

***INDIA – MEASURES CONCERNING THE IMPORTATION  
OF CERTAIN AGRICULTURAL PRODUCTS  
FROM THE UNITED STATES***

**(DS430)**

**EXECUTIVE SUMMARY OF  
THE FIRST WRITTEN SUBMISSION OF  
THE UNITED STATES OF AMERICA**

**April 19, 2013**

## **I. INTRODUCTION**

1. A fundamental requirement of the SPS Agreement is that a Member's SPS measures be based on scientific principles and scientific evidence. A Member generally complies with these obligations by basing its measures either on relevant international standards, guidelines, or recommendations, or on a risk assessment. With respect to the measures at issue here – measures that have been in place for over six years – India has done neither.

2. India's measures prohibit the importation of various agricultural products from countries that report outbreaks in poultry and wild birds of what is known as NAI, including a subset known as LPNAI. The OIE, the organization whose standards, guidelines and recommendations the SPS Agreement designates as the international standards, guidelines and recommendations for animal health and zoonoses, has issued recommendations for reporting NAI and for the safe trade of poultry and poultry products with respect to NAI. Those scientifically based recommendations explicitly disclaim the types of import prohibitions India maintains.

3. Moreover, India treats its *own products* differently from imported products. India does not engage in surveillance activities that are likely to detect LPNAI, a disease, which if found in other countries, triggers application of its import prohibitions. India also does not impose any comparable restrictions on the internal movement of the products that it prohibits for import.

4. In sum, India has failed to comply with the most basic obligations in the SPS Agreement, and no detailed scientific analysis is required to reach this conclusion.

## **II. SUMMARY OF ARGUMENTS**

5. This dispute can be distilled to a few central facts that clearly establish India's breaches of its WTO obligations. Specifically, there are facts that establish that India needed to undertake a risk assessment and failed to do so; that India's measures hold the exports of other Members to severe requirements that India's own products can ignore; and that India was obligated to notify its measures and allow a reasonable interval before putting them in force, but did not do so.

## **III. BIOLOGY OF AVIAN INFLUENZA**

6. AI does not refer to a single or homogenous disease, but rather different diseases caused by an assortment of different viruses. Some variants of AI viruses cause HPAI, a highly contagious disease that can decimate poultry flocks. There is also LPAI, a much milder, often asymptomatic disease in poultry. Most AI strains do not affect humans because they do not readily transmit to humans. Human infection has typically occurred in circumstances involving the close handling and contact of infected birds.

7. With respect to the parties' AI situations, the United States has detected LPNAI – H5 and H7 subtypes of LPAI – in poultry. India, however, has not notified a single outbreak of LPNAI. In contrast, India has detected over 90 outbreaks of HPAI during a period in which the United States has had no HPAI outbreaks.

#### **IV. INTERNATIONAL STANDARDS FOR AVIAN INFLUENZA CONTROL**

8. The OIE Code sets forth recommendations for the control of AI. These recommendations recognize distinctions between HPAI and LPAI and that control measures will need to be tailored to the specific product at issue. Of particular note, the OIE Code explicitly provides that most of the products that India prohibits from import, such as poultry meat and eggs, can be safely imported from territories reporting LPNAI through the use of the proper control measures.

9. The OIE Code's system for the control of AI can be roughly divided into five components for the purpose of this dispute: (i) proper reporting; (ii) classifying a territory; (iii) applying the appropriate control measure based on the classification of that territory; (iv) zoning to ensure the impact of restrictions is appropriately tailored; and (v) surveillance. The fifth component is essential to ensuring the prior four mechanisms function properly.

10. When it comes to its own exports, India invokes the OIE Code to justify their safety. First, after it has suffered an outbreak of HPAI, India routinely argues that it has regained NAI freedom. Second, India recognizes compartments within its own territory that it holds out as being entitled to take advantage of the OIE's recommendations regarding zoning.

#### **V. INDIA'S MEASURES**

11. In the fall of 2006 – without prior warning – India proceeded to prohibit the import of various U.S. poultry and pork products. On February 2, 2007, months after U.S. imports have been subject to import prohibitions, India finally published a document in the Gazette of India Extraordinary, S.O. 102(E), which reflected the measures prohibiting U.S. imports on account of LPAI. Other notifications subsequently followed. The most recent notification issued by India's DAHD is S.O. 1663(E). Unlike prior DAHD notifications, it has no set expiration date. These notifications are issued pursuant to the India's Livestock Importation Act, 1898 (9 of 1898).

12. Before initiating this dispute, the United States made every reasonable effort to resolve its concerns. In addition to bilateral talks, discussions in the SPS Committee, and offers for technical discussions, the United States also asked India to provide an explanation as the reasoning behind its measures pursuant to SPS Article 5.8. Over 14 months have passed since this request, yet India has not provided the requested explanations.

#### **VI. INDIA'S INTERNAL AVIAN INFLUENZA CONTROL MEASURES**

13. India's surveillance and control policies for AI are set forth in DAHD's AI Action Plan. This plan does not mandate surveillance necessary for effective detection of LPNAI, resulting in a failure to apply any controls on the movement of products due to LPNAI in India. Moreover, India's AI Action Plan only imposes control measures that extend a few kilometers from the site of an HPAI outbreak. Accordingly, occurrences of NAI in India will not result in restrictions on the movement of domestic products within India provided the products come from locations outside of the small zone where these control measures are applied.

## **VII. STANDARD OF REVIEW**

14. DSU Article 11 provides that a panel should “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” Further, since there is no risk assessment in this dispute, there is also no scientific evidence needing scrutiny with expert assistance.

## **VIII. LEGAL CLAIMS**

### **A. India’s Measures Are Subject To The SPS Agreement**

15. Because India’s measures are sanitary measures as defined under Annex A of the SPS Agreement (their objectives include those provided for in subparagraphs (a) through (c)), and because the measures affect international trade by imposing import prohibitions, the measures are subject to review for consistency with the SPS Agreement.

### **B. India Breached Articles 5.1, 5.2, And 2.2 Of The SPS Agreement By Failing To Undertake A Risk Assessment And Failing to Consider The Relevant Scientific Evidence**

16. Because India has stated that its measures were adopted to address risks associated with both diseases and food safety, the SPS Agreement obliges India to base its measures on both types of risk assessment – a Pest Risk Assessment and a Food Safety Risk Assessment. India has done neither. The United States has requested for India to provide a risk assessment without any success. As India’s measures are not based on a risk assessment, India is in breach of SPS Article 5.1. Additionally, without a risk assessment, India could not have taken into account the factors noted in SPS Article 5.2, thereby breaching that provision as well.

17. With respect to the document that India provided at the October 2010 meeting of the SPS Committee – which India subsequently disavowed as a risk assessment – it does not constitute a Pest Risk Assessment or a Food Safety Risk Assessment either. That document is deficient with respect to all of the elements required for either assessment.

18. A finding that SPS Article 5.1 or 5.2 has been breached results in a violation of Article 2.2. Therefore, in the absence of *any* risk assessment, and, thus, in the absence of sufficient scientific evidence, supporting India’s measures, India also breaches Article 2.2. India’s ban on the identified avian products, moreover, is not maintained with sufficient scientific evidence because there is no scientific evidence that these products may not be safely traded under any circumstances. To the contrary, the scientific evidence establishes that LPAI virus is not present in poultry meat or inside eggs and thus LPAI cannot be transmitted through these products.

19. The United States notes that India may not invoke SPS Article 5.7 to avoid its obligations under Articles 5.1 and 5.2. Although it is India’s burden to establish such a defense, the facts here are sufficiently defined as to confirm the unavailability of Article 5.7. In particular, relevant scientific evidence exists and it does not support the imposition of import prohibitions.

### **C. India Breached Article 3.1 By Failing to Base Its Measures on the OIE Code**

20. SPS Article 3.1 imposes a positive obligation on a Member to base its measures on international standards unless the Member's measure is justified through another provision of the SPS Agreement. The relevant international standards in this dispute, per Annex A of the SPS Agreement, are those set out in the OIE Code.

21. A defining characteristic of the OIE Code is that it distinguishes between HPNAI and LPNAI with respect to trade. India's measures refuse to make such a distinction and impose a complete ban for certain products regardless of whether the country is reporting HPNAI and LPNAI. In short, the OIE Code allows trade; India's measures do not. Under these circumstances, there can be no dispute that India's measures are not based on the OIE Code.

22. India's failure to abide by Article 3.1 is not excused by Article 3.3. India cannot avail itself of this provision because it lacks a risk assessment. Moreover, India cannot invoke Article 3.3 as a result of its ALOP. Although India has not elucidated its ALOP, it may be possible to infer it from measures India is applying. India does not require surveillance that would effectively detect LPNAI and, even with respect to the more dangerous HPAI, imposes only a simple quarantine zone of a few kilometers. Viewed together with the minimal restrictions on movement of domestic products that India imposes following domestic HPAI outbreaks, it is clear that measures based on the OIE international standard would achieve India's ALOP.

**D. India Breached Articles 5.6 and 2.2 By Maintaining Sanitary Measures That Are More Trade Restrictive than Required to Achieve its Appropriate Level of Protection**

23. A complainant must establish three cumulative elements for a breach of SPS Article 5.6. First, there must be an alternative measure that "is reasonably available taking into account technical and economic feasibility." Here, the OIE Code provides a reasonably available alternative. Second, the measure must achieve "the Member's appropriate level of sanitary or phytosanitary protection." The OIE Code achieves India's ALOP because some products India prohibits are not vectors for transmission, and in any case, the OIE control measures have proven effective. Also, the OIE Code's provisions for AI containment, and trade in products originating outside the area where AI was detected, through the use of zoning and compartmentalization, is consistent with India's measures with respect to *domestic* products, which impose controls and restrictions on products only within a limited area following an AI outbreak. Third, the measure must be "significantly less restrictive to trade than the SPS measure contested." As the OIE Code allows for trade from countries reporting LPNAI detections and India's measures do not, the OIE Code is less trade restrictive. Thus, all three elements are satisfied.

24. A breach of SPS Article 5.6 may also indicate a breach of Article 2.2. The first component of Article 2.2 is that a measure be "applied only to the extent necessary to protect human, animal or plant life or health ..." A finding under Article 5.6 necessitates a determination that a viable alternative measure that achieves a Member's ALOP exists and is less trade restrictive. The existence of such an alternative measure – and the concomitant finding that the Member has declined to adopt it – may lead to the conclusion that a Member has adopted a measure that is applied to a greater extent than necessary and is accordingly inconsistent with Article 2.2.

## **E. India Has Breached Its Obligations Under Article 6 of the SPS Agreement**

25. India’s measures ban products from all parts of a country whenever NAI is detected anywhere in the country. This precludes the application of AI restrictions on a regionalized basis, as provided for in the OIE Code, and as required under SPS Article 6.

26. By applying its measures exclusively on a country-basis, India breaches both the first and second sentences of Article 6.1. First, India fails to ensure that its measures are adapted to the sanitary characteristics of the areas from which covered products originate, contrary to the first sentence of Article 6.1. Even if there has been no detection of NAI within thousands of kilometers of the area from which covered products originate, and regardless of how rigorous a country’s AI-control mechanisms are, India bans the shipment of those products based on a single detection of NAI anywhere in the country of origin.

27. Second, by applying its measures on a country-basis, India has failed to take into account the considerations specified in the second sentence of Article 6.1. India’s measures preclude it from accounting for “the level of prevalence” (*i.e.*, the lack of prevalence) of NAI in areas within a country that are far from a detection. Under its measures, India is also precluded from accounting for “the existence of [disease] eradication or control programmes.” Also contrary to the second sentence of Article 6.1, India has not taken into account the relevant international AI guidelines in OIE Code Chapter 10.4, which provide for the application of AI-related trade restrictions at the zone or compartment level when appropriate surveillance, control, and biosecurity measures are in place.

28. India’s measures are also contrary to Article 6.2. The first sentence of Article 6.2 requires Members to recognize the concept of disease-free areas. Yet India’s measures explicitly preclude recognition of such areas upon notification of a detection of NAI anywhere in the territory of a Member. The second sentence of Article 6.2 requires countries to determine disease-free areas “based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.” By precluding recognition of disease-free areas with respect to AI, India’s measures preclude it from determining HPAI-free and LPNAI-free areas based on these factors, contrary to Article 6.2’s second sentence.

29. Further, India’s country-based application of its measures is contrary to Article 3.1, which provides that “Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.” India’s measures are not applied on a zone or compartment basis, as provided for in the OIE Code, and India has no scientific justification for its more-trade-restrictive approach. Further, India’s country-based measures cannot be justified by virtue of India’s ALOP, which may in the circumstances be inferred from India’s measures governing trade in domestic products following domestic AI detections—measures that do not restrict trade in domestic products beyond the ten-kilometer zone surrounding an AI detection.

**F. India Has Acted Inconsistently With Its Obligations Under Article 2.3 of the SPS Agreement by Treating Imported Products Differently from Domestic Products Without Justification**

30. When it comes to regulating trade in its own products on account of AI, India takes a diametrically different approach from that which it applies to imported products. India's measures therefore serve, not as a buffer against AI, but as a means of arbitrarily or unjustifiably discriminating against imported products and applying a disguised restriction on trade. In so doing, India breaches SPS Article 2.3.

31. India's arbitrary or unjustifiable discrimination against imports, in breach of the first sentence of Article 2.3, takes two key forms. First, India imposes a ban on all imports of covered products from an exporting country whenever there is a notification of AI occurring anywhere in the country. By contrast, when India detects AI within its own borders, it imposes no controls on the movement of these products within its own borders, aside from a ban on the movement of such products to or from a ten kilometer zone surrounding the detection.

32. Second, India bans products from countries that notify detections of LPAI. Yet India has not put in place mechanisms that would provide effective detection of instances of LPNAI within its own territory. As a result, despite having had over ninety outbreaks of the far rarer HPAI since 2006, India has never notified a detection of LPAI. India's reliance on the detection of LPNAI thus only affects imported products. India's measures only serve to block imports from countries that have taken steps necessary to detect LPNAI effectively.

33. India's measures not only run contrary to the anti-discrimination discipline in the first sentence of Article 2.3, but they also constitute a disguised restriction on trade, in breach of the second sentence. Various facts, taken together, establish that India's measures constitute such a disguised restriction, including: India's application of drastically more stringent measures to foreign products than to domestic products; India's shifting position on whether its measures are justified by OIE guidelines or a risk assessment; India's failure to offer either a risk assessment or scientific evidence that would justify LPAI-based import bans or India's application of AI measures to entire countries; and India's aborted attempt to justify its measures by taking analysis from a risk assessment drafted by another country in support of a different conclusion.

**G. In the Alternative, India Could be Viewed as Having Breached Its Obligations Under Article 5.5 of the SPS Agreement, with a Resulting Consequential Breach of Article 2.3**

34. To the extent that transmission of AI by foreign agricultural products is viewed as a "different situation" than the transmission of AI by India's domestic agricultural products, India is maintaining arbitrary or unjustifiable distinctions in its appropriate levels of sanitary protection in different situations, and these distinctions result in discrimination or a disguised restriction on international trade.

35. As India's AI measures with respect to imported products are far more restrictive than those applied with respect to domestic products, the level of protection that would be inferred from the measures applied to imported products would far exceed that which would be inferred

from India's measures for domestic products. Further, the maintenance of different levels of protection based on whether products presenting the same risks are imported or domestic would be unjustifiable. Moreover, in the circumstances here, the measures that India applies to imported products amount to a disguised restriction on trade.

36. Accordingly, if the Panel were to view transmission by way of foreign and domestic products as different situations for purposes of Article 5.5, India's measures would be contrary to Article 5.5. Moreover, as a finding of a breach of Article 5.5 necessarily implies a breach of Article 2.3, first sentence, or Article 2.3, second sentence, then considering transmission by way of foreign and domestic products to be different situations for purposes of Article 5.5 leads to the conclusion that India's measures result in a consequential breach of Article 2.3.

#### **H. India Has Acted Inconsistently With Its Obligations Under SPS Agreement Article 7 and Annex B By Failing to Notify Properly Its AI Restrictions**

37. India breached the obligations in SPS Agreement Article 7, and Annex B, paragraphs 2 and 5(a)-(d). India notified S.O. 1663(E) to the WTO almost three months after it took effect, and published S.O. 1663(E) the day it took effect. This prevented other Members from having a meaningful opportunity to provide comments.

#### **I. India Has Breached GATT Article XI**

38. India has breached GATT Article XI because India's measures that are inconsistent with the SPS Agreement constitute import prohibitions or restrictions other than duties, taxes, or other changes.

### **IX. INDIA'S PRELIMINARY RULING REQUEST IS WITHOUT MERIT**

39. Contrary to what India argues in its Preliminary Ruling Request, the U.S. Panel Request identifies the measures and claims in accordance with DSU Article 6.2. With respect to measures, it clearly identifies the measures at issue: India's import restrictions imposed on countries because of NAI. It also cites specific legal instruments that reflect these measures, thus providing additional clarification. The United States has done so notwithstanding India's failure to respond to the U.S. request under SPS Article 5.8. With respect to claims, the Panel Request identifies the precise treaty provisions at issue, not simply the parent articles. It also provides a textual explanation after each cited provision as to the nature of the breach. It even previews certain arguments. The Panel Request includes more information about the U.S. claims than is legally required. It provides fair notice to India and other Members of both the specific measures at issue and the legal basis of the complaint.

### **X. CONCLUSION**

43. The United States respectfully requests the Panel to find that India's measures are inconsistent with India's obligations under the GATT 1994 and the SPS Agreement. The United States further requests, pursuant to DSU Article 19.1, that the Panel recommend that India bring its measures into conformity with the GATT 1994 and the SPS Agreement.