India – Measures Concerning the Importation of Certain Agricultural Products

(WT/DS430)

Third Party Submission of Australia

26 June 2013
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<th>Abbreviation</th>
<th>Description</th>
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<td>AI</td>
<td>Avian influenza.</td>
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<td>ALOP</td>
<td>Appropriate level of protection.</td>
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<td>HPAI</td>
<td>Highly pathogenic avian influenza.</td>
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<td>HPNAI</td>
<td>Highly pathogenic notifiable avian influenza as defined at Article 10.4.1.2 of the OIE Code. HPNAI is the same as HPAI.</td>
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<td>LPAI</td>
<td>Low pathogenicity avian influenza.</td>
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<tr>
<td>LPNAI</td>
<td>Low pathogenicity notifiable avian influenza as defined at Article 10.4.1.2 of the OIE Code. LPNAI consists of the H5 and H7 subtypes of LPAI.</td>
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<td>NAI</td>
<td>Notifiable avian influenza. NAI consists of HPNAI and LPNAI.</td>
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<td>SPS Agreement</td>
<td>WTO Agreement on the Application of Sanitary and Phytosanitary Measures.</td>
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<td>WTO</td>
<td>World Trade Organization.</td>
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### TABLE OF CASES REFERRED TO IN THIS SUBMISSION

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A. INTRODUCTION

1. In its written submission, Australia will focus on a select few issues raised in this dispute. These are:

   (a) The order of consideration of claims under Article 3 and under Articles 2.2, 5.1 and 5.2;

   (b) Notification of LPAI under the OIE Code;

   (c) ALOP under the OIE Code;

   (d) Whether the burden is on the exporting country to demonstrate that it is maintaining zones or compartments;

   (e) The Australian risk assessment referred to in India’s First Written Submission; and

   (f) Claims under Article 2.3.

2. Australia reserves the right to raise other issues in the third-party hearing with the Panel.

B. THE ORDER OF CONSIDERATION OF CLAIMS UNDER ARTICLE 3 AND UNDER ARTICLES 2.2, 5.1 AND 5.2

3. Australia notes India’s statement at paragraph 7 of its First Written Submission that:

   *It was always India’s understanding that having adopted an OIE recommendation, it was not required to further conduct a risk assessment.*

4. Australia notes that Article 3.2 of the SPS Agreement provides:

   *Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.*

5. Australia notes that the panel will need to determine as a matter of fact whether India’s measures conform to, or are based on, the OIE Code, noting that only measures which conform to international standards enjoy the presumption of consistency with the SPS Agreement. Australia also notes that that presumption is rebuttable.1

6. Bearing this in mind, Australia considers that it is open to the panel to commence its analysis with the claims under Article 3, followed by consideration, if

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necessary, of the claims under Article 2.2, 5.1 and 5.2. Australia agrees with India’s suggestion that the current case can be distinguished from Australia – Salmon for the purposes of determining the order of consideration of issues. In Australia – Salmon, the panel held:

... Australia - in this case the WTO Member imposing the sanitary measure - does not claim that its measure conforms to international guidelines. ... Therefore, the reason to address Article 3 first, because it could lead to a presumption of consistency with all other SPS provisions, does not apply in this case.2

Whilst in Australia – Salmon Australia made no claim that its measures conformed to an international standard, in this dispute India explicitly makes that claim, and as such, it is open to the panel to consider claims under Article 3 first.

C. NOTIFICATION OF LPAI UNDER THE OIE CODE

7. Australia respectfully does not agree with India’s interpretation of the OIE Code as expressed in paragraph 3 of its First Written Submission, where India states that the OIE Code ‘recommends that importing countries may impose an immediate ban on the trade in poultry and poultry products if an exporting country notifies an outbreak of HPAI or LPAI in poultry.’ Article 10.4.1.1 of the OIE Code provides:

Highly pathogenic avian influenza in birds and low pathogenicity notifiable avian influenza in poultry, as defined below, should be notified in accordance with the Terrestrial Code.3

Chapter 10.4 then outlines recommendations on importation, often based on the notification status of the country, zone or compartment. As a result, Australia respectfully suggests to the Panel that the OIE Code only requires notification of HPAI and LPNAI in poultry. The OIE Code does not require notification of LPAI, nor does it sanction an immediate ban on trade in poultry and poultry products following notification of LPAI in poultry.

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3 HPNAI and LPNAI are defined in Article 10.4.1.2 of the OIE Code as follows:

For the purposes of the Terrestrial Code, notifiable avian influenza (NAI) is defined as an infection of poultry caused by any influenza A virus of the H5 or H7 subtypes or by any AI virus with an intravenous pathogenicity index (IVPI) greater than 1.2 (or as an alternative at least 75 percent mortality) as described below. NAI viruses can be divided into highly pathogenic notifiable avian influenza (HPNAI) and low pathogenicity notifiable avian influenza (LPNAI):

a. HPNAI viruses have an IVPI in six-week-old chickens greater than 1.2 or, as an alternative, cause at least 75 percent mortality in four-to-eight-week-old chickens infected intravenously. H5 and H7 viruses which do not have an IVPI of greater than 1.2 or cause less than 75 percent mortality in an intravenous lethality test should be sequenced to determine whether multiple basic amino acids are present at the cleavage site of the haemagglutinin molecule (HA0); if the amino acid motif is similar to that observed for other HPNAI isolates, the isolate being tested should be considered as HPNAI;

b. LPNAI are all influenza A viruses of H5 and H7 subtype that are not HPNAI viruses.
D. ALOP UNDER THE OIE CODE

8. Australia notes India’s statement at paragraph 113 in its First Written Submission that:

...measures prescribed by standard setting bodies such as the OIE are recommendatory in nature which a Member country may adopt depending on the level of protection it has deemed appropriate.

9. Australia respectfully suggests that, in order for a Member to claim that their measures conform to or are based on those standards, that Member’s ALOP must not render the standards nugatory. Australia notes that in Australia-Apples the panel held:

Even if Australia has the right to establish its ALOP and to devise risk management measures if necessary to achieve such ALOP, Australia has to do so consistently with the SPS Agreement.

10. Australia also notes the panel’s comment in Australia-Salmon:

We fully agree with Australia that the determination of its level of sanitary protection is a decision to be made by Australia, not by any other WTO Member or international organization. ... However, this decision on what level of protection is appropriate has to comply with the SPS Agreement. ... The same applies to Australia’s decision as to which sanitary measure will achieve Australia’s level of protection. It is for Australia to decide on this, but, again, in so doing it has to act consistently with the SPS Agreement, in particular Articles 2, 5.1 to 5.3 and 5.6.

11. On appeal, the Appellate Body confirmed this approach:

It would obviously be wrong to interpret the SPS Agreement in a way that would render nugatory entire articles or paragraphs of articles of this Agreement and allow Members to escape their obligations under this agreement.

12. That is, a Member is not permitted to adopt measures to achieve an ALOP which contradict its obligations under the SPS Agreement. Australia respectfully suggests that, in a similar way, the panel could choose to consider the question of whether India’s ALOP renders the standards embodied in the OIE Code nugatory.

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13. Australia also notes that a related issue for the panel will be whether India’s ALOP is properly derived from India’s domestic provisions, as suggested by the United States, or from India’s international measures (such as SO1633(E)) as suggested by India.

E. AUSTRALIAN RISK ASSESSMENT

14. India states in paragraph 9 of its First Written Submission:

*The Australian Risk Assessment categorically concludes that fresh meat of poultry from countries such as USA which notified LPNAI should not be imported.*

India further states in paragraph 178 of its First Written Submission:

*Australia...has prohibited import of unprocessed meat and meat products from regions reporting occurrence LPAI in poultry [sic].*

15. These assertions are apparently drawn from the *General Import Risk Analysis Report for Chicken Meat: Final Report* by Biosecurity Australia, a risk assessment conducted by Australia in 2008. However the conclusions drawn by India from the Australian risk assessment are a misreading of the document. As a result of Australia’s risk analysis, quarantine measures were implemented by Australia which conform to the OIE code, by allowing the importation of chicken meat either from a country or zone which is HPNAI/LPNAI free, or that has been processed to ensure the destruction of the AI virus. It is incorrect to assert that the Australian risk assessment supports a blanket ban on the importation of chicken meat from countries which have notified LPNAI as is asserted by India at paragraphs 9 and 178 of its First Written Submission.

F. ARTICLE 2.3 CLAIM

16. Australia notes India’s assertion that the discrimination alleged by the United States in its Article 2.3 claim has as its object India’s domestic measures under the National Action Plan 2012, which allegedly apply different domestic controls to those mandated at an international level by SO1663(E). India makes two arguments as to why the NAP12 is not a measure that is within the panel’s terms of reference. Firstly, India argues at paragraphs 73-74 of its First Written Submission that the NAP12 was not identified as a measure at issue in the United States panel request:

*In order to make a claim that India’s SPS measures arbitrarily or unjustifiably discriminate between its own territory and that of other members under article 2.3, it has to necessarily adduce and impugn such of India’s measures which it believes are the cause of this arbitrary or unjustifiable discrimination. However nowhere in the panel request is there a mention of the National Action Plan...*
17. Australia considers that, in this regard, the panel will need to determine whether, in a case where discrimination under Article 2.3 is alleged between a Member’s own territory and that of other Members, the measure which causes that discrimination is the allegedly more lenient domestic measure or allegedly more stringent international measure.

18. In this regard, Australia suggests that there would be merit in the conclusion that the allegedly more stringent international measure is the proper focus of an Article 2.3 claim of discrimination between a Member’s own territory and that of other Members. Australia notes that the entirety of Article 2.3 reads as follows:

Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

19. India argues in a different context that the NAP12 could not operate as a disguised restriction on international trade (see, for example, paragraph 189 of India’s First Written Submission, discussed in this submission at paragraph 24). Australia notes that the second sentence of Article 2.3 refers to measures which could possibly operate as a disguised restriction on international trade. In a practical sense, it is likely that Article 2.3 refers to a Member’s international measures. Australia therefore considers that it is open to the panel to conclude that the first sentence of Article 2.3 also has as its focus the international measures of Members. As a result, Australia considers that the proper focus of the Article 2.3 claim in the first instance is India’s international measures as identified in the US panel request.

20. Australia also notes the Appellate Body’s comments in EC – Selected Customs Matters that:

The ‘specific measure’ to be identified in a panel request is the object of the challenge, namely, the measure that is alleged to be causing the violation of an obligation contained in a covered agreement. In other words, the measure at issue is what is being challenged by the complaining member.8

The measures challenged by the United States in this dispute are not India’s domestic measures, but rather India’s international measures, such as those enacted under SO1663(E). In our opinion it appears that NAP12 is being used as a comparison for the purposes of allegedly demonstrating the elements of Article 2.3, rather than as the object of the claim.

G. CONCLUSION

21. Australia thanks the panel for the opportunity to provide this third party submission.

8 Para 103