

7.11.2 Analysis by the Panel

7.803. We recall our findings above that India's AI measures are inconsistent with Articles 3.1, 5.1, 5.2, 2.2, 2.3, 5.6, 6.1, 6.2, and 7, as well as Annex B(2) and Annex B(5)(a), (b) and (d) of the SPS Agreement. In the light of these findings of inconsistency, we consider it appropriate to exercise judicial economy over the United States' claim under Article XI of the GATT 1994.¹³¹⁵

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. As described in greater detail above, the Panel *finds* that:

- a. In respect of India's first request for a preliminary ruling:
 - i. the panel request is sufficiently precise in identifying S.O. 1663(E) as a specific measure at issue as required by Article 6.2 of the DSU, insofar as S.O. 1663(E) prohibits the importation of various agricultural products into India from those countries reporting NAI (both HPNAI and LPNAI);
 - ii. the listing of the products prohibited by S.O. 1663(E) in paragraph 3 of the panel request together with the reference to "these products" immediately following that listing do not suggest that the United States intended to limit its challenge to those products;
 - iii. the word "orders" included in the panel request does not render the panel request inconsistent with the specificity requirement of Article 6.2 of the DSU, and it does not prejudice the ability of India to defend itself;
 - iv. under the circumstances, there can be no uncertainty on India's part as to whether the United States is challenging measures that were not in force as of the date of the panel request. The United States is challenging only the measures that were in force as of the date of the panel request, namely 11 May 2012; and
 - v. the panel request did not fail to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the claims under Articles 2.3, 5.5 and 5.6 of the SPS Agreement.
- b. In respect of India's second request for a preliminary ruling:
 - i. the NAP 2012, being a measure that applies only to India's domestic agricultural products, falls outside the previously delimited scope of "India's [AI] measures [that] prohibit the importation of various agricultural products into India from those countries reporting NAI", and, therefore, is not a measure at issue in this dispute within the meaning of Article 6.2 of the DSU;
 - ii. the health certificates that accompany a SIP and that are issued pursuant to S.O. 655(E) are not "related to" or "implementing" the import prohibition reflected in S.O. 1663(E) and, therefore, are not measures at issue in this dispute;
 - iii. the health certificates that accompany a SIP and that are issued pursuant to S.O. 655(E) do not qualify as "orders issued by [the DAHD] pursuant to the Livestock Act" within the meaning of the panel request and, therefore, are not measures at issue in this dispute;
 - iv. having plainly connected Article 2.3 and India's AI measures, the United States was not under an additional obligation to identify the NAP 2012 in its panel request and

¹³¹⁵ We note that this approach has also been adopted by previous panels when addressing a claim under the GATT 1994, having already made a finding of inconsistency with provisions of the SPS Agreement. For example, Panel Reports, *EC – Hormones (US)*, para. 8.272; *EC – Hormones (Canada)*, para. 8.275; *Australia – Salmon*, para. 8.185; *Japan – Apples*, para. 8.328; and *EC – Approval and Marketing of Biotech Products*, paras. 7.3422 and 7.3429.

thus India's request that the United States' claim under Article 2.3 of the SPS Agreement be set aside as outside the jurisdiction of the Panel is denied.

- c. In respect of the United States' claims pursuant to the SPS Agreement:
- i. India's AI measures are SPS measures subject to the disciplines of the SPS Agreement;
 - ii. India's AI measures are inconsistent with Article 3.1 of the SPS Agreement because they are not "based on" the relevant international standard, the Terrestrial Code, and, in particular, Chapter 10.4 thereof. India is not entitled to benefit from the presumption of consistency of its AI measures with the other relevant provisions of the SPS Agreement and of the GATT 1994 because India's AI measures do not "conform to" the Terrestrial Code, and, in particular, Chapter 10.4 thereof, within the meaning of Article 3.2 of the SPS Agreement;
 - iii. India's AI measures are inconsistent with Article 5.1 of the SPS Agreement because they are not based on a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations;
 - iv. India's AI measures are inconsistent with Article 5.2 of the SPS Agreement because they are not based on a risk assessment that takes into account the factors set forth in Article 5.2;
 - v. In the light of our findings of inconsistency with Articles 5.1 and 5.2 of the SPS Agreement, India's AI measures are also inconsistent with Article 2.2 of the SPS Agreement because they are not based on scientific principles and are maintained without sufficient scientific evidence;
 - vi. India's AI measures are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail. India's AI measures are also inconsistent with Article 2.3, second sentence, of the SPS Agreement because they are applied in a manner which constitutes a disguised restriction on international trade;
 - vii. India's AI measures are inconsistent with Article 5.6 of the SPS Agreement because they are significantly more trade-restrictive than required to achieve India's ALOP, with respect to the products covered by Chapter 10.4 of the Terrestrial Code;
 - viii. Having found that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement, India's AI measures are consequentially inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect human and animal life or health;
 - ix. India's AI measures are inconsistent with Article 6.2, first sentence, of the SPS Agreement because they fail to recognize the concepts of disease-free areas and areas of low disease prevalence. Consequentially, India's AI measures are also inconsistent with Article 6.2, second sentence, of the SPS Agreement because the failure to recognize the concepts of disease-free areas and areas of low disease prevalence renders impossible a determination of such areas based on the factors enumerated in Article 6.2, second sentence;
 - x. Having found that India's AI measures fail to recognize the concepts of disease-free areas and areas of low disease prevalence, India's AI measures are inconsistent with Article 6.1, first sentence, of the SPS Agreement because they are therefore not adapted to the SPS characteristics of the areas from which products originate and to which they are destined. Having found that India's AI measures are inconsistent with Article 6.1, first sentence, and that India has not undertaken the assessment envisaged by Article 6.1, second sentence, India's AI measures are also inconsistent

with Article 6.1, second sentence, of the SPS Agreement because India has not taken into account factors including those specified in Article 6.1, second sentence.

- xi. India acted inconsistently with Annex B(2) of the SPS Agreement because it failed to allow a reasonable interval between the publication of S.O. 1663(E) and its entry into force;
- xii. India cannot rely upon Annex B(6) of the SPS Agreement to justify omitting steps enumerated in Annex B(5) of the SPS Agreement because the condition prescribed in the *chapeau* of Annex B(6) was not present with respect to S.O. 1663(E) at the time of its proposal;
- xiii. India acted inconsistently with Annex B(5)(a) of the SPS Agreement because it failed to publish a notice "at an early stage" about the "proposed" S.O. 1663(E);
- xiv. India acted inconsistently with Annex B(5)(b) of the SPS Agreement because it failed to notify other Members through the WTO Secretariat, "at an early stage", of the "proposed" S.O. 1663(E);
- xv. India acted inconsistently with Annex B(5)(d) of the SPS Agreement because it did not allow "reasonable time" for other Members to make comments on the "proposed" S.O. 1663(E);
- xvi. Having found that India acted inconsistently with Annex B(2) and Annex B(5)(a), (b) and (d), India also acted inconsistently with Article 7 of the SPS Agreement.

8.2. Having found that India's AI measures are inconsistent with Article 2.3 of the SPS Agreement, the Panel *declines to rule* on the United States' alternative claim under Article 5.5 of the SPS Agreement.

8.3. The Panel also *declines to rule* on the United States' claim pursuant to Annex B(5)(c) of the SPS Agreement because the United States failed to make a *prima facie* case of violation thereof.

8.4. Having found that India's AI measures are inconsistent with Articles 3.1, 5.1, 5.2, 2.2, 2.3, 5.6, 6.1, 6.2, and 7 as well as Annex B(2) and Annex B(5)(a), (b) and (d) of the SPS Agreement, the Panel further *declines to rule* on the United States' claim under Article XI of the GATT 1994.

8.5. Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that India has acted inconsistently with the specified provisions of the SPS Agreement, it has nullified or impaired benefits accruing to the United States under that agreement.

8.6. Pursuant to Article 19.1 of the DSU, having found that India acted inconsistently with its obligations under Articles 3.1, 5.1, 5.2, 2.2, 2.3, 5.6, 6.1, 6.2 and 7, as well as Annex B(2) and Annex B(5)(a), (b) and (d) of the SPS Agreement, we recommend that the DSB request India to bring its measures into conformity with its obligations under the SPS Agreement.
