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**Dispute Settlement Body
19 July 2016**

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 19 JULY 2016

Chairman: Mr. Xavier Carim (South Africa)

1 INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

A. Recourse to Article 22.2 of the DSU by the United States (WT/DS430/16)

1.1. The Chairman drew attention to the communication from the United States contained in document WT/DS430/16 and invited the representative of the United States to speak.

1.2. The representative of the United States recalled that on 19 June 2015, the DSB adopted the Panel Report, as modified by the Appellate Body Report in the dispute: "India – Agricultural Products", finding that India's avian influenza measures breached numerous provisions of the WTO SPS Agreement. The DSB had accordingly recommended that India bring its measures into conformity with its obligations under the SPS Agreement. The United States and India had agreed that the reasonable period of time for India to implement the DSB's recommendations and rulings would expire on 19 June 2016. India had not removed or altered the measures at issue in the DS430 dispute within that period, as was clear from the statement made by India at the meeting of the DSB on 22 June 2016. The United States noted that as of the end of the reasonable period of time, and indeed as of the time of the US request under Article 22.2 of the DSU, India had not even claimed that the measures that were the subject of the DSB's recommendations had been modified. In the absence of any agreement on compensation, the United States had requested authorization from the DSB to suspend concessions or other obligations with respect to India at an annual level based on a formula commensurate with the trade effects caused to the interests of the United States, by the failure of India to comply with the recommendations and rulings of the DSB. Based on currently available data, the United States estimated this figure to be approximately US\$450 million in 2016. The United States would update this figure annually. The United States noted that yesterday, on 18 July 2016, India had submitted to the Chairperson of the DSB an objection under Article 22.6 of the DSU to the level of suspension of concessions or other obligations proposed by the United States, thereby referring the matter automatically to arbitration. The United States noted that the meeting was not necessary in light of the objection that India had submitted. Nonetheless, the United States appreciated the opportunity India had afforded them to note to the DSB the US concerns with India's lack of compliance in this dispute and to urge India to come into compliance as soon as possible.

1.3. The representative of India said that, on 18 July 2016, India had submitted a written objection to the US request for authorization to suspend the application of concessions, or other obligations, to India. He said that India was deeply disappointed at the US move to pursue this request for suspension of concessions in this dispute. India recalled that on 19 June 2015, the DSB had adopted the recommendations and rulings in the dispute: "India – Measures Concerning the Importation of Certain Agricultural Products" (WT/DS430). At the following DSB meeting, India had informed the DSB of its intention to implement the DSB's recommendations and rulings pertaining to this dispute. On 8 December 2015, India and the United States had informed the DSB that the parties had agreed on a reasonable period of time, ending on 19 June 2016, for India to implement the recommendations and rulings. To fully comply with these, Indian authorities had

been conferring with interested parties and the relevant administrative authorities since the adoption of the DSB's rulings and recommendations. They had held extensive internal stakeholder consultations in this regard. Based on these consultations and deliberations, India had prepared the draft notification on the proposed measure and had notified the SPS Committee through its notification G/SPS/N/IND/143, dated 20 April 2016. This had allowed the importation of poultry and poultry products into India from countries, zones or compartments free from avian influenza, in accordance with the relevant international standard, i.e. the OIE Terrestrial Code. The draft notification provided a 60-day time-period for interested parties to make comments. Further, India had amended item 8 of the duly filled-in standard format, submitted with the notification, to appropriately reflect the relevant international standard in an addendum dated 21 June 2016. India received comments on the draft notification from one Member only, namely, the United States. These had been taken into consideration by the Government, which had subsequently issued the new notification, S.O. 2337(E), dated 8 July 2016 ("notification"). The notification had been issued in exercise of the power conferred by sub-section (1) of Section 3 and Section 3A of the Livestock Act, 1898 (9 of 1898) and superseded the earlier notification of the Government of India in the Ministry of Agriculture published in the Gazette of India, Extraordinary, part II, Section 3, sub-section (ii), number S.O.1663 (E) dated 19 July 2011, which was the measure in the present dispute. The notification had come into effect from the date of publication in the Official Gazette on 8 July 2016.¹ The notification took into account the findings of the Panel and of the Appellate Body in the DS430 dispute and had provided that the importation of poultry and poultry products shall be allowed from countries, zones or compartments that were free from avian influenza virus in accordance with the relevant international standard, the OIE Terrestrial Code. The notification had further provided for the process to be followed for recognition of such countries, zones or compartments in conformity with Chapter 10.4 of the OIE Terrestrial Code and the SPS Agreement. Pursuant to this notification, India had also framed the relevant guidelines referred in the notification². With the publication of the new notification on 8 July 2016 that had superseded the earlier notification S.O. 1663(E), India considered that it had fully complied with the rulings and recommendations of the DSB in this dispute. He noted that on 18 July 2016, India had also circulated a statement regarding its implementation, which had been circulated in document WT/DS430/18.

1.4. After having issued its final notification on 8 July 2016, in compliance with the DSB's rulings and recommendations, India requested the United States to enter into a "sequencing agreement" whereby the US would suspend its request for retaliation and pursue the matter, if necessary, in a compliance panel under Article 21.5 of the DSU. India stated that it was common practice for Members to enter into such "sequencing agreements" to sequence compliance and retaliation. The United States had done so in many other disputes. Members had agreed in the past, on an ad hoc basis, that the procedure for examining the WTO-inconsistency of the implementing measures would need to be terminated before granting the authorization for retaliation measures. This would enhance certainty and was the logical step at that stage of the proceedings. India had recently entered into one such agreement with the United States in the DS436 dispute, despite the fact that India had opposed the US claim of compliance in that dispute. Members had entered into such agreements regardless of the specific interests in a particular dispute. India believed that the fact of initiating a retaliation request did not take away the possibility of entering into such an understanding. India expected the United States to follow such a course in good faith in this dispute too, not only to enhance certainty in the dispute, but also to remove ambiguity for other Members. Regarding the US recourse to Article 22.2 of the DSU in the dispute: "India – Measures Concerning the Importation of Certain Agricultural Products" (DS430), the Indian authorities had announced that India had brought the measures at issue into conformity and that, therefore, the request for suspension of concessions had no legal basis. If there was a disagreement between the United States and India on this matter, the proper course of action was first to have recourse to Article 21.5 of the DSU. It had been the consistent practice of WTO Members to sign sequencing agreements to ensure that this proper order be respected.

1.5. India wished to draw Members' attention to the recent statement made by the United States that "the DSB cannot grant authorization to suspend concessions in any amount where the Member concerned has come into compliance".³ India agreed with this statement. Before the DSB could grant authorization, in case of disagreement as to whether there had been compliance, the

¹ The notification is available on <http://egazette.nic.in/WriteReadData/2016/170589.pdf>.

² The guidelines can be accessed at www.dahd.nic.in.

³ WT/DS381/32, p. 3.

fact of non-compliance must have first been established in accordance with Article 21.5 of the DSU. Should the DSB, following a proceeding under Article 21.5 of the DSU, rule that the measures taken to comply by India did not exist or were inconsistent with a covered agreement, it would have then been appropriate for the United States to request suspension of concessions under Article 22.6 of the DSU. In any event, India objected to the level of suspension of concessions or other obligations under the GATT 1994 proposed by the United States in document WT/DS430/16. Should the DSB, following a proceeding under Article 21.5 of the DSU, rule that the measures taken to comply did not exist or were inconsistent with a covered agreement, then the Article 22.6 arbitrator would resume its work. Accordingly, as required by Article 22.6 of the DSU, the matter shall be referred to arbitration. While India believed that it had complied with the recommendations and rulings in this dispute, it would continue to discuss bilaterally the concerns, if any, of the United States and would seek to resolve them. In fact, the relevant authorities of India and the United States had scheduled a bilateral discussion for 20 July 2016 regarding this matter. India urged the United States, once again, to enter into a sequencing agreement in order to provide certainty to the procedures under this dispute. In the meantime, India would continue to work with the United States to understand and address any remaining concerns.

1.6. The representative of the United States said that, under Article 22.6 of the DSU, the negative consensus rule applied within 30 days of the end of the period for compliance. By submitting the Article 22.2 request, the United States was preserving its negative consensus rights. Taking this step was neither surprising nor unusual. Again, the United States noted that as of the end of the reasonable period of time, and at the time of the US request under Article 22.2 of the DSU, India was not even claiming that the measures at issue had been modified. The United States remained prepared to engage with the Government of India to facilitate its coming into compliance with the DSB's recommendations in this dispute. Regarding sequencing agreements, as India knew, the US position was that sequencing agreements were not required under the DSU. India did not provide certain aspects of its new measures to the United States until a mere five days before the present meeting, and setting aside whether they would comply with India's WTO obligations or the DSB's recommendations and rulings, it remained unclear to the United States whether those aspects had even been officially promulgated. Nonetheless, the United States continued to study the measures that it had only recently received from India. The United States remained willing to discuss a variety of pending issues in this dispute with India, including procedural approaches that could achieve efficient and effective resolution of this dispute, while protecting US rights.

1.7. The representative of India thanked the United States for its comments. While the United States did initiate its request for suspension of concessions before the final notification, it could have suspended its request pending the issuance of the final notification. India had been in continuous consultations and discussions with the United States on this matter. As it had already been stated, India and the United States would meet on 20 July to discuss this matter. India looked forward to working with the United States to enter into agreed procedures in this dispute.

1.8. The representative of the European Union said that her delegation noted India's statement that it had taken measures to comply with the DSB recommendations and rulings. The EU also noted that the United States did not agree that India had brought its measures into compliance with the covered agreements. It appeared, therefore, that "there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB within the meaning of Article 21.5 of the DSU. The EU recalled that, pursuant to that provision "such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible recourse to the original panel". In cases of disagreement about the existence or consistency with WTO rules of compliance measures, concessions or other obligations could be suspended under the DSU once there is a multilateral determination on the alleged compliance action. The EU trusted that the India and the United States would ensure that the DSU provisions regarding compliance and suspension of obligations in this dispute could be conducted efficiently and in the correct sequence. Finally, the EU recalled that it had participated as a third party in the panel and appeal proceedings in this dispute. Therefore, pursuant to Articles 10.1 to 10.3 of the DSU, the EU reserved its right to participate as a third party in any subsequent proceedings, including with respect to any disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the DSB's recommendations and rulings.

1.9. The representative of Canada said that his delegation would briefly comment on the remarks made by the United States regarding the DSB's role in considering authorizations to suspend

concessions and objections to such requests. As Canada had noted in the past, it considered that these requests and objections to them should be considered by the DSB in the course of a meeting in order for the referral to arbitration to occur. Canada would encourage the parties to come to an agreement on procedures that would govern the next steps in this dispute. Canada was encouraged by the apparent willingness expressed by the parties to come to an arrangement that served both their interests and those of the dispute settlement system.

1.10. The representative of Japan said that his delegation recognized that a complaining Member had the legitimate right to have recourse to Article 22.6 of the DSU when the relevant conditions under the DSU were satisfied. However, practice had developed under which the parties to a dispute could conclude an ad hoc agreement on the procedures under Articles 21 and 22 of the DSU to address the issue of sequencing. Under this practice, "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings", the parties committed themselves to have recourse to the compliance proceedings under Article 21.5 of the DSU prior to the arbitration under Article 22.6 of the DSU. These procedural arrangements would have implications for the existing time-frames under the DSU, but had been, and would provide a practical way forward by securing a legal certainty at a very critical stage in a dispute. This practical arrangement made sense for the following reasons: (i) the need to fully review complex issues of compliance through an adjudicative process and multilateral decision by the DSB; (ii) to secure the parties' rights to appeal; and (iii) to provide the basis for the work of the Arbitrator under Article 22.6 of the DSU. Japan noted a timing issue with respect to this dispute but encouraged the parties to resolve this procedural issue as soon as possible.

1.11. The DSB took note of the statements and that the matter raised by India in document WT/DS430/17 has been referred to arbitration, as required by Article 22.6 of the DSU.
