India – Measures Concerning the Importation of Certain Agricultural Products

(WT/DS430)

Executive Summary
of the Third Party Written Submission
and the Third Party Oral Statement
of Australia

31 July 2013
A. THE ORDER OF CONSIDERATION OF CLAIMS UNDER ARTICLE 3 AND UNDER ARTICLES 2.2, 5.1 AND 5.2

1. Australia considers that it is open to the panel to commence its analysis with the claims under Article 3, followed by consideration, if necessary, of the claims under Article 2.2, 5.1 and 5.2. In this regard, Australia notes that only measures which conform to international standards enjoy the presumption of consistency with the SPS Agreement. Australia also notes that this presumption is rebuttable.

B. ALOP UNDER THE OIE CODE

2. Australia respectfully suggests that, in order for a Member to claim that their measures conform to or are based on an international standard, that Member’s ALOP must not render that standard nugatory. As highlighted by the panel in Australia–Apples and by the Appellate Body in Australia–Salmon 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.

3. In this context, Australia agrees with the argument made by the European Union in its Third Party Submission that regionalisation should not automatically be equated with a low ALOP, and could in fact be compatible with a high ALOP. Australia also notes the European Union’s argument that the regionalisation requirements in Article 6 of the SPS Agreement should be understood in light of the “significantly less trade restrictive alternative” requirement in Article 5.6 of the SPS Agreement, and shares that view.

C. AUSTRALIAN RISK ASSESSMENT

4. 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.

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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].

5. 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.

D. INTERNATIONAL RISK ASSESSMENT TECHNIQUES

6. Australia notes that Article 5.1 of the SPS Agreement states that Members shall ensure that their SPS measures are based on a risk assessment, "taking into account risk assessment techniques developed by the relevant international organisation." The United States notes in its First Written Submission that the OIE has developed standards for risk assessment, including Chapter 2.1 of the OIE Code and the Handbook. Australia shares Japan’s view that the requirement to take into account risk assessment techniques developed by international organisations does not equate to a requirement to conform to such international standards. In this regard Australia notes the Appellate Body’s guidance in *EC-Hormones* regarding the distinction between "based on" and "take into account."

E. STANDARD OF REVIEW

7. Australia considers that the SPS Agreement balances the right to take measures to protect human, animal, or plant life or health against the trade liberalization goals of the WTO. This balance cannot be maintained if Panels fail to apply appropriate standards of review.

    Australia reiterates its submission in *US – Continued Suspension* that the appropriate standard of review to be applied in a given dispute should be informed by both Article 11 of the DSU and the particular covered agreements and obligations at issue. Australia maintains that the standard of review to be applied by Panels may vary between different obligations under the SPS Agreement and must reflect the balance between regulatory autonomy and international scrutiny that is reflected in that Agreement.

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8. In Australia’s view, the most significant limitation imposed by the text of the SPS Agreement on a panel’s fact-finding jurisdiction is provided in Article 5.1. Article 5.1 imposes a positive obligation on Members to obtain and rely upon a risk assessment that is appropriate to the circumstances. A panel may not usurp the role of a risk assessor by conducting the risk assessment itself, because doing so would nullify the competence retained by Members under Article 5.1 of the SPS Agreement, and would amount to a de novo review. Such a review would be inconsistent with Article 11 of the DSU. Considerable, but not total, deference to a Member’s risk assessment should therefore be accorded by the panel where the Member has performed a comprehensive and transparent risk assessment.¹⁰

9. It will be for the panel to determine whether India has performed a risk assessment, and if so whether that risk assessment is comprehensive and transparent. Australia considers that a panel must not interfere with a Member’s risk assessment solely because it might have drawn different conclusions on the basis of the available evidence. A panel must limit the scope of its review to determining whether the risk assessor’s decision is objective and credible.

F. ARTICLE 2.3 CLAIM

10. In relation to the Article 2.3 claim in this dispute, Australia suggests that there would be merit in the conclusion that the allegedly more stringent international measure, rather than the allegedly more lenient domestic measure, is the proper focus of an Article 2.3 claim of discrimination between a Member’s own territory and that of other Members. 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.