

ANNEX 1



WORLD TRADE
ORGANIZATION

WT/DS430/8

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**INDIA – MEASURES CONCERNING THE IMPORTATION OF
CERTAIN AGRICULTURAL PRODUCTS**

NOTIFICATION OF AN APPEAL BY INDIA
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 26 January 2015, from the Delegation of India, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review (WT/AB/WP/6) ("Working Procedures") and in view of the decision taken by the Dispute Settlement Body in its meeting dated 18 November 2014, India hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretation in the Panel Report in *India – Measures Concerning the Importation of Certain Agricultural Products* (WT/DS430) ("Panel Report").¹

2. Pursuant to Rules 20(1) and 21(1) of the Working Procedures, India files this Notice of Appeal *together* with its Appellant's Submission with the Appellate Body Secretariat.

3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an *indicative* list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel in its report, without prejudice to India's ability to rely on other paragraphs of the Panel Report in its appeal.

4. India seeks review by the Appellate Body of the errors of law and legal interpretation by the Panel in its Report and requests findings by the Appellate Body as noted below.

A. The Panel has committed legal errors in Sections 7.5.2 - 7.5.4 of its Report and in connected findings in Section 7.5.5 of its Report

5. The Panel erred in its interpretation and application of Article 2.2 of the SPS Agreement and/or failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, in so far as the Panel found that India's Avian Influenza ('AI') measures are inconsistent with Article 2.2 of the SPS Agreement. In particular, the Panel erred because:

¹ WT/DS430/R and WT/DS430/R/Add.1.

- a. It made an incorrect interpretation and application of Article 2.2 of the SPS Agreement² and therefore committed a legal error. The Panel consequently did not analyze the independent claim under Article 2.2 of the SPS Agreement on the ground that India had acted inconsistently with Article 5.1 and 5.2 of the SPS Agreement.³
- b. the Panel failed to make an objective assessment of the matter by disregarding arguments and evidence presented by India to establish that its AI measures are based on scientific principles and sufficient scientific evidence pursuant to Article 2.2 of the SPS Agreement.⁴
- c. it failed to take into account that the United States arguments under Article 2.2 of the SPS Agreement were limited to the ban upon occurrence of LPNAI in fresh meat of poultry and eggs and did not include the ban upon occurrence of HPNAI. In spite of the limited nature of the claim, the Panel ruled that India's AI measures which provide for import prohibition upon occurrence of HPNAI and LPNAI are inconsistent with Article 2.2 of the SPS Agreement⁵ and therefore acted inconsistently with Article 11 of the DSU.
- d. the Panel disregarded India's arguments under Article 5.1 of the SPS Agreement and therefore acted inconsistently with Article 11 of the DSU.⁶

6. For these reasons, India requests the Appellate Body to reverse the Panel's finding that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement.⁷

7. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- a. The Panel incorrectly interpreted and applied Article 2.2 of the SPS Agreement.
- b. A SPS measure can comply with Article 2.2 of the SPS Agreement by being based upon scientific principles and sufficient scientific evidence and which would also fulfill the requirement of Article 5.1 and Article 5.2 of the SPS Agreement.
- c. The Panel has failed to make an objective assessment of the matter pursuant to Article 11 of the DSU by completely disregarding the evidence and the arguments submitted by India with respect to Article 2.2 of the SPS Agreement.
- d. The arguments of the United States with respect to its claim under Article 2.2 of the SPS Agreement are limited to eggs and fresh meat of poultry upon occurrence of LPNAI.
- e. In light of the scientific evidence submitted by India, its AI measures are based on scientific principles and sufficient scientific evidence and are consistent with Article 2.2 of the SPS Agreement.

B. The Panel has committed legal errors in Sections 7.4.2.2 - 7.4.2.3 of its Report and in connected findings in Sections 7.4.2.2.4; 7.4.2.2.6 and 7.4.2.3 of its Report

8. The Panel erred in its interpretation and application of Article 3.1 and Article 3.2 of the SPS Agreement and/or failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, in so far as the Panel found that India's AI measures do not conform with the international standard and therefore are inconsistent with Article 3.2 of the SPS Agreement and/or are not based on international standard and are therefore inconsistent with Article 3.1 of the SPS Agreement. In particular, the Panel erred because:

² Panel report, *India – Agricultural Products*, paragraphs 7.282 and 7.331.

³ *Ibid*, paragraph 7.332.

⁴ *Ibid*, paragraphs 7.331-7.332.

⁵ *Ibid*, paragraph 7.332.

⁶ *Ibid*, paragraphs 7.309-7.319.

⁷ *Ibid*, paragraphs 7.332 and 7.334.

- a. First, the terms of reference of the Panel to the OIE were inconsistent with Article 11(2) of the SPS Agreement and Article 13 of the DSU.⁸
- b. Second, the Panel delegated the judicial function of making an objective assessment of the matter to the OIE and therefore acted inconsistently with Article 11 of the DSU.⁹ It also failed to make an objective assessment of the matter by disregarding India's arguments and evidence.¹⁰ Further, it also acted inconsistently with Article 3.2 of the DSU by not interpreting the OIE Code in accordance with the customary principles of international law as codified in Article 31 and Article 32 of the VCLT.¹¹
- c. Third, the Panel has arrived at a conclusion which is not supported by the evidence available and thus is not an objective assessment of matter.¹²

9. For these reasons, India requests the Appellate Body to reverse the Panel's finding that India's AI measures do not conform to and/or are not based upon the international standard and therefore are inconsistent with Article 3.1 and Article 3.2 of the SPS Agreement.¹³

10. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- a. The Panel's terms of reference to the OIE were inconsistent with Article 13(2) of the DSU and Article 11(2) of the SPS Agreement.
- b. The Panel delegated the judicial function of making an objective assessment of the matter to the OIE and therefore acted inconsistently with Article 11 of the DSU.
- c. The Panel has failed to make an objective assessment of the matter pursuant to Article 11 of the DSU by completely disregarding the evidence and the arguments submitted by India with respect to Article 3.2 and Article 3.1 of the SPS Agreement.
- d. The conclusion of the Panel with respect to Article 3.1 and Article 3.2 of the SPS Agreement is not based upon the factual evidence and thus, the Panel failed to make an objective assessment of the matter.
- e. Interpret Article 10.4.1.10 of the OIE Code in accordance with the customary principles of international law as codified in Article 31 and Article 32 of the VCLT and to conclude that a country can impose a trade ban upon occurrence of HPAI/LPNAI in poultry.
- f. Interpret the product specific recommendations in chapter 10.4 of the OIE Code in accordance with the customary principles of international law as codified in Article 31 and Article 32 of the VCLT and to conclude that an importing country based upon its ALOP can import from a NAI free country/zone/compartiment or HPNAI free country/zone/ compartment and in the event this condition of entry is not fulfilled, products of concern may not be imported.
- g. Clause 1(ii)(a) of S.O. 1663(E) (live poultry) conforms to Article 10.4.1.10 and Article 10.4.5 of the OIE Code; Clause 1(ii)(b) of S.O. 1663(E) conforms to Article 10.4.1.10 and Article 10.4.7 of the OIE Code; Clause 1(ii)(c) of S.O. 1663(E) conforms to Article 10.4.1.10 and Article 10.4.19 of the OIE Code; Clause 1(ii)(d) of S.O. 1663(E) conforms to Article 10.4.1.10 and Article 10.4.10 of the OIE Code; Clause 1(ii)(e) of S.O. 1663(E) conforms to Article 10.4.1.10; Article 10.4.13 and Article 10.4.15 of the OIE Code; Clause 1(ii)(j) of S.O. 1663(E) (poultry semen) conforms to Article 10.4.1.10 and Article 10.4.16 of the OIE Code. These clauses of

⁸ Panel Report, *India – Agricultural Products*, paragraph 1.23. Also see Panel's letter to the parties dated 10 September 2013 and Panel's letter to the OIE dated 11 September 2013.

⁹ Panel Report, *India – Agricultural Products*, paragraphs 7.231-7.273.

¹⁰ *Ibid*, paragraphs 7.231-7.273.

¹¹ *Ibid*, paragraphs 7.231-7.273.

¹² *Ibid*, paragraphs 7.231-7.273.

¹³ *Ibid*, paragraphs 7.272-7.275.

S.O. 1663(E) conform to the international standard and are therefore consistent with Article 3.2 of the SPS Agreement.

- h. Alternatively, Clause 1(ii)(a) of S.O. 1663(E) (live poultry) is based upon Article 10.4.1.10 and Article 10.4.5 of the OIE Code; Clause 1(ii)(b) of S.O. 1663(E) is based upon Article 10.4.1.10 and Article 10.4.7 of the OIE Code; Clause 1(ii)(c) of S.O. 1663(E) is based upon Article 10.4.1.10 and Article 10.4.19 of the OIE Code; Clause 1(ii)(d) of S.O. 1663(E) is based upon Article 10.4.1.10 and Article 10.4.10 of the OIE Code; Clause 1(ii)(e) of S.O. 1663(E) is based upon Article 10.4.1.10; Article 10.4.13 and Article 10.4.15 of the OIE Code; Clause 1(ii)(j) of S.O. 1663(E) (poultry semen) is based upon Article 10.4.1.10 and Article 10.4.16 of the OIE Code. These clauses of S.O. 1663(E) are based upon the international standard and therefore are consistent with Article 3.1 of the SPS Agreement.

C. The Panel has committed legal errors in Sections 7.9.2.3 - 7.9.2.4 of its Report and in connected findings in Section 7.9.2.6 of its Report

11. The Panel erred in its interpretation and application of Article 6.1 and 6.2 of the SPS Agreement and/or failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, in so far as the Panel found that India's AI measures fail to recognize the concept of disease free areas and areas of low disease prevalence and therefore are inconsistent with Article 6.2 of the SPS Agreement and are also inconsistent with Article 6.1 of the SPS Agreement as India's AI measures fail to adapt to the SPS characteristics of the areas from where the products originate. In particular, the Panel erred because:

- a. The Panel observed that India pursuant to Livestock Act may be able to recognize the concepts of disease-free areas and areas of low disease prevalence¹⁴, though there is no evidence of this being ever recognized and in addition, S.O. 1663(E) provides for a country wide prohibition.¹⁵ On this basis, the Panel concluded that India's AI measures do not recognize the concept of disease-free areas and areas of low disease prevalence with respect to AI and therefore are inconsistent with Article 6.2, first sentence.¹⁶ Consequently, the Panel ruled that India's AI measures are also inconsistent with Article 6.2, second sentence.¹⁷
- b. The Panel while coming to this conclusion has committed legal errors. The first is a legal error as the requirement under Article 6.2, first sentence of the SPS Agreement is of recognizing the concept of disease free areas in a domestic measure and not of implementing a domestic measure which recognizes the concept of disease free areas.¹⁸ The Panel's conclusion was therefore not consistent with the obligation as provided in Article 6.2, first sentence of the SPS Agreement. Further, this analysis and conclusion by the Panel, was not based on and is contrary to the United States' argument under Article 6 of the SPS Agreement which is limited to the argument that India as a policy does not recognize the concept of disease-free areas and areas of low disease prevalence¹⁹. Thus, the Panel also failed to make an objective analysis of the matter under Article 11 of the DSU as its conclusion is based on an argument not advanced by the United States.
- c. Second, the Panel erred in disregarding arguments and evidence submitted by India²⁰ as the same do not find any mention in the Panel's analysis²¹ and therefore the Panel acted inconsistently with Article 11 of the DSU. As a result, the Panel incorrectly concluded that India's AI measures are inconsistent with Article 6.2.²²

¹⁴ Panel Report, *India – Agricultural Products*, paragraphs 7.701 and 7.706.

¹⁵ *Ibid*, paragraphs 7.701; 7.702 and 7.706.

¹⁶ *Ibid*, paragraphs 7.706-7.707.

¹⁷ *Ibid*, paragraph 7.708.

¹⁸ *Ibid*, paragraph 7.698.

¹⁹ *Ibid*, paragraph 7.618.

²⁰ *Ibid*, paragraph 7.632 and footnote 1155.

²¹ *Ibid*, paragraphs 7.693-7.706.

²² *Ibid*, paragraphs 7.707 and 7.708.

- d. Third, the Panel made a legal error by incorrectly interpreting the relationship between Article 6.1, first sentence and Article 6.3, first sentence.²³ As a result, the Panel incorrectly concluded that India's AI measures are inconsistent with Article 6.1, first sentence and consequently with Article 6.1, second sentence.²⁴

12. For these reasons, India requests the Appellate Body to reverse the Panel's finding that India's AI measures are inconsistent with Article 6.1 and Article 6.2 of the SPS Agreement.²⁵

13. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- a. Article 6.2, first sentence of the SPS Agreement only requires recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence and not of implementation of these concepts. The Panel therefore committed a legal error in coming to its conclusion in Article 6.2, first sentence. Further, the Panel's conclusion was also not based upon an objective assessment of the matter as the Panel ruled on a claim not argued by the United States.
- b. The Panel also acted inconsistently with Article 11 of the DSU by disregarding evidence under Article 6.2, first sentence of the SPS Agreement which was of critical importance to India and therefore failed to make an objective assessment of the matter.
- c. Pursuant to Article 6.1, first sentence of the SPS Agreement an importing country is required to adapt its sanitary measures to the sanitary or phytosanitary characteristics of the area of the exporting country only upon receiving a formal proposal pursuant to Article 6.3 of the SPS Agreement.
- d. Since the United States has not made any formal proposal pursuant to Article 6.3 of the SPS Agreement, India has not acted inconsistently with Article 6.1, first sentence and Article 6.1, second sentence of the SPS Agreement.

D. The Panel has committed legal errors in Sections 7.8.2.1 - 7.8.2.3 of its Report and in connected findings in Sections 7.8.2.1 - 7.8.3 of its Report

14. The Panel erred in its interpretation and application of Article 5.6 and 2.2 of the SPS Agreement and/or failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, in so far as the Panel found that India's AI measures are more trade restrictive than required to achieve India's ALOP and therefore are inconsistent with Article 5.6 of the SPS Agreement and as a consequence are also inconsistent with Article 2.2 of the SPS Agreement. In particular, the Panel erred because:

- a. the Panel concluded that the United States' claim under Article 5.6 of the SPS Agreement is not restricted to LPNAI²⁶ and the alternate measure is Chapter 10.4 of the Terrestrial Code which would fulfill India's ALOP.²⁷ However, the United States had only presented arguments and evidence for LPNAI whereas the OIE Code includes recommendations for both HPNAI and LPNAI. The Panel therefore ruled on a claim not argued by the United States and therefore failed to make an objective analysis of the matter.
- b. the United States failed to make a *prima facie* case as 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 measure²⁸. Further, the Panel disregarded India's arguments and therefore failed to make an objective assessment of the matter.

²³ *Ibid*, paragraph 7.711.

²⁴ *Ibid*, paragraphs 7.711-7.712.

²⁵ *Ibid*, paragraphs 7.707-7.708 and paragraphs 7.709-7.712.

²⁶ Panel Report, *India – Agricultural Products*, paragraph 7.516.

²⁷ *Ibid*, paragraph 7.586.

²⁸ *Ibid*, paragraph 7.487.

- c. the Panel did not identify the proposed alternative measure with precision²⁹ and therefore committed a legal error by concluding that the alternate measure would fulfill India's ALOP.³⁰ Further, the United States presented a *prima facie* case with respect to only two products and upon occurrence of HPNAI.³¹

15. For these reasons, India requests the Appellate Body to reverse the Panel's finding that India's AI measures are more trade restrictive than required to achieve India's ALOP and therefore are inconsistent with Article 5.6 of the SPS Agreement and as a consequence are also inconsistent with Article 2.2 of the SPS Agreement.³²

16. Further, the Appellate Body must, where necessary, complete the legal analysis and find that India's AI measures are consistent with Article 5.6 of the SPS Agreement and consequently with Article 2.2 of the SPS Agreement.

E. The Panel has committed legal errors in Sections 7.6.4.2.1 - 7.6.4.2.2 of its Report and in connected findings in Sections 7.6.5 - 7.7. of its Report

17. The Panel erred in its interpretation and application of Article 2.3 of the SPS Agreement and/or failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, in so far as the Panel found that India's AI measures arbitrarily and unjustifiably discriminate between members where identical or similar conditions prevail and therefore are inconsistent with first sentence of Article 2.3 of the SPS Agreement. In particular, the Panel erred because:

- a. the terms of reference of the Panel's consultation with the individual experts³³ were beyond the scope of the OIE Code which with respect to avian influenza does not provide for review of member countries' domestic surveillance regime and allows self certification of freedom from avian influenza by member countries. The Panel therefore acted inconsistently with Article 11 of the DSU.
- b. the Panel's questions to the experts on this issue erroneously shifted the burden of proof onto India even though it was the United States which had presented the hypothesis that LPNAI must be present in India as it is ubiquitous in wild birds. The Panel therefore acted inconsistently with Article 11 of the DSU.³⁴
- c. the Panel questions to the individual experts delegated the determination of India's LPNAI status to the individual experts and which is inconsistent with Article 11 of the DSU.³⁵

18. For these reasons, India requests the Appellate Body to reverse the Panel's finding which is based upon the testimony provided by the individual experts.³⁶

²⁹ *Ibid*, paragraphs 7.529-7.534.

³⁰ *Ibid*, paragraphs 7.582-7.586.

³¹ *Ibid*, paragraphs 7.529-7.534.

³² *Ibid*, paragraph 7.597 and paragraphs 7.616-7.617.

³³ Panel Report, *India – Agricultural Products*, paragraph 1.23.

³⁴ *Ibid*, paragraphs 1.31-1.34 and 7.443.

³⁵ *Ibid*, paragraphs 7.437-7.457 and 7.418-7.425.

³⁶ *Ibid*, paragraphs 7.454 and 7.457.