning the relationship between Articles 5.1, 5.2, and 2.2 are misplaced because they fail to recognize the obligation at hand when assessing the consistency of a measure under Articles 5.1 and 5.2. Specifically, as one panel noted, the obligation is that "[a]ny SPS measure must be based on a risk assessment, which, in turn, must be based on scientific evidence."[6] Whether such an assessment exists is the pertinent question in assessing whether a measure is consistent with SPS Agreement Articles 5.1, 5.2, and by consequence Article 2.2.

14. The United States sought the answer to whether India had a risk assessment before these proceedings commenced by sending a request to India pursuant to SPS Agreement Article 5.8.

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[5] Vienna Convention, Art. 31.3(b) (emphasis added).

[6] *Australia – Apples (Panel)*, para. 7.214.

India did not respond. The Panel gave every opportunity to India to answer this question including the following:

- The Panel sought clarification from India at the First Panel Meeting;
- The Panel requested India in Panel Question 31 to confirm whether India's AI measures are based on a risk assessment, and if so, to provide it to the Panel;
- The Panel requested India at the Second Panel Meeting to answer whether its measures are based on a risk assessment; and
- The Panel requested India in Panel Question 59 to confirm whether India's measures are based on a risk assessment.

15. What were India's responses to these questions? They include in pertinent part the following:

- It is India's position that India is not required to conduct a risk assessment for measures which conform to the international standards pursuant to Article 3.2 of the SPS Agreement. The same is reflected in the principle of harmonization as provided in Article 3 and the recital of the SPS Agreement.[7]
- India is not required to conduct a risk assessment for measures which conform to the international standards pursuant to Article 3.2 of the SPS Agreement.[8]

16. In short, India provided no evidence or argument that its measures were in fact based on a risk assessment. Accordingly, the record of the dispute has no evidence that India based its measures on a risk assessment or that the Panel deliberately disregarded any evidence submitted by India. Thus, India breached Articles 5.1 and 5.2, and as the Appellate Body has previously found, this suffices to establish the consequential breach of Article 2.2.

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[7] India, Response to Panel Q. 31.

[8] India, Response to Panel Q. 59.

III. SPS Agreement Article 5.6

17. We would like to address two particular aspects of India's claims concerning the Panel's findings under SPS Agreement Article 5.6. First, India claims that "the Panel did not identify the proposed alternative measure with precision and therefore committed a legal error by concluding that the alternate measure would fulfill India's ALOP."[9] The United States, however, clearly identified in its submissions that its proposed alternative measure are the recommendations in Chapter 10.4 of the OIE Code. Indeed, the Panel explicitly listed the OIE Code recommendations per the references made in U.S. submissions.[10] It was not simply clear to the Panel though; it was also *perfectly clear to India during the Panel proceedings* that the alternative measure was in fact the specific recommendations identified by the United States in Chapter 10.4. Specifically, consider how India describes the U.S. alternative measure in its second written submission:

> it [the United States] proposes control measures or veterinary certificate requirements prescribed under Chapter 10.4 of the OIE Code, which the US believes address the level of risk.[11]

In other words, the alternative measure that India claims to be indefinite on appeal was precisely recognized by India itself before the Panel – and India had a full and fair opportunity to defend against it.

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[9] India, Appellant Submission, para. 253.

[10] Panel Report, para. 7.529, citing in footnote 997 (United States, First Written Submission, para. 134; United States, Response to Panel question No. 37; United States, Second Written Submission, paras. 50 and 59-61).

[11] India, Second Written Submission, para. 89.

18. Second, India claims the "alternate measure identified by the United States to fulfill India's ALOP was not based upon the measure at issue but was instead based upon its domestic control measure."[12] That is not correct. The United States in its submissions highlighted that the alternative measure would achieve India's purported ALOP:

- [a]ssuming arguendo though that the ALOP was extremely high – to prevent any infection by LPNAI subtypes – the control measures in the OIE Code are sufficient to achieve it.[13]
- In this respect, even if one accepted India's purported statements that it should be allowed to specify its ALOP in terms of preventing ingress and establishment of LPNAI, then application of the OIE Code should suffice.[14]

That is precisely how the Panel found. The Panel accepted India's proffered ALOP and also that the OIE Code would achieve that ALOP as the United States argued.[15] Accordingly, India's arguments simply misread the proceedings before the Panel and the Panel report.

IV. SPS Agreement Article 6

19. The Panel properly found that India does not recognize the concepts of disease-free areas. As the Panel explained, India's AI measures contradict the concept by *requiring* country-based application,[16] and there is nothing in the record to suggest that India nonetheless recognizes the concept.[17] On appeal, India argues that, because India's central government has broad statutory

[12] India, Appellant Submission, para. 253.

[13] United States, First Written Submission, para. 136.

[14] United States, Second Written Submission, para. 56.

[15] Panel Report, paras. 7.554, 7.571, 7.574-7.576, 7.580-7.586.

[16] Panel Report, para. 7.702.

[17] Panel Report, para. 7.703.

authority to regulate or restrict the importation of livestock or livestock products for animal health purposes in such a manner and to such an extent as India's central government may think fit, and could therefore have changed its AI measures (which preclude recognizing the concepts of disease-free areas) at any time, the Panel erred in finding India in beach of its Article 6 obligations.[18] But this statutory authority is not relevant to the issues in dispute, and in no way calls into question the Panel's findings. The Panel found that S.O. 1663(E), the measure containing India's import prohibitions from countries reporting AI, on its face contradicts the concept of disease-free areas with respect to AI. That India might have authority to change this measure does not reflect recognition by India of the concept of disease-free areas.

20. Nor did the Panel err in concluding that a request under Article 6.3 is not a pre-requisite to the existence of obligations by a Member under Article 6.1. India's argument to the contrary[19] is unfounded. As the Panel explained,[20] the text of Article 6.1 makes clear that it creates a freestanding obligation, in contrast to other provisions of the SPS Agreement that explicitly condition an importing Member's actions upon an action by the exporting Member. Indeed, the phrasing of the first sentence of Article 6.1 – "ensure that their sanitary or phytosanitary measures are adapted" – makes clear that it covers not only a failure to recognize particular disease-free areas where an exporting Member has made the necessary demonstration, but also adoption of measures that fail to permit the importing Member to account for relevant differences in the sanitary or phytosanitary characteristics of different areas.

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[18] India, Appellant Submission, paras. 211-224.

[19] India, Appellant Submission, paras. 235-241.

[20] Panel Report, paras. 7.674-7.680.

V. SPS Agreement Article 2.3

21. India challenges the Panel's findings and conclusions under Article 2.3 with respect to one of the ways that India's measures discriminate against imported products, offering several arguments concerning the Panel's consultation with the individual experts. None of these arguments have merit. First, contrary to what India asserts,[21] nothing about the OIE Code prevents the Panel from evaluating, or asking experts for assistance in evaluating, the evidence of India's domestic AI control measures or of whether AI is exotic to India. Indeed, as the United States explained at length in its Appellee Submission, India's argument is contrary to both Article 11 of the DSU and to the OIE Code.

22. Second, India argues that the Panel's questions to the experts improperly shifted the burden of proof with respect to whether India had LPNAI.[22] Yet India's argument misunderstands the allocation of the burden of proof in a dispute settlement proceeding – in which, after a complaining party makes out its *prima facie* case, a responding party must prove the case it makes in response. India's assertion of LPNAI-freedom was its response to the U.S. *prima facie* case.[23] Moreover, India is in any event incorrect in arguing that the Panel's questions to the experts on the subject of whether India is free of LPNAI reflect an allocation by the Panel of the burden of proof, as is clear when those questions are viewed as a whole.[24]

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[21] India, Appellant Submission, paras. 289-297.

[22] India, Appellant Submission, paras. 298-304.

[23] Panel Report, para. 7.441.

[24] Questions from the Panel to the Individual Experts, 24 October 2013.

23. Third, India argues that the Panel's questions to the individual experts delegated decision-making authority to the experts regarding the evidence on India's claims of LPNAI-freedom.[25] India's argument on appeal fails, both because the Panel conducted its own objective assessment of the answer, and because the Panel's questions to the experts in no way delegated decision-making responsibility but instead properly sought scientific and technical assistance in evaluating scientific and technical evidence.

VI. Conclusion

24. In conclusion, we would like to recollect straightforward – and well established – findings by the Panel:

- India maintains AI measures that not only fail to conform to the relevant international standards, but contradict those standards including by prohibiting products that the OIE Code provides can be safely traded and applied on a regionalized basis.
- Despite imposing AI measures that contradict international standards, India has no risk assessment to support its measures.[26]
- India's measure on its face does not recognize the concepts of disease-free areas. As the Panel explained, its AI measures contradict the concept by *requiring* country-based application,[27] and there is nothing in the record to suggest that India nonetheless recognizes the concept.[28]
- While, with respect to imported products, India maintains AI measures that contradict the OIE Code and will not even recognize the concept of disease-free areas with respect to AI, the Panel correctly found that the situation with respect to domestic products in India was far different.

[25] India, Appellant Submission, paras. 305-307.

[26] Panel Report, para. 7.317.

[27] Panel Report, para. 7.702.

[28] Panel Report, para. 7.703.

These basic elements go to the heart of the obligations in the SPS Agreement and dictate the findings that the Panel correctly arrived at.

25. Presiding Member, Members of the Division, this concludes our opening statement. We thank you for your attention and would be pleased to respond to any questions you may have.