

Interpretation of International Standards in the SPS Agreement:

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SPS Agreement

- WTO Member's right to regulate
- Protect **human, animal, plant life or health**/fulfill legitimate objectives at levels they consider appropriate.

SPS Agreement: Scope

- Risks arising from:
 - Entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms
 - Additives, contaminants, toxins or organisms in foods, beverages or feedstuffs
 - Diseases caused by animals, plants or products or from diseases carried by animals, plants or from the entry, establishment and spread of pests.

Two Recent Cases: *India- Agri. Products* and *Russia- Pigs (EU)*

- India Agri. Products case—Avian Influenza and Poultry trade
- S. O 1663 (E) (2011)
- Livestock Act
- India's ban on poultry imports

Background

- HPAI is an extremely infectious, systemic viral disease in poultry that produces high mortality
- Bans on the grounds of HPNAI and LPNAI
- OIE (World Organization for Animal Health) prepares the international standards on AI

India's prohibition

- Can a India impose restrictions on the importation of poultry and other agricultural products?

'Based on'

- *EC- Hormones:*
- “A thing is ‘based on’ another thing, when the former ‘stands on’ or is ‘founded’ or ‘built’ upon, or is supported by another.
- “To be based on an international standard, a measure may adopt some, not necessarily all, of the elements of the international standards”

Conform to



Chapter 10.4 of the Terrestrial Code

- Whether countries can import only from NAI or LPNAI free countries or also from “zones or compartments”?
- According to India, Chapter 10.4 allows an importing country to choose whether to require NAI- freedom or LPNAI freedom.

Terrestrial Code

- **Article 10.4.19**
- Recommendations for importation from either a NAI or HPNAI-free country, zone or compartment

- **Article 10.4.10**
- Recommendations for importation from a NAI-free country, zone or compartment

Article 10.4.1.10

“A Member should not impose immediate bans on the trade in poultry commodities in response to a notification, according to Article 1.1.3 of the Terrestrial Code, of infection with HPAI and LPAI virus in birds other than *poultry*, including wild birds.”

Panel's interpretation of Chapter 10.4

- The panel engaged OIE experts to opine on the issue whether the Terrestrial Code envisages import restrictions?
- India challenged recourse to OIE experts.
- AB didn't find fault with the panel.

“Condition of Entry”

- Panel: “India’s approach of allowing an importing country to choose as a “condition of entry” the NAI- free status of the exporting country and apply that condition on a country-wide basis, runs contrary to Chapter 10.4”.
- AB agreed with the panel.

Russia- Pigs

- EU-wide ban and individual measures against four Member States on pork products
- Reason: African Swine Flu (ASF)
- Russia does not conduct Risk Assessment
- Are the measures “based” or ‘conform to” international standards (OIE Standards)?

Key issue in these disputes

- How should the Terrestrial Code be interpreted?
- Article 3.1 and 3.2 of the SPS and Annex A 3 (b)
- Should be based on VCLT?
- AB in India's dispute suggests a mix of approaches

VCLT principles

- **Text:**
 - Interpret “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” (Art. 31(1))
- **Context of treaty**
 - Preamble, annexes, text itself, agreements, other international law provisions, etc.
 - Subsequent agreement of the parties; subsequent practice establishing agreement of parties as to treaty meaning ; and
- Applicable relevant rules of international law shall be taken into account

VCLT principles

- Meaning of the “treaty”
- **VCLT: Article 2(1) (a)**
- “International agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.
- What about the OIE Code?

SPS, Standards and VCLT

Key Terms

- “international standards, guidelines or recommendations”
- Are they ambiguous?

SPS, Standards and VCLT

- Can international standards be considered as a “context” while interpreting the relevant SPS provisions?
- Not wholly desirable, but international standards have a *sui generis* existence in the SPS Agreement

Conclusions

- International standards are getting complex, detailed and are increasingly resembling treaties.
- VCLT rules embody some of the best practices of treaty interpretation.
- Rather than an option, VCLT principles should become the default consideration in interpreting international standards in the SPS provisions