

***INDIA – MEASURES CONCERNING THE IMPORTATION
OF CERTAIN AGRICULTURAL PRODUCTS
FROM THE UNITED STATES***

(DS430)

**EXECUTIVE SUMMARY OF THE
OPENING AND CLOSING STATEMENTS OF
THE UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES**

September 13, 2013

I. INTRODUCTION

1. India's measures do not conform to the OIE Code. Most notably, the Code does not recommend imposing a ban on imports on account of LPNAI. In fact, the OIE Code explicitly provides that most of the products affected by India's measures can be safely traded with respect to avian influenza. And the Code allows for zoning in recognition of the geographic limitations of AI outbreaks and efficacy of control measures to minimize trade disruptions even further. Despite the passage of over six years since the adoption of the measures, India has still not conducted a risk assessment that would be needed to justify a departure from the OIE Code, has not adopted any measures that allow for regionalization with respect to avian influenza, and has not properly notified its measures.

2. What India has done during those six years is allow its domestic producers to engage in poultry trade without meaningful LPNAI restrictions, while imposing trade bans on producers from foreign countries whenever they notify the presence of LPNAI. The discrimination is exacerbated by India's failure to require the sort of systematic surveillance testing used elsewhere to detect LPNAI, prompting resulting notifications to the OIE. In short, India's measures fail to comply with some of the most basic obligations in the SPS Agreement.

II. INDIA'S MEASURES CONTRADICT THE OIE CODE

A. The United States relies on what is in the OIE Code

3. The United States and India agree that the OIE Code is the relevant international standard for purpose of applying the SPS Agreement to India's measures. An examination of the plain text of the OIE Code in comparison to India's measures shows that they do not conform to the Code. India's measures prohibit the importation of products, while the OIE Code provides that these same products – with respect to the risk of avian influenza – can be safely imported.

4. The United States does not understand how India could assert that the OIE Code states anything differently. To the extent that India attempts to extrapolate from OIE reporting requirements to OIE-recommended restrictions, India's approach has no basis in the text of the OIE Code, or otherwise. In fact, a delegate of the OIE at a 2007 WTO Committee meeting explained the important difference between OIE reporting requirements and OIE-recommended restrictions. In short, what the OIE Code says is that while LPNAI outbreaks should be reported, products from reporting countries can be safely imported.

B. India argues based on what is absent from the OIE Code

5. India imports into the OIE Code something that is said nowhere – that it recommends bans when LPNAI is detected in poultry. In other words, since the Code does not expressly claim that India cannot use notifications to impose bans, its measures conform to the OIE Code and are entitled to a presumption of consistency under Article 3.2 of the SPS Agreement. As an initial matter, we think this approach puzzling. India's reading of "conform to" appears to be "is not expressly prohibited by." That reading is not in keeping with the ordinary meaning, in context, and in light of the object and purpose of the SPS Agreement. If India chooses measures that are different from, or not found in, the OIE Code, then those measures do not "conform to"

the relevant international standards. From what we can discern, India's approach is based on three assumptions that have no support in either the OIE Code or the SPS Agreement.

6. First, India asserts the various recommendations in the OIE Code are but options by which India can decide how to best achieve its appropriate level of protection, or "ALOP." Thus, according to India, it has chosen the option of a ban, which achieves a purportedly higher ALOP than the control measures that constitute most of the OIE Code chapter on avian influenza. But there is nothing in the OIE Code that suggests its recommendations amount to some sort of menu that sets out options for achieving varying degrees of protection.

7. Second, India claims each recommendation of the OIE Code should be read in isolation from the rest of the OIE Code. Nothing in the OIE Code suggests that should be the case. Indeed, the provision India cites as recommending a ban, Article 10.4.1.10, is located in a section of the avian influenza chapter whose heading is "General Provisions." As is evident from a cursory review, many of the provisions in this section are meant to impart meaning to others.

8. To justify its approach, India misconstrues the Appellate Body's findings in *EC – Hormones*. India incorrectly asserts that each recommendation must be read individually because to do otherwise would make them mandatory contrary to the Appellate Body findings. The Appellate Body made no findings that international standards are to be read in isolation. It found in pertinent part that "an SPS measure that conforms to an international standard ... would embody the international standard completely and, for practical purposes, converts it into a municipal standard." Far from finding that a standard may be followed piecemeal, the Appellate Body found it must be adopted "*completely*" to obtain the rebuttable presumption of consistency.

9. Finally, India argues that Article 10.4.1.10's admonishment not to impose bans on account of NAI in wild birds is actually a recommendation to impose bans on poultry products. India's logic is flawed. A road sign that recommends driving carefully when it rains does not mean a driver is recommended to drive carelessly when conditions are dry. India's argument is particularly misplaced when one considers that the OIE Code is meant to be used practically by veterinary authorities. Clarity as to the precise recommendations is critical. Where the OIE Code recommends prohibitions, it *explicitly so provides*.

10. In addition to having important implications for Article 3.2 of the SPS Agreement, the fact that India's measures are inconsistent with the OIE Code is also important for the application of Article 3.1. In this instance, the failure of India's arguments to establish that its measures conform to the OIE Code also establishes that India has not based its measures on international standards, thereby breaching Article 3.1. Because India's arguments rely only on Article 10.1.4.10 of the OIE Code – and because India's interpretation of that provision cannot be sustained – India has no basis for any assertion that its measures are based on the OIE Code.

III. INDIA'S MEASURES RESULT IN ARBITRARY OR UNJUSTIFIABLE DISCRIMINATION

11. There are two basic contrasts between the avian influenza measures that India applies to imported products and those that India applies with respect to domestic products:

- 1) India imposes import bans when an exporting country reports detections of LPNAI. Yet India does not have in place surveillance mechanisms capable of reliably detecting LPNAI when it occurs in India. Hence, when LPNAI occurs in India, no restrictions on domestic trade are imposed.
- 2) When either HPAI or LPNAI is detected in an exporting country, India applies an import ban covering the entirety of that country. By contrast, when NAI is detected in India—really HPAI, as India does not detect LPNAI—India restricts trade in products only from a limited zone.

There is no valid reason for India's disparate treatment of foreign and domestic products following NAI incidents in their country of origin. This disparate treatment breaches Article 2.3.

12. Regarding the first contrast, India argues that it does not have LPNAI. However, India has had over 90 outbreaks of the far rarer HPAI. As a matter of epidemiology it is not a reasonable or scientifically valid hypothesis to suggest that India does not have LPNAI. Further, the United States is submitting a study noting the detection of H5 and H7 antibodies in domestic ducks in India. Most crucially, however, India does not have in place a system for reliably detecting LPNAI. Without a valid detection system, India is not in fact applying measures to contain LPNAI when it occurs in India. India does not dispute that it has no mandatory requirement for the conduct of random laboratory tests in apparently healthy flocks for LPNAI, even though LPNAI's lack of symptoms makes visual observation inadequate for its detection. As India is not even taking steps necessary to detect LPNAI, it is contradictory for India to claim that the disease is so serious that it must impose import bans on poultry products when other countries detect LPNAI. This is particularly so because the products that India bans are not vectors for transmission of the disease, and the OIE has found they can be safely traded even after detections of LPNAI.

13. Regarding the second contrast, it makes no sense for India to say that, whereas it will allow trade of domestic products from areas only 10.1 kilometers from an HPAI detection, its lack of knowledge of what happens in other countries prevents it from even considering whether other countries' surveillance and control systems are strong enough to contain outbreaks in those countries. If India thinks that it can control NAI, even in HPAI form, Article 2.3 requires it to at least admit the possibility that products from other countries with NAI detections can be safely traded in the same way that Indian products are traded following an HPAI outbreak.

14. India tries to argue that its purported absence of LPNAI gives it carte blanche to impose differential measures on domestic and imported products. Its argument is simply false. This is not a situation where an importing Member has no need to worry about domestic spread of a disease because it exists only in another part of the world. India itself believes that it has a significant risk for domestic LPNAI incidents. India cannot plausibly claim that its conditions are so dissimilar from those elsewhere that a lack of effective domestic surveillance and control measures, alongside measures for imported products far more stringent than recommended by OIE guidelines, simply reflect differences in disease conditions between India and elsewhere.

IV. INDIA’S MEASURES CONSTITUTE A DISGUISED RESTRICTION ON INTERNATIONAL TRADE

15. India’s measures result in an additional breach of Article 2.3 because they amount to a disguised restriction on trade. This can be inferred from the totality of how these measures operate, including the ways that they discriminate against imported products—*i.e.*, the forms of discrimination discussed in the context of the U.S. claim under the first sentence of Article 2.3. There are, moreover, further indicia that India’s discriminatory measures constitute disguised restrictions on international trade. The *Australia – Salmon* panel relied on considerations similar to those here to identify a disguised restriction under Article 5.5.

V. INDIA’S MEASURES DO NOT PROVIDE FOR REGIONALIZATION

16. India’s measures do not allow for regionalization. S.O. 1663(E) on its face precludes imports of listed products from a “country” if that country has reported NAI. The United States has not been silent over the years about the need for India to apply its AI measures on a less-than-country-wide basis. India has refused. In 2007, India told the United States that it would “insist on country freedom” and that its conditions for import are “uniform.” India’s failure to apply its AI measures on a less-than-country-wide basis has been mentioned repeatedly in SPS Committee meetings, and India’s delegate has never indicated that this complaint was ill-founded. Just last year, India’s delegate to the OIE stated that for India “the concept of zoning looked irrelevant as far as avian influenza was concerned.”

17. India’s unwillingness to even “recognize the concept[] of ... disease free areas” with respect to AI is what places India in breach of Article 6.2 of the SPS Agreement. Similarly, by refusing to recognize the possibility that an NAI incident anywhere in a large country like the United States may not warrant a ban on all products from the entire country, India is not ensuring that its measures “are adapted to the sanitary ... characteristics of the area[s]” from which products originate, in violation of Article 6.1. India is in breach of Article 6, regardless of how much or how little information any other Member might have submitted to India. India argues that it need not recognize the differences in the sanitary characteristics of areas from which a product is exported, while it is free to treat different areas in India differently based on the different sanitary characteristics of those areas, by asserting that it has information about domestic disease outbreaks, but not about foreign outbreaks. India’s approach would mean that, in effect, a failure to recognize disease-free areas is never discriminatory. India’s approach cannot be reconciled with the text of Articles 6.1 and 6.2.

VI. INDIA CANNOT EXCUSE ITS FAILURE TO COMPLY WITH ARTICLE 7 AND ANNEX B

18. India’s only response to the claim under Article 7 is that its measures conform to international standards. Yet India’s measures do not conform to international standards.