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Public Health Concerns and Trade Regulation: The Avian Influenza Dispute

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The first issue of the second volume of the Law & Policy Brief examines the legal issues that arose in India- Agricultural products, the first SPS dispute filed against a developing country in the WTO. The case featured allegations that India's Avian Influenza measures were restrictive and constituted violations of its obligations under the sanitary and phytosanitary (SPS) Agreement. This case underlies the need for conducting proper risk assessments while imposing trade restraints on animal and public health grounds. This dispute is also a reminder to the WTO members of the need to proactively participate in international standard setting process.

Introduction

"Chicken trade wars" are not entirely uncommon in international trade. The United States was engaged in a major trade dispute on poultry products with the European Community in the early 1960s. High import duties and application of trade contingent measures such as antidumping are also fairly common in this field. More recently China and the United States were locked in two high profile chicken disputes, with the U.S. imposing SPS measures on Chinese exports and China in return imposing anti-dumping duties on broiler products from the United States. *India-Agriculture Products* is yet another addition to the high-profile disputes on chicken trade.

SPS disputes are intrinsically complex and involve a certain amount of intrusion into a WTO member's sovereign space in adopting health or food safety regulations. *India-Agricultural Products* was a complex case and the science was not entirely clear on several issues. However, this case has provided some new thinking on several issues under the SPS Agreement. The most important contribution of this dispute is on the relationship between Article 2.2 and Article 5.1 and 5.2 of the SPS Agreement, which require that there must be a rational relationship between the SPS measure and science. Yet another contribution is on the interlinkages between various paragraphs of Article 6, which specify the obligations on regionalization and compartmentalization. This dispute has also left behind certain ambiguities. For example, this dispute does not give enough guidance on the interpretation of the text of international standards which are specifically mentioned in Article 3 of the SPS Agreement.

Back ground of the Dispute

Avian Influenza (AI) is an infectious disease that often affects birds, especially wild water fowl such as ducks and geese. AI viruses have been reported to cause diseases or subclinical infections in humans and animals and can be transmitted through direct contact between the infected and the susceptible birds and through a number of other means.

The global response to the AI disease has not been uniform. In fact, many countries still have self-imposed bans on poultry and poultry products from AI infected countries. The international standards developed by the World Organization for Animal Health (OIE) are, to an extent, expected to bring a certain amount of consistency in approaches in responding to AI. The international standards are embodied in the Terrestrial Code (hereinafter "OIE Code" or "Terrestrial Code").

AI is classified into two groups depending on their pathogenicity. High Pathogenic Avian Influenza (HPAI) is an extremely infectious, systemic viral disease in poultry that produces high mortality. AI viruses that are less virulent and that do not meet the criteria for HPAI are known as Low Pathogenic Avian Influenza (LPAI). The term Notifiable Avian Influenza (NAI) includes both HPAI and low pathogenic notifiable avian influenza (LPNAI).

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The measure at the heart of this dispute is S.O. 1663 (E)—a notification issued by the Indian Government in 2011 pursuant to Sections 3 and 3A of the Livestock Act prohibiting the imports of agricultural products and, in particular, poultry and poultry meat from countries reporting both high pathogenic notifiable avian influenza (HPNAI) and low pathogenicity avian influenza (LPNAI). While the notification was silent on the duration of the prohibitions, its applicability was restricted until the time the exporting country in question notified freedom from Notifiable Avian Influenza to the OIE.

The United States challenged India's measures before the WTO in 2012. A WTO panel was established and the panel gave its ruling in October 2014. India challenged several aspects of the ruling before the Appellate Body in January 2015 and the Appellate Body gave its finding in June 2015. This policy brief seeks to provide an analysis of both the panel and the Appellate Body findings.

International Standards and the WTO Consistency of India's AI measures

The United States challenge was mainly against the countrywide restriction on imports of poultry and related products imposed by India. The United States argued that OIE Code does not envisage an import ban, but, on the contrary, required that restrictions be imposed at the zone or compartment level when appropriate biosecurity or surveillance control measures are in place. In this regard, it is important to specify the importance of Article 3 of the SPS Agreement. Article 3.2 of the SPS Agreement states that a measure which "conforms to" an international standard shall be presumed to be consistent with the SPS Agreement.

The short question in *India- Agricultural Products* was whether India's AI measures were based on an international standard. If they are based on international standards, the entire U.S. challenge is bound to fail. There was also no dispute that the product specific recommendations, especially the recommendations in Chapter 10.4 of the OIE Code were the appropriate international standard. The OIE Code applied to most products mentioned in S.O. 1663 (E), except two categories, viz. (i) live pigs and (ii) pathological material and biological products from birds. However, this dispute was more about import restrictions on poultry meat and related products which have significant commercial interests. According to the United States, Chapter 10.4 of the OIE Code permitted imports of products from countries reporting LPNAI.[1] India, on the other hand, argued that the recommendations in Chapter 10.4 involved a "condition of entry". According to this view, an importing country had the freedom to choose between NAI-freedom or HPNAI-freedom and the choice to extend such requirement to an entire exporting country, zones or compartments, as it deems fit. The terms "import ban" as such were not prominent in Chapter 10.4 of the OIE Code, but one of the provisions, namely, Article 10.4.1.10 referred to the imposition of a ban.[2] Article 10.4.1.10 stated as follows:

> A Member should not impose immediate bans on the trade in poultry commodities in response to a notification, according to Article 1.1.3 of the Terrestrial Code of infection with HPNAI and LPNAI virus in birds <u>other than poultry</u>, including wild birds. (emphasis not original)

A proper interpretation of this Article was critical to India's defence. India suggested an *a contrario* interpretation to Article 10.4.1.10. According to this interpretation, if there is an infection of HPNAI and/or LPNAI in poultry in another country, India can impose import restrictions. This language, in India's view, is just an exhortation not to impose bans in the commercially important segment of poultry if there is an occurrence of HPNAI and/or LPAI in birds other than poultry, including wild birds. However, the panel decided to seek advice through a written consultation with the OIE on the interpretation of the OIE Code. India challenged the authority of the panel to consult experts on an issue which is not strictly scientific and technical. Interpretation of language is not a scientific or technical matter, India argued. The panel stated that the explanations provided by the OIE "resonate with the argument of the United States" that where the OIE Code has recommended prohibitions, it has explicitly provided so.[3] However, this statement is not free from doubt. The OIE itself states that there are several provisions in the OIE Code that permit trade from countries that are free from HPNAI (but not free from NAI)—the implication being that safe trade is not always envisaged from countries reporting LPNAI. The Panel's reliance on the explanations provided by the OIE and the Appellate Body's affirmation of this position beg some tough questions. The interpretative matter is the text of the international standard itself. In that case, interpretation of Article 10.4.1.10 should have relied upon the customary rule of interpretation codified in Article 31-33 of the Vienna Convention of the Law of Treaties (VCLT). But the Panel did not deem it important to mention the VCLT. The Appellate Body is ambivalent here, but adds that a Panel may be guided by any "relevant interpretative principles, including relevant customary rules of interpretation of public international law".[4]

The Panel and the Appellate Body held that India's AI measures were not "based on" or "conforming to" to the OIE standards and that India was not entitled to get the benefit of presumption of consistency of its AI measures with the relevant provisions of the SPS Agreement and GATT 1994. The matter rests here, but how a future panel would interpret an ambiguous provision of an international standard is still uncertain.

Scientific evidence and risk assessment: separate existence or a specific means to an end?

India had made it clear that its AI measures were taken to address risks associated with AI and ensure food safety. India's assumption throughout was that India's measures were in conformity with the OIE Code and, therefore, the

existence or non-existence of a risk assessment was of no consequence. Apparently, India had compiled some scientific material on the risks associated with the imports of products originating from countries reporting LPNAI, none of which properly fitted the description of a risk assessment. To state it pithily, India's defence under Article 5.1 and 5.2 was weak.

However, *India- Agricultural Products* gave clarification on the relationship between Article 2.2, and 5.1 and 5.2 of the SPS Agreement. Article 2.2 states that an SPS measure must be based on scientific principles and that it must not be maintained without scientific evidence. The complainant argued that a breach of obligations under Article 5.1 and 5.2, viz., a failure to conduct a risk assessment would result in a breach of Article 2.2 as well. In an important finding, the Appellate Body held that "[w]hile Articles 5.1 and 5.2 may be considered as specific applications of the obligations in Article 2.2, this does not imply that the obligations in Articles 5.1 and 5.2 somehow serve to limit the scope of applications of the obligations in Article 2.2, or vice versa." According to the Appellate Body, the only limitation of the scope of Article 2.2 was specific to the circumstances in which Article 5.7. Thus, in making a clear departure from some of the earlier cases, the Appellate Body stated that a breach of Articles 5.1 and 5.2 would not "invariably lead to a finding of inconsistency with Article 2.2". From a more practical point of view, a violation of Articles 5.1 and 5.2 does not "entail" in a violation of Article 2.2, but only gives rise to a rebuttable presumption. This finding was clearly in India's favour and is, clearly, one of the major jurisprudential contributions of this case.

Exotic diseases and discrimination claims: Who bears the 'burden of proof'?

There is an obligation in Article 2.3 of the SPS Agreement not to discriminate among WTO members and between the importing country and the exporting country. The United States also raised two forms of discrimination in this case: first, that India maintained a total ban on imported products, whereas it maintained a ban on domestic products only within a 10 km zone; second, that while maintaining bans on imported products on account of LPNAI, India does not maintain surveillance sufficient to detect LPNAI within India's domestic poultry. In substance, the United States' claim is the following: if the threats posed by the LPNAI virus are present in India, although not detected due to poor surveillance, why should India treat the imports differently from the domestic poultry products?

This first form of discrimination is almost unavoidable, since an equivalent of enforcing the import measure to domestic poultry would be to stop any domestic trade in poultry or to cull the entire poultry population if there is an occurrence in any part of the country. In the case of a domestic AI outbreak, the epicenter of the disease is known and the control measures could be easily targeted, but this cannot be said in the case of imports.

The more contentious issue in this dispute was the second form of discrimination which related to the surveillance of LPNAI. India's defence focused on the aspect that LPNAI is exotic to India and that India has not identified or reported any previous occurrence of LPNAI. However, the panel asked three individual external experts to comment whether India was conducting a surveillance that would reliably detect LPNAI. None of the experts testified that LPNAI was prevalent in India, but all of them concluded that India's surveillance was not adequate to detect LPNAI. The panel almost endorsed the view of the experts.

India's objection was on a substantive legal issue, especially in regard to the panel allegedly shifting the evidentiary burden to India rather than requiring the complainant to discharge this burden. It was an essential premise of the complainant's argument that LPNAI incidents might have occurred in India. However, asking the respondent country to establish that "LPNAI was exotic to India" is an exceedingly difficult threshold. The Appellate Body noted that the assertion relating to the absence of the disease in India was a "central factual pillar" of India's response in that case, and that such a burden should rest with India. This particular finding will have significant systemic importance in the allocation of burden of proof in WTO dispute settlement, especially in SPS disputes.

Appropriate Level of Protection and India's AI measures

The purpose of SPS measures is to guard against certain types of identifiable risks. The concept of "acceptable level of protection" or ALOP is defined in Annex A (5) of the SPS Agreement. In simple terms it is the level of protection deemed appropriate by a WTO Member adopting an SPS measure. As a WTO Panel stated in *Australia- Salmon*, the determination of ALOP is the prerogative of the concerned Member and not that of the panels or the Appellate Body.[5]

The case raised certain interesting issues. If a WTO Member asserts that the ALOP it has chosen is reflected in an SPS measure, is there an evidentiary burden on that Member to establish that its measures truly and realistically establish its ALOP? India contended that LPNAI is exotic to India and that it wants "prevention of ingress of LPNAI and HPNAI" or "freedom from NAI". India did not have any doubt about its ALOP.

Notwithstanding this position, the Panel did not accept India's ALOP. The Panel took into account the particularities of India's AI situation, that is, whether a zero-risk level of protection can be arrived particularly if the disease can be transmitted not only through commercial channels of trade but also by wild birds, and informal and illicit trade. Based on this reasoning, the panel held that India's ALOP was not zero-risk. The Panel determined India's ALOP as *"very high or very conservative*".

The Appellate Body has affirmed the Panel's characterization of India's ALOP. With this decision, the deference which importing Members enjoyed in identifying their ALOP has been considerably diluted.

Regionalization and Compartmentalization: New Jurisprudence

Previous SPS disputes at the WTO have shed very little light on the interpretation of Article 6 of the SPS Agreement, which discusses the concepts of zoning and compartmentalization.

Article 6 has three sub-articles and all the sub-articles have two paragraphs. Stated shortly, there are two key principles in Article 6. Article 6.1, first paragraph, sets forth the requirement that Members shall ensure that their SPS measures are adapted to the SPS characteristics of the area—whether all of a country, part of a country or all parts or parts of several countries. The second key obligation is mentioned in Article 6.2, first sentence, which states that Member shall, in particular, *recognize* the concepts of pest- or disease-free areas and areas of low-pest or disease prevalence. Finally, Article 6.3 stipulates that exporting Members must provide evidence to the importing Members to objectively demonstrate whether areas within their territories can be considered as pest –or-disease-free areas or areas of low pest or disease prevalence.

The United States raised a claim that India's AI measures explicitly prohibited poultry products from all parts of the country. India contended that India's regionalization obligations are triggered only when an exporting Member complies with Article 6.3. According to India, the burden is on the exporting Member to initiate the proposal to recognize areas and provide the documentary evidence concerning the proposed disease-free area or area of low disease prevalence.

The Appellate Body clarified that the overarching obligation under Article 6 is to ensure that a member's SPS measures are adapted to regional SPS characteristics as stated in Article 6.1. The remainder of Article of 6, according to the Appellate Body, is to set out the specifics of this obligation. To this extent, the obligations under various paragraphs of Article 6 are not free standing as the panel had suggested. Regarding the act of recognition, the Appellate Body agreed with the panel that an SPS measures must, at a minimum, not deny or contradict the recognition of the concepts disease-free areas and areas of low pest or disease prevalence as they may be relevant to the disease at issue. In this regard the panel found that while the Indian Livestock Act 1898 contained a broad discretion, it contained no reference to the possibility of recognizing disease-free areas, zones, compartments or equivalent.

Conclusion

The final outcome of this case was based on one particular issue: whether India had complied with the OIE Code while imposing trade restrictions on poultry products? Having lost that defence, India lost a host of consequential challenges. In that context, the Avian Influenza dispute reignites the debate as to what kind of measures a WTO Member can adopt for animal, public health and food safety especially in response to diseases which are considered to be exotic or non-existent in its territory. The case also highlights the importance of proactively participating international standard setting to ensure that the concerns a particular country may have with respect to a particular disease or health risk is clearly and unambiguously stated in international standards. Equally important is the need for conducting proper risk assessments, without which a WTO member is unlikely to be found as meeting the obligations under the SPS Agreement. The third important principle is the requirement to impose measures on a regional basis as opposed to a country-wide basis while addressing animal and public health issues.

[1] Panel Report, India- Agricultural Products, WT/DS 430, para. 7.231.
[2] Panel Report, para. 7.251.
[3] Panel Report, para. 7.238.
[4] Appellate Body Report, India- Agricultural Products, para. 5.79.
[5] Panel Report, Australia- Salmon, para. 199.

About the Author

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