

The Estey

**Journal of International Law
and Trade Policy**

Abstract

Reflections on the *India–Agricultural Products Dispute* in the Light of “Risk Assessment” and the SPS Agreement: Why Has India Failed so Miserably?

Saloni Khanderia-Yadav

Postdoctoral Fellow (International Commercial Law), University of Johannesburg, South Africa

Science and scientific evidence occupy a crucial place in the Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement), which consequently calls for an assessment of risks posed to the lives and health of human, animal and plant life prior to the application of an SPS measure by a WTO member country in accordance with internationally accepted standards. The recent report of the dispute settlement panel in the *India–Measures concerning the Importation of Certain Agricultural Products* dispute has, in turn, assumed a significant role in the development and understanding of “risk assessment”, which has been a contentious issue in the majority of disputes concerning the implementation of the SPS Agreement. The United States challenged India’s measures, claiming that Indian law, *vide* the Livestock Importation Act in conjunction with the Statutory Order issued to give effect to the former, was not in compliance with WTO law and in particular the SPS Agreement. The agreement requires scientific evidence that is based on scientific principles, along with an assessment of the risk posed to human, animal and plant life, in cases where the importation of certain agricultural products is prohibited or restricted. Consequently, India erred in various aspects when it based its risk assessment concerning Avian Influenza on methods that were

*Editorial Office: Estey Journal of International Law and Trade Policy, College of Law, University of Saskatchewan, 15 Campus Dr., Saskatoon, SK, S7N 5A6, Canada
Phone (306) 966-6879; email: estey.j.editor@usask.ca*

outside the scope and ambit of the standards prescribed by the Terrestrial Code. While the Terrestrial Code authorized a prohibition of the importation of livestock products merely from zones and compartments within the country affected with AI, in contrast India imposed a complete ban on livestock from countries that reported Avian Influenza (irrespective of whether such products originate from Avian Influenza-free zones or not). In doing so, India violated the requirement that its SPS measure be based on scientific principles; its measure did not conform to scientific principles. Consequently, despite the fact that India had a right to determine the level of protection it considers appropriate as per the agreement, it also over-stepped this right when it failed to perform its duty of ensuring that the SPS measure was not more trade restrictive than necessary. The panel's interpretation of the use and significance of risk assessment as a basic premise is therefore noteworthy, not merely given increasing concerns pertaining to agricultural protectionism in deterring the goals of free trade policy, but at the same time considering the limited jurisprudence on the subject matter – namely the relationship between scientific principles and evidence on the one hand, and risk assessment on the other. This article, hence, provides insight into the recent panel report in the *India–Agricultural Products* dispute against the backdrop of the requirement of risk assessment in the SPS Agreement.

Keywords: dispute, India, science, SPS, standards, United States, WTO