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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY INDIA

REQUEST FOR THE ESTABLISHMENT OF A PANEL

The following communication, dated 6 April 2017, from the delegation of India to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

India hereby requests the establishment of a panel pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Article 11 of the *Agreement on Sanitary and Phytosanitary Measures* ("SPS Agreement") with respect to the issues identified below.

1. BACKGROUND TO THIS REQUEST

On 19 June 2015, the Dispute Settlement Body ("DSB") adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, in *India – Measures Concerning the Importation of Certain Agricultural Products* (DS430).¹ These reports concluded that India's Avian Influenza measures, reflected in S.O. 1663(E), were inconsistent with Article 2.3; Article 3.1; Article 5.1; Article 5.2; Article 5.6 and consequentially inconsistent with Article 2.2; Article 6.1; Article 6.2; Article 7; as well as Annex B(2) and Annex B(5)(a), (b) and (d) of the SPS Agreement. In accordance with these reports, the DSB recommended that India bring its measures, found to be inconsistent with the SPS Agreement, into conformity with its obligations under that Agreement.

On 15 July 2015, India informed the DSB that it intended to implement the recommendations and rulings of the DSB in a manner that respects its WTO obligations within a reasonable period of time.² On 8 December 2015, India and the United States informed the DSB that they had agreed on a reasonable period of time up to 19 June 2016 for India to implement the recommendations and rulings of the DSB.³ On 10 June 2016, India provided a status report to the DSB on its progress in implementation, pursuant to Article 21.6 of the DSU.⁴

India requested the United States to enter into a sequencing agreement to sequence any possible recourse to Article 21.5 or Article 22.2 of the DSU, which India considers to be the general practice followed in good faith by WTO Members. Till date, the United States has not agreed to India's request, and, as a result, there is no sequencing agreement between India and the United States in this dispute.

¹ Action by the Dispute Settlement Body, WT/DS430/11 circulated on 22 June 2015.

² Communication from India, WT/DS430/12 circulated on 15 July 2015.

³ Communication from India and the United States concerning Article 21.3(b) of the DSU, WT/DS430/14 circulated on 11 December 2015.

⁴ Status Report by India, WT/DS430/15 circulated on 10 June 2016.

2. IMPLEMENTATION ACTION DECLARED BY INDIA

India notified a draft amendment notification to the SPS Committee on 20 April 2016⁵, allowing a 60-day period for interested parties to provide comments on the same. Further, India vide a corrigendum dated 22 June 2016, amended item 8 of the aforesaid draft amendment notification, in order to reflect the relevant international standard.⁶

India received comments on its draft amendment notification from only one WTO Member, the United States. These comments were taken into consideration by India while issuing notification S.O. 2337(E) on 8 July 2016, which superseded the previous notification S.O. 1663(E). Notification S.O. 2337(E) was published in the Official Gazette of India.⁷ Pursuant to this, India notified the DSB on 18 July 2016 that it had adopted measures necessary to comply with the recommendations of the DSB.⁸ This notification was also notified to the SPS Committee.⁹

India has also issued the relevant guidelines referred to in notification S.O. 2337(E) as well as the questionnaire which will be used to recognize a part of a country, zone or compartment for the purpose of trade in poultry and poultry products.

After the publication of S.O. 2337(E), India and the United States entered into bilateral discussions to address additional concerns raised by the United States. Pursuant to the same, India amended notification S.O. 2337(E) vide notification S.O. 2998(E) dated 19 September 2016.¹⁰ This amendment notification was notified to the SPS Committee on 20 September 2016¹¹ and to the DSB on 26 September 2016.¹²

India then further continued its efforts to resolve the concerns of the United States on a bilateral basis. In this respect, India provided the relevant information to the United States in response to the request made by the United States under Article 5.8 of the SPS Agreement.¹³ Subsequently, it was observed that the term "areas of low pest or disease prevalence" was inadvertently omitted from the definition of "Pest-or disease-free areas and areas of low pest or disease prevalence" in paragraph 1(d) of notification S.O. 2337(E). Thus, this inadvertent omission was rectified vide notification S.O. 510(E) dated 17 February 2017 which was notified to the SPS Committee on 22 February 2017¹⁴ and to the DSB on 02 March 2017.¹⁵

Notification S.O. 2337(E) dated 8 July 2016, amendment notifications S.O. 2998(E) dated 19 September 2016 and S.O. 510(E) dated 17 February 2017, as well as the guidelines, and the questionnaire, together form the "revised Avian Influenza measures". These notifications have 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 came into effect from the date of their publication in the Official Gazette.

India considers that the revised Avian Influenza ("AI") measures comply with the recommendations of the DSB in this dispute for the following reasons:

- a. In the original proceedings, the Panel found that the measure at issue, S.O. 1663 (E) was not based on the relevant international standard i.e. Chapter 10.4 of the OIE Terrestrial Code because it prohibited imports of poultry and poultry products upon occurrence of Notifiable Avian Influenza (NAI) in a country. The Panel held that Chapter 10.4 of the OIE Terrestrial Code envisages imports of poultry and poultry products from

⁵ Notification of draft S.O. 2337(E) to the SPS Committee, G/SPS/N/IND/143 circulated on 20 April 2016.

⁶ Notification of corrigendum to the SPS Committee, G/SPS/N/IND/143/Corr.1 circulated on 22 June 2016.

⁷ See <http://egazette.nic.in/WriteReadData/2016/170589.pdf>.

⁸ Communication from India, WT/DS430/18 circulated on 19 July 2016.

⁹ Notification, G/SPS/N/IND/150 circulated on 26 July 2016.

¹⁰ See <http://egazette.nic.in/WriteReadData/2016/171799.pdf>.

¹¹ Notification of amendment to S.O. 2337(E), G/SPS/N/IND/160 circulated on 21 September 2016.

¹² Communication from India, WT/DS430/19 circulated on 23 September 2016.

¹³ The United States made a request pursuant to Article 5.8 of the SPS Agreement vide letter dated 21 December 2016. In response, India provided the relevant information to the United States vide email dated 31 January 2017.

¹⁴ Notification, G/SPS/N/IND/143/Add.1 circulated on 02 March 2017.

¹⁵ Communication from India, WT/DS430/20 circulated on 03 March 2017.

NAI or highly pathogenic NAI (HPNAI) free zones/compartments and not only from NAI or HPNAI free countries.¹⁶ Thus, the Panel held that S.O. 1663(E) was inconsistent with Article 3.1 of the SPS Agreement¹⁷ and that India could not benefit from the presumption set out in Article 3.2 of the SPS Agreement.¹⁸ This ruling was upheld by the Appellate Body.¹⁹

The revised AI measures remove these inconsistencies. They allow for imports of poultry and poultry products from a country, zone or compartment in accordance with the recommendation of the OIE Terrestrial Code. Further, the mechanism to recognize pest-or disease-free areas and/or areas of low pest or disease prevalence in the exporting country is provided in paragraph 3 of notification S.O. 2337(E). In view of the above, India considers that its revised AI measures comply with the rulings and recommendations of the DSB with respect to Article 3.1 of the SPS Agreement.

- b. In the original proceedings, the Panel held that the measure at issue, S.O. 1663(E) was inconsistent with Article 6.1 and Article 6.2 of the SPS Agreement because it failed to recognize the concepts of disease-free areas and areas of low disease prevalence.²⁰ Consequently, the Panel also held that India's AI measures were not adapted to the SPS characteristics of such areas and thus, were inconsistent with Article 6.1 of the SPS Agreement.²¹ In order to remove these inconsistencies, India has recognized the concepts of pest-or disease-free areas and areas of low pest or disease prevalence in its revised AI measures. S.O. 2337 (E), as amended by S.O. 2998 (E), explicitly provides that poultry and poultry products can be imported from pest-or disease-free areas and areas of low pest or disease prevalence. Further, paragraph 3 of S.O. 2337 (E) provides that India will adapt its sanitary and phytosanitary measures to the sanitary and phytosanitary characteristics of the area of the exporting country. In view of the above, India considers that its revised AI measures comply with the rulings and recommendations of the DSB with respect to Article 6.1 and Article 6.2 of the SPS Agreement.
- c. In the original proceedings, the Panel held that the measure at issue S.O. 1663(E) was inconsistent with Article 2.3 of the SPS Agreement. With respect to Article 2.3 first sentence, the Panel concluded that there is a difference in treatment of imported poultry and domestic poultry and poultry products which amounts to unjustifiable discrimination²² as similar or identical conditions prevail between India and other countries.²³ The Panel also held that there is discrimination on account of occurrence of LPNAI in treatment between imported and domestic poultry and poultry products and such discrimination is arbitrary and unjustifiable²⁴ as similar or identical conditions prevail.²⁵ With respect to Article 2.3, second sentence, the Panel concluded that India's measure was applied in a manner that constitutes a disguised restriction on international trade.²⁶

In order to comply with the rulings and recommendations of the DSB, the revised AI measures ensure that there is no discrimination between imported and domestic poultry and poultry products. Further, India has modified its AI measures to allow import of poultry and poultry products from pest-or disease-free areas and areas of low pest or disease prevalence. Thus, India considers that its revised AI measures comply with the rulings and recommendations of the DSB with respect to Article 2.3 of the SPS Agreement.

¹⁶ Panel Report, *India – Agricultural Products*, para. 7.263.

¹⁷ Panel Report, *India – Agricultural Products*, paras. 7.271-7.273.

¹⁸ Panel Report, *India – Agricultural Products*, para. 7.275.

¹⁹ Appellate Body Report, *India – Agricultural Products*, para. 5.111.

²⁰ Panel Report, *India – Agricultural Products*, 8.1.c.x.; Appellate Body Report, *India – Agricultural Products*, para. 6.1.c.

²¹ Panel Report, *India – Agricultural Products*, paras. 7.709-7.712.

²² Panel Report, *India – Agricultural Products*, para. 7.436.

²³ Panel Report, *India – Agricultural Products*, para. 7.464.

²⁴ Panel Report, *India – Agricultural Products*, para. 7.457.

²⁵ Panel Report, *India – Agricultural Products*, para. 7.472.

²⁶ Panel Report, *India – Agricultural Products*, paras. 7.477- 7.478.

- d. In the original proceedings, the Panel found India's AI measures inconsistent with Article 5.6 and consequentially inconsistent with Article 2.2 of the SPS Agreement.²⁷ The Panel found that the alternative measure recommended by the United States, namely, one based on Chapter 10.4 of the OIE Terrestrial Code, would have been able to achieve India's ALOP and would have also been significantly less trade restrictive than S.O. 1663(E).²⁸ As explained above, the revised AI measures allow imports of poultry and poultry products into India from the relevant country, zone or compartment in accordance with the product-specific recommendations in the OIE Terrestrial Code. Thus, India considers that it has complied with the rulings and recommendations of the DSB with respect to Article 5.6 and Article 2.2 of the SPS Agreement.

The Appellate Body largely upheld the Panel's findings.²⁹

In view of the above, India strongly considers that it has brought itself into conformity with its WTO obligations. It has complied with the recommendations of the DSB by rectifying the inconsistencies in S.O. 1663(E), and by issuing notification S.O. 2337(E) and amendment notifications S.O. 2998(E) and S.O. 501(E), as well as the guidelines and the questionnaire.³⁰

3. SYSTEMIC ISSUES ARISING IN THIS DISPUTE

It is a standard practice among WTO Members to enter into a sequencing agreement to ensure that, in the event of disagreement between the parties with respect to compliance with the DSB's rulings and recommendations, recourse under Article 21.5 of the DSU should be pursued as the first option. However, as mentioned above, the United States has not agreed to India's request to enter into a sequencing agreement. Moreover, India understands that the United States disagrees that the revised Avian Influenza measures are consistent with the WTO covered agreements and that India has brought itself into conformity with its WTO obligations. However, the United States has not sought the establishment of a compliance panel.

On 7 July 2016, the United States made a request pursuant to Article 22.2 of the DSU seeking authorization from the DSB to suspend concessions under the covered agreements in the amount of US\$450 million in 2016, which will be updated annually.³¹ India objected to this request vide its communication dated 18 July 2016 to the Chair of the DSB and in its oral statement at the DSB meeting held on 19 July 2016³², when it raised its concerns about the request by the United States for authorization to suspend concessions or other obligations under the covered agreements. India objected to the level of suspension of concessions or other obligations under the GATT 1994 proposed by the United States, and the DSB referred the matter to arbitration under Article 22.6 of the DSU.³³ Till date, despite India's compliance, the United States has not agreed to suspend the arbitration proceedings under Article 22.6 of the DSU. In India's opinion, if there is a disagreement between the parties with respect to "the consistency with a covered agreement of measures taken to comply with the recommendations and rulings", the proper course of action is first to have recourse to Article 21.5 of the DSU.³⁴

In fact, this has also been the position of the United States in other WTO disputes. In *US - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (DS381), the United States itself observed that "*the DSB cannot grant authorization to suspend concessions in any amount where the Member concerned has come into compliance*".³⁵ India agrees with this statement made by the United States. In this case, where India considers that it has brought itself into full compliance and where the United States disagrees, the issue of compliance must be

²⁷ Panel Report, *India - Agricultural Products*, paras. 7.616 and 7.617.

²⁸ Panel Report, *India - Agricultural Products*, para. 7.597.

²⁹ Appellate Body Report, *India - Agricultural Products*, para. 6.1.

³⁰ India further considers that the revised AI measures comply with the rulings and recommendations of the DSB with respect to Articles 2.2, 5.1, 5.2, 7 as well as Annex B(2) and Annex B(5)(a), (b) and (d) of the SPS Agreement.

³¹ Recourse to Article 22.2 of the DSU by the United States, WT/DS430/16 circulated on 8 July 2016.

³² WT/DS430/17 dated 19 July 2016; also see https://www.wto.org/english/news_e/news16_e/dsb_19jul16_e.htm.

³³ Recourse to Article 22.6 of the DSU by India, WT/DS430/17 circulated on 19 July 2016.

³⁴ Ibid.

³⁵ *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by the United States*, WT/DS381/32 circulated on 12 April 2016, page 3.

decided following the procedures of Article 21.5 of the DSU. In the circumstances of this dispute, therefore, India considers it appropriate to seek recourse to Article 21.5 of the DSU to resolve the disagreement over compliance.

As noted above, so far, there is no sequencing agreement between India and the United States in this dispute. Thus, there is no agreement between the parties addressing the issue of whether consultations should be held before a party could request the establishment of an Article 21.5 panel. In these circumstances, consultations between India and the United States have not been held.³⁶

4. REQUEST FOR THE ESTABLISHMENT OF PANEL UNDER ARTICLE 21.5 OF THE DSU.

In light of the fact that the United States disagrees that India's revised AI measures comply with the recommendations and rulings of the DSB, India requests that a panel be established pursuant to Article 21.5 of the DSU, with standard terms of reference as set forth in Article 7.1 of the DSU. India also requests that the DSB refer the matter to the original panel, if possible.

As India has brought its revised Avian Influenza measures into conformity with its WTO obligations, prompt findings by the DSB will assist the parties in securing a positive solution to the dispute.³⁷

Please include this request on the agenda of the next regular Dispute Settlement Body meeting scheduled for the 19th of April 2017. Please also circulate this request to all Members.

³⁶ See on this point, Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, (Recourse to Article 21.5 of the DSU by the United States)*, WT/DS132/AB/RW, circulated on 22 October 2001, para. 70. See also para. 52.

³⁷ Article 3.7 of the DSU.