

INTERNATIONAL FOOD TRADE: INDIA'S CONCERN FOR FOOD SAFETY

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Abstract

The money involved in international food trade are enormous and so is India's interest with regards to FDI, employment and majorly the rights of health and life based on nutritious and healthy food guaranteed by the Constitution of India. India's domestic obligations namely with WTO rules, put major challenges before the authorities especially when India faced a huge loss of a case in WTO on health issues. Recently transformed Act called Food Safety and Standard Act, 2006 which aims to alleviate the business of food along with safeguarding consumers' interests is not that effective because of the absence of good food product standards and infrastructures.

The paper will focus on these topics, divided into following parts, respectively:

The first part deals with general introduction as to why there is a need to scrutinize recent controversies related to food at WTO as well as domestic level. In second part elaborates over the volumes of global food trade exchange dollars included the potential development and India's approach towards it alongside strategy measures are discussed. The third part focuses on the core issue: why is food safety issue so much significant in most developing countries like India with so many people to feed, where maximum number of people survives less than a dollar a day. The fourth part of the paper is to undertake India's harmonization with WTO's SPS measures and the case which India lost at both Panel and Appellate Body level against USA in June 2015 relating to 'bird flu'. It will also blanket how India is going to implement the rules of this case and also what risk assessment it will have before 18 months are over and what will be its overall impact on India. In fifth part of the paper, highlight is draws upon the impact of international trade on Indian agriculture and its implications thereof. Finally last segment deduces the conclusion to the entire discussion.

Keywords: WTO, Food Safety, Global Food Trade, SPS Measures.

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INTRODUCTION

For the 1.3 billion people of India, 4 June 2015 was unfavorable as the WTO's Appellate Body upheld most of the findings of Panel in the case concerning India – Measures Concerning the Importation of Certain Agricultural Products¹ (Indian Measures case). The dispute settlement body considered Indian measures prohibiting imports of poultry and other livestock products from countries as they reported modifiable avian influenza (NAI), violating the Sanitary and Phytosanitary Measures (SPS Measures). India banned the importation of these products and declined in giving Sanitary Import Permit for the impending threat risk for avian influenza (AI) which is of two types:

- (i) highly pathogenic avian influenza (HPAI)
- (ii) low pathogenic avian influenza³ in the wake of AI outbreak also called 'bird flu'.²

From the period of 2003 to March 2013, India had officially notified the OIE of 95 outbreaks of HPAI (subtype H5N1) in poultry in India. The United States Department of Health and Human Services recognizes the way that human can get contaminated with 'bird flu' and its viruses can get modified and harm in other forms as well, and this spreads in human by direct or close contact with infected poultry or surfaces contaminated with secretions and excretions from infected birds.³

On the other hand, the months of May, June and July 2015 were filled with news coverage of 'maggi noodles', consisting of led and monosodium glutamate (MSG) in excess and thus violating the labeling rules and propelling of a Nestle item in Indian market without item endorsement and resulting bans on it by the Food Safety Standard Authority of India (FSSAI).⁴ The controversy also dragged with it, the celebrities endorsing these brands on advertisements. Both the matters are related to the safety of human health and cannot be left unchecked because apart from right to life being fundamental rights in India, it likewise cast a sacred obligation up on the officials to give safe and healthy nutritious food to every citizen.⁵

¹ India – Measures Concerning the Importation of Certain Agricultural Products, WT/DS430/AB/R, reported on June 4, 2015. For Panel Report see, WT/DS430/R reported on October 14, 2014.

² Questions and Answers About Avian Influenza (Bird Flu) and Avian Influenza A (H5N1) Virus', Available at <http://www.cdc.gov/flu/avian/gen-info/qa.htm>

³ 'Key Facts About Avian Influenza (Bird Flu) and Highly Pathogenic Avian Influenza A (H5N1) Virus' Centre for Disease Control and Prevention, USA, Available at <http://www.cdc.gov/flu/avian/gen-info/facts.htm>

⁴ FSSAI Order dated 5 June 2015, Available at http://www.fssai.gov.in/Portals/0/Pdf/Order_Nestle.pdf

⁵ Centre for Public Interest Litigation v. Union of India, (2013) 16 SCC 279 @ para 21

Also the definition of 'food' under Article 2 (j) and (zk) of the Food Safety and Standard Act, 2006 might be capable of covering the products in the question on both the counts. As one can notice heavy trades in these products, the government has taken up this area of trade sternly, keeping in mind the risk involved and profit secured by countries worldwide. Hence, it is important that the food safety and international food trade needs to be analyzed from Indian view point and also see how the authorities tackle these challenges.

EXPANDING FOOD TRADE OF INDIA

According to IIM-Calcutta and Academic Foundations report, India's food industry will grow 11% annually to reach \$65.4 billion (about four lakh corer) by 2018.¹¹ India is one of the greatest markets for food utilization and thus a significantly potential market for global exchange. As per the data of Ministry of Food Processing Industries of the Government of India the value of India's exports of Processed Food was Rs. 26,067.64 Crores in 2015-16. The last five year trend in export shows that it accounted for 8.3%, 8.2%, 10.4%, 12.1% and 12.1% respectively accounting from 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14 of the total export of India.⁶ To boost this sector through FDI, the government has allowed 100 percent FDI through automatic route in food processing area with the exception of certain saved things for Small and Micro Small Enterprises (MSMEs).⁷ The Indian Food Sector is poised for a rapid growth and has potential to turn out to be well founded outsourcing accomplice in the Food Industry given its quality in essential Food Sector. The Indian Food brands are now finding prime shelf space in the retail chains across US and Europe.⁸ This is one of the fastest growing sectors of the Indian economy with 8.4 percent growth rate. This growth is not an unexpected result. The plan was set up way back in 2005 when the Vision 2015 for Food Processing Industries was visualized by the government.⁹

The government is well aware that India accounts for less than 10% of total food in form of processed food unlike 'very high percentage' in certain developed and developing countries. Consequently, to promote this sector, the government reduced the excise duty from 10% to 6% on food packaging and processing and provided 100% tax exemption for the profits

⁶ Exports From FPI (Million \$ US), Available at <http://mofpi.nic.in/HDwld.aspx?KYEwmOL+HGqTrhLeUJv1qkQ0u6ur0YH8bufgUbQ7I8nj7GdfDPc8oA>

⁷ 'Food Processing Sector Attracts \$421 Million FDI in April-January', THE ECONOMIC TIMES, 29 April, 2015, Available at <http://economictimes.indiatimes.com/news/economy/foreign-trade/food-processing-sector-attracts-421million-fdi-in-april-january/articleshow/47101196.cms>

⁸ 'Scenario of Indian Food Industry' Available at: <http://www.indiafoodex.com>

⁹ 'Vision 2015 for Food Processing Industries', Available at <http://pib.nic.in/newsite/erelease.aspx?relid=64178>

accruing in the first five years of operation and 25% exemption for next five years of operation, proving to be a good incentive to the investors.¹⁰ The economic weapon of the government-The Reserve Bank of India has classified loan to food and agro-based processing units and cold chain under Agriculture activities for Priority Sector Lending (PSL) with a limiting cap of INR 1 billion per borrower.¹¹ Visualizing the future growth of food processing sector the government of India has set up 'National Institute of Food Technology Entrepreneurship and Management' situated at Sonapat, Haryana as the specialized institution to cater the need of Entrepreneurs, Industries, Exporters, Policy makers, the Government and other Institutions. When we look at the agricultural products as a whole which are used as food items either processed or not but falling under the definition of 'food' under the Food Safety and Standard Act, 2006 then the trade involved is bound to be higher. The CLSA Asia-Pacific Markets Report 2013 estimates that Indian food services market alone will be of \$175 billion till 2018. Therefore it is evident that International food trade matters a lot for India.

IS FOOD SECURITY INDIA'S CONCERN?

The question that, why does 'food safety' matter for India can be easily answered by putting this question to any developed, developing or least developed countries. As per Food and Agriculture Organization (FAO) it is the prime responsibility of the national government to make certain adequate food and fundamental right of freedom from hunger. It also considers "food quality and safety are vital aspects of the right to food. Food safety means the absence or safe levels of contaminants, bacteria, naturally occurring toxins or any other substance that can be said to be harmful to human health". World Health Organization (WHO) in its Constitution states that highest reasonable standard of health is a fundamental right of every human being. Quite for this reason the WHO established the Codex Alimentarius Commission in 1962 to put forth the food standards and related things. And this got reflected in the Agreement Establishing World Trade Organization in 1995 on the Application of Sanitary and Phytosanitary Measures (SPS Measures). It sets out guidelines how governments will regulate food safety and animal health measures in the WTO regime. The

¹⁰ 'Complex Regulations Impact Food Processing Industry: Government', THE ECONOMIC TIMES, May 5, 2015, <http://economictimes.indiatimes.com/news/economy/policy/complex-regulations-impact-foodprocessing-industry-government/articleshow/47160665.cms>

¹¹ 'Loans to Processing Industry Under Priority Lending: Harshimrat Kaur Badal', THE ECONOMIC TIMES, May 25, 2015, <http://economictimes.indiatimes.com/news/politics-and-nation/loans-to-processing-industryunder-priority-lending-harsimrat-kaur-badal/articleshow/47421583.cms>

Centers for Disease Control and Prevention data of 2011, provides that in the United States of America which is one of the most scientifically developed country, sees in reality roughly one in every six Americans getting sick, hospitalized, and the death of at least 3000 every year because of the food borne diseases. The general science acknowledges the belief of human civilization for the requirement of different varieties of food as sources of fat, carbohydrates, proteins and minerals for the proper growth of human body and health. But this food should be a source to the above cited requirements rather than being a source of food borne diseases. Since the distance between farm and dining table has increased, the chances of disease being caused due to the contaminated food have grown manifold. The quality of food is directly proportional to the health and life expectancy. Poor diet has been a major risk factor for killer diseases such as diabetes, cancer and coronary heart disease in United Kingdom. So if in most developed countries like USA where food safety standard and implementation of the same is very high, there are so many food born diseases that we can easily think of in adverse situations as noticed in India which lacks on all the counts such as safety standard, implementation mechanism and the proper resources needed for them. In fact 'food safety cost' creates economic problems for the food safety and the health of economy. The safety of food products directly affects international trade as perilous foods will not be allowed in any country's market. In India already there are huge arrears of health facilities at reasonable cost and there are 363 million people living below poverty line (BPL) therefore spending less than a dollar per day¹² making the requirement of safe food as a must. Thus regulation of food safety is very important for India.

INDIAN MEASURE CASE

The US-India controversy relating to imports of certain agricultural products in India got much attention across the globe as the matter concerned SPS (sanitary and phytosanitary) measures and health issues of human as well as animals and live stocks. India lost this case on both the forums of Panel and Appellate body.

A. SPS Measures: SPS measure¹³ provided under Agreement of WTO started as an effort to elaborate Article XX(b) of existing GATT provision, went too far from it and now it includes new obligations such as of transparency providing notice of , and an opportunity of comment

¹² 'Report of the Expert Group to Review the Methodology for Measurement of Poverty', Planning Commission of India, June 2014 available at http://planningcommission.nic.in/reports/genrep/pov_rep0707.pdf

¹³ The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), WTO, available at https://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm

on proposed SPS measures. SPS deals with the protection of human, animal and plant life and health from animal borne pests or diseases, toxins or disease causing organisms in foods, beverages, or feedstuffs but it must not be discriminatory. India is the party to this Agreement since the establishment of WTO. In short SPS measures assures Parties to have their own standards and safety norms suitable for their country, provided it complies with international norms and based on scientific justifications. Thereby on another hand it restricts unjustifiable trade restrictions.

B. Indian measures under SPS Agreement leading to the controversy with the USA

The Department of Animal Husbandry, Dairying and Fisheries (DAHD) under the Live Stock Act 1898 along with its Amendment of 2001, brought the Statutory Order 1663 (E) and published in the Gazette of India on 19 July 2011 and notified to the SPS Committee on 11 October 2011. As per this S.O. the Central Government of India prohibited the import of certain products in view of Avian Influenza (NAI) of both HPNA and LPNA, provided that the Central Government may permit the import of handled poultry meat after sufficient conformity assessment of the exporting country.

Seeing the concerned Indian measures prohibiting certain imports, the US requested consultation with India and sat down to resolve the issue on 16-17 April 2012 which failed. Thus US requested for the establishment of the Panel to settle the dispute by the Dispute Settlement Body of the WTO.

C. Panel's Finding viz a viz AB findings

- a. With respect to Articles 2.2(measures based on scientific principles and scientific evidence), 5.1 (risk assessment to be based on scientific evidence) and 5.2 of SPS Agreement: i. Panel's interpretation of the three provisions stated above was correct. ii. AB reversed in part, the Panel's findings and stated that India's measures are inconsistent with Article 2.2 because they are not based on scientific principles and are maintained without sufficient scientific confirm, seeing that those discoveries concern India's import disallowance on wholesome meat of poultry and eggs from countries reporting LPNAI; iii. Panel's findings are correct, that India's measures are inconsistent with Articles 5.1(risk assessment to human, plant and animal life) and 5.2 (risk assessment to be based on scientific evidence).

- b. With respect to Articles 3.1 (measures based on international standards, guidelines or recommendations) and 3.2 (measures to conform international standard and be presumed to GATT 1994) of SPS Agreement: i) Panel's findings are correct that India's AI measures are inconsistent with Article 3.1 and will not get benefit of Article 3.2.
- c. With respect to Articles 6.1 (measures to be based on sanitary or phytosanitary characteristics of the area- where all of a country, part of a country or all or parts of several countries) and 6.2 (recognition of the concepts of disease free areas and areas of low pest or disease prevalence) Panel's finding is correct that India's measures are inconsistent with Articles 6.1 and 6.2.
- d. With respect to Articles 5.6 (measures not to be more trade restrictive than required to achieve the objective) and 2.2 (based on scientific principles) Panel's findings that India's measures are inconsistent with Article 5.6 because they are significantly more trade prohibitive than required to accomplish India's fitting level of security (ALOP) with respect to products covered by Chapter 10.4 of the OIE code.
- e. With respect to Article 2.3 of the SPS Agreement: i) Panel's findings that India's measures are inconsistent with Article 2.3, first sentence. India has to comply with this judgment and harmonize its measures with the findings up till 18 months from the date of the judgment of the Appellate Body.

WHERE INDIA LACKED IN ITS DEFENSE?

India was very casual in its approach as the summary document which it provided to US and EU was based on good faith and was informal document. It emphasized before the panel that it was informal document and it could not provide any new document based on scientific assessment of risk involved. It does not mean there was no risk to human, plant or animal life. Also India referred to risk assessment conducted by Australia in banning meat and meat products from LPNAI occurring countries in poultry. But Australia contends that India misread the Australian measures as it does not put a blanket ban on imports rather allows from the country or zone that is HPNAI/LPNAI free or that has been processed to destroy AI virus.¹⁴ The point to be noted here is that why India is referring to risk assessment of other countries and not having its own assessment as the impact of viruses or chemicals in food

¹⁴ Third Party Oral Statement of Australia in Indian Measures WT/DS430/R, Available at: <http://dfat.gov.au/international-relations/international-organisations/wto/wtodispute-settlement/Pages/india-measures-concerning-the-importation-of-certain-agricultural-products-wt-ds430.aspx>

differs from place to place based on geography. It simply means India was not prepared to do so which it can do in future if it works on this area.

The Sanitary Import Permit of DAHD required the compliance signature of importing country's veterinary doctor's signature that the product is NAI-free. But it has no format or specific requirements. It simply is a blank form which you can subjectively fill and sign making it non-uniform. Also none of the health certificates provided by India covers all the products listed. It shows Indian officials did not do homework before bringing that format of health certificate. It could not draw the parallel between 'bird flu' and 'swine flu' both caused by HxNy virus combination falling under AI whereby still India is facing human deaths by 'swine flu' in thousands. Although swine flu spreads more by human contacts but still live pigs remain the host of the virus in whom it mutates and take new form of a new virus of even remain the same one.

IMPACT OF THIS RULING OVER INDIA: NEUTRALIZING THE IMPACT OF THE WTO RULING THROUGH DOMESTIC FSSA, 2006

It will be interesting to see, once the products enter the Indian boundary how it is handled by FSSAI under FSSA, 2006 because the definition of 'food'¹⁵ under the Act might cover those products in issue. As till now there is no final authority on the point that 'food' will cover poultry, its products, live pigs etc. in the absence of any judicial decision or statutory clarification, the point can be tilted judiciously in favor. The FSSAI has enormous power in terms of regulating product standard, packaging, labeling, food approval for non- standard food etc. If it is activated by FSSAI then some of the problems can be removed which resulted out of India loosing at the WTO level. But it won't be easy as legally tenable means would be required to justify these moves. Since the FSSAI is already in mess it will remain an interesting thing to see how FSSA 2006 can be effectively used to mitigate the risk created by the Indian measures case at WTO.

INTERNATIONAL TRADE AND ITS IMPACT ON INDIAN AGRICULTURE

Agriculture trade contributes 15% of total foreign exchange earnings. Agricultural and agro-based products can be divided into three categories; raw products, semi-raw products and processed and ready to yield products.

¹⁵ Section 2 (j) and (zk) of the FSSA, 2006

The major agro-exports of India are cereals, rice, basmati rice and non-basmati rice, spices, oilcake, tobacco un-manufactured, tea, coffee and marine products. Due to high tariffs and pronounced non-tariff barriers the export is hampered in developing countries.

Subsequent to the economic reforms initiated in June 1991, removing the restrictions and protective licensing administration, facilitated commerce in an expansive number of things has turned into the request of the day.

As many farmers are not given a level playing field for cultivation, they are not able to compete with their western counterparts in agricultural production and exports.

The emergence of World Trade Organization (WTO) required the member's compliance to:-

- a. All non-tariff barriers are replaced by tariff barriers and tariffs to be reduced by 36% by industrialized countries and 24% by developing nations.
- b. Nations with closed farm market should import no less than 3% of local utilization of the item, ascending to 5% over a time of 6 years.
- c. Trade support to farmers will have to cut by 20% over a period of 6 years by developed and by 13.3% by developed countries.
- d. The value of direct export subsidy will have to be cut by 36.1% and the volume of subsidized exports by 21% over a period of 6 years, while in the manifestation of creating nations direct export subsidies should diminish by 24% and the quantity of subsidized exports will have to reduce by 14% over a period of 10 years.

IMPLICATIONS: The agreement reached is not favourable to many developing nations including India because:

- (a) The government is forced to withdraw/reduce subsidies to its farmers.
- (b) The nation is constrained to import no less than 3% of the household interest for horticultural items.
- (c) Policies like Public Procurement and PDS will be abandoned.

- (d) Patenting of seeds will drive Indian ranchers to purchase seeds from Multinational foreign enterprises.

CONCLUSION

The international food industry both processed and unprocessed is very big in terms of volume and money. In India, there are restrictions on mobility and trade in agricultural goods, stocking constraints, monopolistic state buying agencies, genuine bottlenecks coming about because of an assortment of policies restricting supply of key inputs as credit, infrastructure services, storage etc.

The Indian share in terms of imports and exports are also very high. In processed food area the kind of export and FDI India is receiving is very happy situation, because it is generating job and providing foreign exchanges. The potential growth is high in this sector. India's processed food market is high as against other developed and developing countries. But the bigger question is how India is going to handle this sector efficiently where the investors need not face unduly bureaucratic hurdles and the domestic concerns also balanced. For this India came out with a new and consolidated Food Safety and Standard Act, 2006. But it is not a very well and calculated enactment rather a cut copy paste kind of thing as no home work is done to bring out product standards as only 370 standards are there against several thousand present in different countries. At the international level after the adverse findings of both Panel and Appellate body in Indian Measures Case, there are undoubtedly higher chances of getting Indian market flooded with unsafe food product of poultry and pigs in India. The menace of bird flu and swine flu will remain a greater threat in this environment. But the untested domestic law of Food Safety and Standard Act, 2006 remains a hidden weapon to counter those situations because those products might fall under the definition of 'food' bringing this law in action. As food safety becomes a fundamental need of the country for the number of poor and non-capacity to afford the health facilities and government's incapacity to take care of every ill person, the precautionary approach to provide safe and healthy food has to be given primacy.

The solution lies in more effective allotment of assets to administrative units, institutional reinforcing and capacity building, tighter strategic and operational coordination among agencies, and the maintenance of a balance-of-powers system in which one government branch calls out other government bodies for incompetence. Restrictions and sanctions should be applied in areas needing urgent policy attention; however focusing on prominent items

trying to flag administrative movement is counterproductive. It will be interesting to see how India copes up with the situation and save its interest as there is very high stake involved in terms of human health and foreign exchange and jobs to the people.