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INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

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US – Upland Cotton (Article 22.6 – US I)	Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1, 31 August 2009, DSR 2009:IX, p. 3871
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US – Zeroing (EC) (Article 21.5 – EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/RW, adopted 11 June 2009, as modified by Appellate Body Report WT/DS294/AB/RW, DSR 2009:VII, p. 3117
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441
US – Zeroing (Japan) (Article 21.5 – Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/RW, adopted 31 August 2009, upheld by Appellate Body Report WT/DS322/AB/RW, DSR 2009:VIII, p. 3553

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AI	Avian Influenza
ALOP	Appropriate Level of Protection
CBEC	Central Board of Excise and Customs
Code Commission	OIE Terrestrial Animal Health Standards Commission
DAHD	Department of Animal Husbandry, Dairying, and Fisheries
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FAO	Food and Agriculture Organization
GATT 1994	General Agreement on Tariffs and Trade 1994
HPAI	Highly Pathogenic Avian Influenza, or High Pathogenicity Avian Influenza
HPNAI	Highly Pathogenic Notifiable Avian Influenza
IVPI	Intravenous Pathogenicity Index
Livestock Act	Live-Stock Importation Act 1898 (9 of 1898)
Livestock Amendment Act	Live-Stock Importation (Amendment) Act 2001 (No. 28 of 2001)
LPAI	Low Pathogenicity Avian Influenza
LPNAI	Low Pathogenicity Notifiable Avian Influenza
NAI	Notifiable Avian Influenza
NAP 2012	National Action Plan 2012
OIE	World Organisation for Animal Health
Prevention of Diseases Act	Prevention and Control of Infectious and Contagious Disease in Animals Act 2009
SCI	Strictly Confidential Information
SIP	Sanitary Import Permit
S.O.	Statutory Order
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
SPS Committee's Transparency Procedures	Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7)
Guidelines	Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures
Terrestrial Code	OIE Terrestrial Animal Health Code
The Guide	User's Guide to the Terrestrial Code
USDA	United States Department of Agriculture
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WHO	World Health Organization
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the United States

1.1. On 6 March 2012, the United States requested consultations with India pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 16 and 17 April 2012. Those consultations were unsuccessful in resolving this dispute.[2]

1.2 Panel establishment and composition

1.3. On 11 May 2012, the United States requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference as set out in Article 7.1 of the DSU.[3] At its meeting on 25 June 2012, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the United States in document WT/DS430/3, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS430/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 7 February 2013, the United States requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU.

1.6. On 18 February 2013, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Stuart Harbinson
Members:	Ms Delilah Cabb
	Mr Didrik Tønseth

1.7. Argentina, Australia, Brazil, China, Colombia, Ecuador, the European Union, Guatemala, Japan, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.8. After consultation with the parties, the Panel adopted its Working Procedures[6] and timetables[7] on 15 March 2013. Following the Panel's decision to consult with the World Organisation for Animal Health (OIE) and individual scientific experts, and after consultation with the parties, the Panel adopted its revised timetable on 20 September 2013.

1.9. The Panel held a first substantive meeting with the parties on 24 and 25 July 2013. A session with the third parties took place on 24 July 2013. The Panel held a second substantive meeting with the parties on 18 December 2013.

[1] United States' request for consultations (WT/DS430/1).
[2] United States' request for the establishment of a panel (WT/DS430/3).
[3] United States' request for the establishment of a panel.
[4] WT/DSB/M/318.
[5] Constitution of the Panel (WT/DS430/4).
[6] Panel's Working Procedures in Annex A-1.
[7] The Panel adopted two separate timetables. The first timetable included steps covering the Panel's possible consultation with experts. The second timetable did not.

1.10. On 14 March 2014, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 23 May 2014. The Panel issued its Final Report to the parties on 18 July 2014.

1.3.2 Additional Working Procedures for the Protection of Strictly Confidential Information (SCI)

1.11. On 29 May 2013, India requested the Panel to adopt additional working procedures to protect SCI to be included in India's first written submission, which was due to be filed on 31 May 2013.

1.12. On 30 May 2013, the United States provided its comments on India's request for additional working procedures, pursuant to the Panel's invitation to do so. On 31 May 2013, India provided supplementary comments in support of its request for additional working procedures, pursuant to the Panel's invitation to do so.

1.13. After consultation with the parties, the Panel adopted Additional Working Procedures for the Protection of Strictly Confidential Information on 1 July 2013.[8]

1.3.3 Preliminary ruling requests

1.3.3.1 India's first request for a preliminary ruling

1.14. On 4 March 2013, India submitted to the Panel a request for preliminary ruling concerning the consistency of the United States' request for the establishment of a panel (panel request) with Article 6.2 of the DSU.

1.15. On 10 April 2013, further to the Panel's invitation, the United States responded to India's preliminary ruling request in its first written submission.[9] On 17 April 2013, Argentina, Australia, Brazil, the European Union, and Guatemala provided comments on India's preliminary ruling request, pursuant to the Panel's invitation to all third parties to do so.[10]

1.16. The Panel issued its preliminary ruling to the parties, with a copy to the third parties, on 22 May 2013. After consulting the parties, the Panel requested the Chairman of the DSB to circulate its preliminary ruling to all WTO Members. The Panel further decided that the preliminary ruling of 22 May 2013 would become an integral part of the Panel's Final Report, subject to any changes that would be necessary in the light of comments received from the parties during the interim review. The Panel's preliminary ruling of 22 May 2013 was circulated on 28 June 2013.[11]

1.3.3.2 India's second request for a preliminary ruling

1.17. On 31 May 2013, as part of its first written submission, India submitted to the Panel a second request for a preliminary ruling concerning the consistency of the United States' panel request with Article 6.2 of the DSU.[12]

1.18. On 19 June 2013, upon the Panel's invitation, the United States responded to India's second preliminary ruling request. Following the Panel's invitation to all third parties, on 26 June 2013, Argentina, Australia, Brazil, the European Union, and Guatemala provided comments on India's second preliminary ruling request in their third-party written submissions.

1.19. The Panel's reasoning and findings on India's second preliminary ruling request are set out in section 7.1.2 below.

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[8] Panel's Additional Working Procedures for the Protection of Strictly Confidential Information in Annex A-2.

[9] United States' first written submission, paras. 204-235.

[10] Argentina, Australia, Brazil, the European Union, and Guatemala's respective comments on India's request for a preliminary ruling, 17 April 2013.

[11] Communication from the Panel ("preliminary ruling of 22 May 2013 ") (WT/DS430/5).

[12] India's first written submission, paras. 66-106.

1.3.4 Experts' consultation process

1.3.4.1 Panel's decision to consult with experts

1.20. On 21 June 2013, the Panel sent a series of questions to the parties, inviting their comments on whether the Panel should seek advice from experts and international organizations. On 28 June 2013, the United States provided its responses to the Panel questions. On the same date, India suggested that the Panel evaluate the need to engage experts after the conclusion of the first substantive meeting, scheduled for 24 and 25 July 2013.

1.21. On 5 July 2013, the Panel invited India to respond to the Panel's questions to the parties of 21 June 2013, and invited the United States to provide any additional comments to its responses of 28 June 2013. On 11 July 2013, India responded to the Panel's questions to the parties regarding whether the Panel should seek advice from experts and international organizations.

1.22. On 24 July 2013, at the first substantive meeting, the United States provided comments to India's responses of 11 July 2013. On 26 July 2013, India reacted in writing to the United States' written comments, upon invitation from the Panel to do so.[13]

1.23. Following further consultations with the Parties and third parties[14], the Panel decided on 10 September 2013 to seek advice from experts and international organizations, albeit in a limited manner. In this regard, the Panel decided to conduct:

a. a written consultation with the OIE on the interpretation of the OIE's Terrestrial Animal Health Code (Terrestrial Code); and

b. a written and oral consultation with two individual experts[15] on the avian influenza (AI) surveillance regime with particular respect to India's domestic measures and its disease situation.

1.3.4.2 Panel's selection of individual experts

1.24. On 10 September 2013, the Panel informed the parties that it would contact the OIE, the Food and Agriculture Organization (FAO), and the World Health Organization (WHO) for names of potential individual experts.

1.25. The Panel also invited the parties to agree on individual experts and to provide the names to the Panel. On 30 September 2013, the parties informed the Panel that they were unable to agree on individual experts to be consulted by the Panel.

1.26. On 11 September 2013, the Panel requested the OIE, FAO and WHO to provide names and contact details of individual experts on AI surveillance whom the Panel could consult regarding evidence submitted by the parties on India's surveillance regime for low pathogenicity avian influenza (LPAI), as well as on India's domestic disease situation. The Panel invited these international organizations to provide non-confidential *curricula vitae* of those experts they identified, where available.

[13] The United States considered that an expert consultation process was not necessary for the present dispute. However, in the event that the Panel decided to consult experts, the United States proposed that the Panel consult the OIE on the proper interpretation of the Terrestrial Code and individual scientific experts on the scientific aspects of India's domestic AI surveillance regime. India also considered an expert consultation process to be unnecessary in the present dispute. However, in the event that the Panel decided to consult experts, India proposed that the Panel consult only individual experts, and not international organizations.

[14] These further consultations were held at the first substantive meeting of the Panel with the parties on 24 and 25 July 2013, and at the session of the Panel with the third parties, on 24 July 2013. Additionally, the Panel invited the parties and the third parties to comment in their responses to the Panel's questions following the first substantive meeting on whether the Panel should consult with experts. The third parties' responses and the parties' responses were received on 2 and 3 September 2013 respectively.

[15] Following receipt of the curricula vitae, lists of publications and other relevant documentation pertaining to potential experts, the Panel decided to select three and not two individual experts (para. 1.29 below).

1.27. The Panel received names and contact information of potential individual experts from all three international organizations. On 7 October 2013, the Panel sent to the parties a consolidated list of names of experts, along with the available relevant accompanying documentation. The Panel sent additional relevant accompanying documentation concerning the potential experts to the parties on 9 and 15 October 2013.

1.28. On 15 and 17 October 2013, the parties submitted their respective comments on the potential experts.

1.29. On 21 October 2013, the Panel informed the parties of its decision to consult the following experts: Professor Ian Brown[16], Dr Nick Honhold[17], and Dr Astrid Tripodi.[18]

1.30. On 24 October 2013, Dr Astrid Tripodi informed the Panel that she was no longer available to assist the Panel in these proceedings. On 25 October 2013, the Panel informed the parties of its decision to consult Dr Yi Guan[19] in the place of Dr Astrid Tripodi.

1.3.4.3 Panel's questions to the OIE and to the individual experts

1.31. On 10 September 2013, the Panel sought the parties' input in the preparation of its questions to the OIE and to the individual experts. The Panel invited the parties to provide the Panel with up to a dozen potential questions to be addressed to the OIE concerning the interpretation of the Terrestrial Code, and to the individual experts on the AI surveillance regime (India's domestic measures and disease situation). On 1 October 2013, the parties submitted to the Panel their potential questions to the OIE and to the individual experts.

1.32. On 18 October 2013, the Panel sent its questions to the OIE, taking into account the questions submitted by the parties. On 15 November 2013, the OIE submitted its written responses to the Panel's questions.

1.33. On 24 October 2013, the Panel sent its questions to two of the individual experts, Professor Ian Brown and Dr Nick Honhold, taking into account the questions submitted by the parties. On 25 October 2013, following the Panel's decision to consult with Dr Yi Guan in the place of Dr Astrid Tripodi, as described in paragraph 1.30 above, the Panel sent its questions to Dr Yi Guan. On 12, 14, and 15 November 2013, Dr Nick Honhold, Dr Yi Guan, and Professor Ian Brown respectively submitted their written responses to the Panel's questions to the individual experts.

1.34. On 28 November 2013, the parties submitted their comments on the OIE's and individual experts' responses to the Panel's questions. On the same date, the Panel sent the parties' comments to the three individual experts.

1.3.4.4 Panel's meeting with the experts and the parties

1.35. In preparation for the Panel's meeting with the experts and the parties, the Panel provided the parties with an opportunity to submit advance questions, through the Panel, to the experts. On 3 December 2013, the parties submitted to the Panel advance questions for the experts. On 4 December 2013, the Panel sent the parties' advance questions to the experts.

1.36. The Panel held a meeting with the experts and the parties on 16 December 2013.

[16] Professor Ian Brown is Director of the International Reference Laboratory for Avian Influenza in the United Kingdom, which is the EU Reference Laboratory for Avian Influenza and Newcastle Disease. He is also the present head of the Avian Virology and Mammalian Influenza workgroup.

[17] Dr Nick Honhold is a veterinary epidemiologist, currently working as an independent consultant.

[18] Dr Astrid Tripodi is a consultant, currently working as Coordinator, Technical Cooperation Programme for avian influenza A (H7N9), at the FAO.

[19] Dr Yi Guan is Director of the State Key Laboratory of Emerging Infectious Diseases, University of Hong Kong, and Co-Director of the H5N1 Reference Laboratory under the WHO. Dr Guan is also Daniel C K Yu Endowed Professor of Virology at the School of Public Health, Li Ka Shing Faculty of Medicine, University of Hong Kong, China.

1.37. On 21 January 2014, the Panel sent a transcript of the meeting with the experts and the parties to the individual experts with a request for the experts to verify that the transcript accurately reflected the information they provided. Following receipt of the experts' comments on the transcript and having made the adjustments requested by the experts, the Panel sent the transcript to the parties on 30 January 2014, for verification of their interventions. Following receipt of the parties' comments on the transcript, and having made the adjustments requested by the United States[20], the Panel sent a final version of the transcript to the experts and the parties on 12 February 2014.

2 FACTUAL ASPECTS

2.1 Introduction

2.1. This dispute concerns measures that India imposes on the importation of various agricultural products because of concerns related to AI.

2.2. In this section of the Report, the Panel will describe the disease, the measures at issue as identified in the United States' panel request, and the broader factual context of the dispute. This includes a description of India's notifications of its AI measures to the WTO Secretariat, India's measures affecting importation of agricultural products other than the measures at issue in this dispute, India's AI measures affecting domestic agricultural products, the parties' domestic disease situations, and the Terrestrial Code.

2.3. The Panel notes that the parties disagree on a number of factual issues. To the extent that it is necessary for the Panel to resolve those disputed factual issues, it will do so in its Findings.

2.2 The disease at issue: AI

2.2.1 General background

2.4. The term "influenza" originally referred to epidemics of acute, rapidly spreading fevers of humans caused by viruses in the family *Orthomyxoviridae*.[21] Today, such viruses are recognized as causing a significant number of natural infections and diseases, usually of the upper respiratory tract, in humans, horses, domestic pigs, various bird species, and, sporadically, in mink and a variety of marine mammals.[22]

2.5. Generally, influenza viruses are divided into types A, B and C according to their antigenic characteristics. Only viruses of the "type influenza A" are known to infect birds.[23] In fact, birds are the "natural reservoir" of influenza A viruses and consequently, many of these viruses are simply known as AI viruses.[24]

2.6. AI, also commonly known as "avian flu" or "bird flu", is described by the WHO as "an infectious viral disease of birds (especially wild water fowl such as ducks and geese), often causing no apparent signs of illness". According to the WHO, AI viruses can sometimes spread to domestic poultry and cause large-scale outbreaks of serious disease. Some of these AI viruses have also

[20] India did not request for any adjustments to be made to the transcript. India's communication to the Panel of 6 February 2014.

[21] D. Swayne and D. Halvorson, "Influenza", in Y. Saif, A. Fadly, J. Glisson, L. McDougald, L. Nolan, and D. Swayne (eds.), *Diseases of Poultry* (Blackwell Publishing, 2008, 12th ed.) (Swayne & Halvorson), (Exhibit US-6), p. 153. WHO, "Influenza", accessed 17 January 2014, <http://www.who.int/topics/influenza/en/>.

[22] Swayne & Halvorson, (Exhibit US-6), p. 153.

[23] OIE's response to Panel question No. 3. FAO, "What is avian influenza?", accessed 17 January 2014, <http://www.fao.org/avianflu/en/qanda.html> (Exhibit US-28); E. Spackman, "A Brief Introduction to the Avian Influenza Virus", in E. Spackman (ed.), *Avian Influenza Virus*, (Humana Press, 2008) (Spackman), (Exhibit US-8), p. 1; A. Osterhau, V. Munster, & R. Fouchier, "Epidemiology of Avian Influenza", in H.-D. Klenk, M. Matrosovich, and J. Stech, *Avian Influenza*, (Karger, 2008) (Osterhau) (Exhibit US-9), p. 1

[24] FAO, "Avian Flu is ...", accessed 17 January 2014, <http://www.fao.org/avianflu/en/background.html>. D. Causey and S. V. Edwards, "Ecology of Avian Influenza Virus in Birds", *Journal of Infectious Diseases*, Vol. 197 Supp. 1 (2008) (Exhibit US-14) (Causey & Edwards), p. S29.

been reported to cross the species barrier and cause disease or subclinical infections in humans and other mammals.[25]

2.2.2 Typology

2.7. AI has a variety of subtypes which are classified according to the two components that make up the virus – haemagglutinin (H) and neuraminidase (N). H is a protein found on the surface of influenza viruses which is responsible for binding the virus to the cell that is being infected; N is also a protein found on the surface of influenza viruses. To date, 16 H and nine N subtypes of AI virus have been identified, giving rise to hundreds of variations on the "HxNy" combination. In fact, according to the OIE, new influenza viruses are constantly emerging as a result of genetic mutation and re-assortment.[26]

2.8. All AI subtypes are classified as belonging to one of two groups according to their pathogenicity, i.e. their ability to cause disease in birds: (i) highly pathogenic avian influenza (HPAI); and (ii) LPAI.[27]

2.2.2.1 HPAI

2.9. HPAI is an extremely infectious, systemic viral disease of poultry that produces high mortality and necrobiotic, haemorrhagic or inflammatory lesions in multiple visceral organs, the brain and skin.[28] The use of the term "highly pathogenic" implies that the virus is highly virulent for chickens and has been demonstrated to meet one or more of the following three criteria:

a. any influenza virus that is lethal for six, seven or eight out of eight (>75%) four- to six-week-old susceptible chickens within ten days following intravenous inoculation with 0.2 ml of a 1:10 dilution of a bacteria-free, infectious allantoic fluid;

b. any H5 or H7 virus that does not meet the criteria in a), but has an amino acid sequence at the H cleavage site that is compatible with HPAI viruses;

c. any influenza virus that is not an H5 or H7 subtype and that kills one to five of eight inoculated chickens and grows in cell culture in the absence of trypsin.[29]

2.10. All naturally occurring HPAI viruses identified to date have been H5 or H7 subtypes.[30] HPAI viruses are therefore currently defined as H5 and H7 viruses that cause 75% or higher mortality

[25] WHO, "Avian Influenza", accessed 17 January 2014, <http://www.who.int/mediacentre/factsheets/avian_influenza/en/index.html>.

[26] OIE's response to Panel question No. 3. FAO, "Avian Flu is …", accessed 17 January 2014, <http://www.fao.org/avianflu/en/background.html>; D. Swayne, "Epidemiology of Avian Influenza in Agricultural and Other Man-Made Systems," in D. Swayne (ed.) *Avian Influenza* (Blackwell Publishing, 2008), (Swayne, Epidemiology), (Exhibit US-13), p. 62; Causey & Edwards, (Exhibit US-14), p. S30; Centre for Disease Control and Prevention, "Avian Influenza (Bird Flu): Influenza Viruses" (Nov. 18, 2005) (CDC, Avian Influenza), (Exhibit US-16), pp. 1-2.

[27] In 1981, at the first International Symposium on AI, the terminology "highly pathogenic avian influenza" was adopted as the official designation for the highly virulent form of AI. "High pathogenicity" is an equivalent grammatical variant to "highly pathogenic" and can be used interchangeably. In 2002, at the fifth International Symposium on AI, the terminology "low pathogenicity" was adopted as the official designation for low virulence AI. Swayne & Halvorson, (Exhibit US-6), p. 153; H.-D. Klenk, M. Matrosovich and J. Stech, "Avian Influenza: Molecular Mechanisms of Pathogenesis and Host Range," in T. Mettenleiter and F. Sobrino (eds.) *Animal Viruses: Molecular Biology* (Caister Academic Press, 2008) (Klenk & Matrosovich), (Exhibit US-5), p. 256.

[28] D. Swayne & D. Suarez, "Highly Pathogenic Avian Influenza", *Revue Scientifique et Technique de L'Office International des Epizooties*, Vol. 19 No. 1 (2000) (Swayne & Suarez), (Exhibit US-19), p. 463.

[29] Swayne & Suarez, (Exhibit US-19), p. 464. FAO, "Epidemiology of Avian Influenza", accessed 17 January 2014, <http://www.fao.org/avianflu/en/clinical.html> (Exhibit US-12); and WHO, "Avian Influenza Fact Sheet", accessed 28 January 2014, <http://www.who.int/mediacentre/factsheets/avian_influenza/en/index.html> .

[30] OIE's response to Panel question No. 3; FAO, "Epidemiology of Avian Influenza", accessed 17 January 2014, <http://www.fao.org/avianflu/en/clinical.html> (Exhibit US-12).

after experimental infection of chickens and that have a polybasic H cleavage site. All other AI viruses that do not meet any of these criteria are classified as LPAI.[31]

2.2.2.2 LPAI

2.11. LPAI is the official designation for low virulence AI, i.e. any AI viruses that do not meet the criteria for HPAI.[32] Most of the H5 and H7 subtypes of AI viruses are believed to be LPAI.[33] Infection with LPAI may be asymptomatic[34] or have very mild symptoms, e.g. birds may suffer ruffled feathers, reduced egg production, or mild effects on the respiratory system.[35] Therefore, infections with LPAI may pass unnoticed.[36]

2.12. LPAI viruses are endemic to various species of wild birds and found in more than 100 different wild bird species of more than 25 different families. Wild birds, and in particular wild aquatic birds such as ducks, geese and gulls, are the "princip[al] reservoirs" for LPAI viruses.[37]

2.2.3 AI viruses notifiable to the OIE

2.13. The OIE requires that its members notify the OIE of any occurrence of HPAI and of certain types of LPAI in their territories. The 21st edition of the Terrestrial Code defines "notifiable avian influenza" (NAI) 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)".[38] This covers both high pathogenic notifiable avian influenza (HPNAI) and low pathogenicity notifiable avian influenza (LPNAI).

2.14. The Terrestrial Code defines HPNAI as follows:

> 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.[39]

2.15. LPNAI is defined in the Terrestrial Code as "all influenza A viruses of H5 and H7 subtype that are not HPNAI viruses."[40]

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[31] Klenk & Matrosovich, (Exhibit US-5), p. 258.

[32] Swayne & Halvorson, (Exhibit US-6), p. 153.

[33] D. Suarez, "Influenza A Virus", in D. Swayne (ed.) *Avian Influenza* (Blackwell Publishing, 2008) (Suarez), (Exhibit US-10), p. 11. FAO, "What is avian influenza?", accessed 17 January 2014, <http://www.fao.org/avianflu/en/qanda.html#1> (Exhibit US-28).

[34] OIE "What is Avian Influenza?", accessed 28 January 2014, <http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/AI-EN.pdf> (Exhibit US-23).

[35] OIE "What is Avian Influenza?", accessed 28 January 2014, <http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/AI-EN.pdf> (Exhibit US-23).

[36] OIE's response to Panel question No. 3. I. Capua and C. Terregino, "Clinical Traits and Pathology of Avian Influenza Infections, Guidelines for Farm Visit and Differential Diagnosis," in I. Capua & D. Alexander (eds) *Avian Influenza And Newcastle Disease: A Field and Laboratory Guide* (Springer, 2009) (Capua & Terregino), (Exhibit US-27), p. 49; Spackman, (Exhibit US-8), p. 3; Swayne and Pantin-Jackwood, (Exhibit US-18), p. 91-92; D. Swayne, "The Global Nature of Avian Influenza", in D. Swayne (ed.) *Avian Influenza* (Blackwell Publishing, 2008) (Swayne, Global Nature), (Exhibit US-21), p. 128; FAO, "What is avian influenza?", accessed 17 January 2014, <http://www.fao.org/avianflu/en/qanda.html> (Exhibit US-28).

[37] Osterhau, (Exhibit US-9), p. 2. OIE's response to Panel question No. 3; Swayne, Epidemiology, (Exhibit US-13), p. 63; R. Fouchier & V. Munster, "Epidemiology of Low Pathogenic Avian Influenza Viruses in Wild Birds", *Revue Scientifique et Technique de L'Office International des Epizooties*, Vol. 28 No. 1 (2009) (Fouchier & V.J. Munster), (Exhibit US-22), p. 49.

[38] Terrestrial Code (21st edition), Article 10.4.1.2. The Panel refers to the authentic text in English of the 21st edition of the Terrestrial Code provided by the OIE further to the request by the Panel.

[39] Terrestrial Code (21st edition), Article 10.4.1.2(a).

[40] Terrestrial Code (21st edition), Article 10.4.1.2(b).

2.2.4 Transmission of AI

2.16. AI viruses are transmitted by direct contact between infected and susceptible birds, or indirect contact through aerosol droplets or exposure to virus-contaminated materials, trays or the surface of eggs.[41] Faeces, in particular, contain large amounts of the virus, and faecal-oral transmission is the predominant means of spread in wild bird reservoirs.[42] Humans may facilitate transmission of AI viruses through movement of dead infected birds and use of contaminated equipment. Moreover, turkeys can be infected by certain AI virus subtypes of swine origin either from pigs directly, or via infected humans.[43] With respect to HPAI viruses, the high virus levels in tissues mean that consumption of carcasses by birds can also be a route for transmission. [44]

2.17. Wild birds may also play a major role in the initial introduction of AI viruses in domestic poultry. However, once AI is established or adapted in poultry, wild birds have had a very limited role in secondary dissemination.[45] Indeed, according to the OIE, scientific investigations indicate that the wild bird reservoir is the original source of H5/H7 LPAI viruses and that these viruses, circulating in poultry, give rise to HPAI viruses. In general, the longer that an H5 or H7 LPAI virus is allowed to circulate in poultry, particularly in areas of high poultry density, the greater the chances that an HPAI virus will emerge.[46]

2.18. According to the FAO, it is therefore "unlikely that wild birds play a major role in spreading [AI] in poultry after its initial introduction".[47] The spreading, or wider distribution of the disease, takes place within flocks or sizeable numbers of poultry and is influenced more by production and marketing practices.[48] The Asian lineage of H5N1 HPAI virus however constitutes an exception, since it is generally accepted that this HPAI virus may be carried by wild birds and transmitted into poultry directly from such birds without mutation from LPAI.[49]

2.19. While AI is primarily a disease affecting birds, it can also affect other animals. The virus is known to have occurred in cats and related animals such as leopards, tigers, ferrets, stone martens, dogs and pigs. According to the FAO, it is thought that these other animals contract the disease through eating raw infected birds.[50]

2.20. Similarly, although most AI viruses do not cause disease in humans, some are zoonotic, meaning that they can infect humans and cause disease.[51] However, transmission between

[41] Swayne & Halvorson, (Exhibit US-6), p. 166; Canadian Food Inspection Agency, "Fact Sheet – Avian Influenza" (Exhibit US-20), p. 2; David E. Swayne and Collen Thomas, "Trade and Food Safety Aspects for Avian Influenza Viruses," AVIAN INFLUENZA, Ed. David E. Swayne (2008) (Swayne & Thomas), (Exhibit US-31), p. 502; FAO, "How is avian influenza transmitted?", accessed 17 January 2014, <http://www.fao.org/avianflu/en/qanda.html#7> (Exhibit US-28).

[42] FAO, "How is avian influenza transmitted?", accessed 17 January 2014, <http://www.fao.org/avianflu/en/qanda.html#7> (Exhibit US-28). Swayne & Halvorson, (Exhibit US-6), p. 165; Centre for Food Security & Public Health, "High Pathogenicity Avian Influenza", (CFSPH), (Exhibit US-32), p. 3.

[43] Swayne & Halvorson, (Exhibit US-6), p. 166.

[44] FAO, "How is avian influenza transmitted?", accessed 17 January 2014, <http://www.fao.org/avianflu/en/qanda.html#7> (Exhibit US-28). Swayne & Halvorson, (Exhibit US-6), p. 165; CFSPH, (Exhibit US-32), p. 3.

[45] Swayne & Halvorson, (Exhibit US-6), p. 166.

[46] OIE's response to Panel question No. 3; Suarez, (Exhibit US-10), p. 11; D. Swayne, "Avian Influenza Control Strategies", in D. Swayne (ed.) *Avian Influenza* (Blackwell Publishing, 2008) (Swayne, Control Strategies), (Exhibit US-24), p. 288.

[47] FAO, "What part do wild birds play in the spread of avian influenza?", accessed 17 January 2014, <http://www.fao.org/avianflu/en/qanda.html#C1> (Exhibit US-28).

[48] FAO, "What part do wild birds play in the spread of avian influenza?", accessed 17 January 2014, <http://www.fao.org/avianflu/en/qanda.html#C1> (Exhibit US-28).

[49] Dr Honhold's response to Panel question No 2; OIE's response to Panel question No. 3. Swayne, Control Strategies, (Exhibit US-24), p. 288; WHO, "Do migratory birds spread highly pathogenic avian influenza viruses to poultry?", accessed 17 January 2014, http://www.who.int/foodsafety/micro/avian/en/index1.html>.

[50] FAO, "Avian Flu is ...", accessed 17 January 2014, <http://www.fao.org/avianflu/en/background.html>.

[51] WHO, "Avian influenza in humans", accessed 17 January 2014, <http://www.who.int/influenza/human_animal_interface/avian_influenza/en/> (Exhibit US-36); WHO, "Human infection with avian influenza A (H7N9) virus – update", accessed 30 March 2014, <http://www.who.int/csr/don/2013_07_20/en/index.html> (Exhibit IND 130).

humans appears to have occurred only on very rare, exceptional occasions and in nearly all reported cases of human infection with AI viruses there has been a close association with infected birds or infective carcasses.[52] Generally, serious complications or fatal cases in humans have been reported in cases of infection with certain strains of HPAI viruses. Nonetheless, there have been outbreaks of LPNAI (H7N9) in China resulting in fatalities and illness to humans.[53] In most other cases, illness from infection with LPAI viruses has been clinically mild and has ranged from focal mild signs and symptoms (e.g., conjunctivitis) to more acute systemic illness (fever and upper respiratory trace disease) with full recovery.[54]

2.21. One of the most well-known examples of transmission to humans is the HPAI subtype H5N1 virus present in poultry in certain parts of Asia and northeast Africa, which has caused human disease and deaths since 1997. According to the OIE, cases of human illness and death associated with H5N1 infection fuelled concerns in the past decade that the H5N1 AI virus could potentially cause a global influenza pandemic in humans.[55] The WHO and the OIE observe that other AI subtypes, including H7N7, H7N9 and H9N2, have also infected people. Some of these infections have been very severe and a few have resulted in deaths, but most infections have been mild or even subclinical in humans.[56]

2.3 The measures at issue

2.22. The measures at issue in this dispute are India's AI measures, which are those measures that "prohibit the importation of various agricultural products into India from those countries reporting [NAI]".[57] India maintains its AI measures through, *inter alia*, the following legal instruments:

a. the Live-Stock Importation Act 1898 (9 of 1898) (Livestock Act)[58] published on 12 August 1898, as amended by the Live-Stock Importation (Amendment) Act 2001 (No. 28 of 2001) (Livestock Amendment Act)[59], and published in the Gazette of India on 29 August 2001; and

b. S.O. 1663(E), issued by India's Department of Animal Husbandry, Dairying, and Fisheries (DAHD) pursuant to the Livestock Act and published in the Gazette of India on 19 July 2011.

2.3.1 Livestock Act

2.23. The Livestock Act was enacted "to make better provision for the regulation of the import live-stock which is liable to be affected by infectious or contagious disorders".[60] This Act "extends to the whole of India".[61]

2.24. The Livestock Act includes in its definition of "infectious or contagious disorders" any disease or disorder which may be specified by the Central Government by notification in the Official

[52] D. Alexander, "Orthomyxoviridae – Avian Influenza", in D. Alexander (ed.) *Poultry Diseases*, (Saunders El Sevier, 2008, 6th ed.) (Alexander), (Exhibit US-11), p. 331.
[53] WHO, "Human infection with avian influenza A (H7N9) virus – update", accessed 30 March 2014, <http://www.who.int/csr/don/2013_07_20/en/index.html> (Exhibit IND 130).
[54] N. Cox & T. Uyeki, "Public Health Implications of Avian Influenza Viruses", in D. Swayne (ed.) *Avian Influenza* (Blackwell Publishing, 2008) (Cox & Uyeki), (Exhibit US-37), p. 462.
[55] OIE's response to Panel question No. 3. FAO, "Avian Flu is ...", accessed 17 January 2014, <http://www.fao.org/avianflu/en/background.html>.
[56] WHO, "Avian influenza in humans", accessed 17 January 2014, <http://www.who.int/influenza/human_animal_interface/avian_influenza/en/> (Exhibit US-36); OIE, "Questions and Answers on influenza A(H7N9)", accessed 17 January 2014, <http://www.oie.int/en/for-the-media/press-releases/detail/article/questions-and-answers-on-influenza-ah7n9/>.
[57] Preliminary ruling of 22 May 2013. A summary of the findings is included in section 7.1.1 below.
[58] Live-Stock Importation Act, Act No. 9 of 1898, (Livestock Act), (Exhibit US-114).
[59] Live-Stock Importation (Amendment) Act, No. 28 of 2001, (Livestock Amendment Act), (Exhibit US-115).
[60] Livestock Act, (Exhibit US-114), Preamble.
[61] Livestock Act, (Exhibit US-114), Section 1(2).

Gazette.[62] Further, for the purposes of the Livestock Act, "live-stock" includes any animal which may be specified by the Central Government by notification in the Official Gazette.[63]

2.25. The Livestock Act empowers the Central Government to regulate, restrict, or prohibit, in such manner as it may think fit, the import into India of any livestock which may be liable to be affected by infectious or contagious disorders. In particular, Section 3 of the Livestock Act provides, in relevant part:

> **Power to regulate importation of live-stock.** – (1) The Central Government may, by notification in the Official Gazette, regulate, restrict or prohibit in such manner and to such extent as it may think fit, [the import] into [India] or any specified place therein, any live-stock which may be liable to be affected by infectious or contagious disorders, and of any fodder, dung, stable-litter, clothing harness or fittings appertaining to live-stock or that may have been in contact therewith. (footnotes omitted)

2.26. The Livestock Amendment Act, which came into force on 5 July 2001, amended the Livestock Act. In particular, it expanded the scope of the Livestock Act to cover not only livestock but also "live-stock products".[64] These livestock products include "meat and meat products of all kinds including fresh, chilled and frozen meat, tissue, organs of poultry, pig, sheep, goat, egg and egg powder" as well as "any other animal product which may be specified by the Central Government by notification in the Official Gazette".[65]

2.27. Furthermore, the Livestock Amendment Act introduced an additional provision regarding the Central Government's powers to regulate imports. Accordingly, Section 3A of the Livestock Act as amended, provides:

> The Central Government may, by notification in the Official Gazette, regulate, restrict or prohibit in such manner and to such extent as it may think fit, the import into the territories to which this Act extends, of any live-stock product which may be liable to affect human or animal health.[66]

2.28. The DAHD is the department of India's Central Government that is tasked with the role, described in Sections 3 and 3A of the Livestock Act, of regulating the importation of livestock and livestock products into India. It is noteworthy that a notification under Section 3 or Section 3A of the Livestock Act operates as if it has been issued under Section 11 of the Customs Act, 1962 and becomes a customs notification.[67] Such notifications are delegated legislation, the form of which is prescribed by the parent statute. Notifications are typically legislative in character; they are assigned with an S.O.[68] number and published in the Official Gazette of India.

2.29. Once the DAHD publishes a notification, it informs other departments of the government such as the Department of Commerce, the Department of Revenue, and the Central Board of Excise and Customs (CBEC) through office memoranda of the promulgation of the notification. In this way, the CBEC does not re-issue a notification already issued by the DAHD regarding regulation of imports of livestock products. However, the notification issued by the DAHD may be disseminated as a circular or instruction (issued under Section 151A of the Customs Act) to field officers at all ports. Further, the CBEC may issue circulars where clarifications regarding the implementation of a notification are deemed necessary.[69]

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[62] Livestock Act, (Exhibit US-114), Section 2(a).
[63] Livestock Act, (Exhibit US-114), Section 2(b).
[64] Livestock Amendment Act, (Exhibit US-115), Section 2.
[65] Livestock Amendment Act, (Exhibit US-115), Section 3.
[66] Livestock Amendment Act, (Exhibit US-115), Section 5.
[67] India's response to Panel question No. 20(a); Exhibits US-114, Section 3(2); and US-115, Section 4. Customs Act 1962, accessed on 20 January 2014, <http://www.cbec.gov.in/customs/cs-act/custom-act-1962.pdf>.
[68] S.O. stands for "statutory order" (para. 2.30 below).
[69] India's response to Panel question No. 20(a). Customs Act 1962, accessed on 20 January 2014, <http://www.cbec.gov.in/customs/cs-act/custom-act-1962.pdf>.

2.3.2 S.O. 1663(E)

2.30. S.O. 1663(E) was issued by the DAHD in exercise of powers conferred by the Livestock Act. It was published in the Gazette of India on 19 July 2011 and came into effect on that same date. According to India, although the abbreviation "S.O." generally refers to "statutory order", S.O. 1663(E) "is in fact in the nature of a notification".[70] It was notified to the SPS Committee on 11 October 2011.[71]

2.31. S.O. 1663(E) begins with a *chapeau*, which reads (in relevant part):[72]

> In exercise of the powers conferred by sub-section (1) of Section 3 and Section 3A of the Livestock Importation Act, 1898 (9 of 1898), and in supercession of the notification of the Government of India in the Ministry of Agriculture (Department of Animal Husbandry, Dairy and Fisheries) published in the Gazette of India, …, except as respects things done or omitted to be done before such supercession, the Central Government hereby prohibits, with effect from the date of publication of this notification in the Official Gazette, namely:

2.32. Paragraph (1) of S.O. 1663(E) provides:

> (i) the import into India from all countries in view of Notifiable Avian Influenza (both Highly Pathogenic Notifiable Avian Influenza and Low Pathogenic Notifiable Avian Influenza), of wild birds except those reared and bred in captivity;
>
> (ii) the import into India from the countries reporting Notifiable Avian Influenza (both Highly Pathogenic Notifiable Avian Influenza and Low Pathogenic Notifiable Avian Influenza), the following livestock products, namely:
>
> (a) domestic and wild birds (including poultry and captive birds);
>
> (b) day old chicks, ducks, turkeys, and other newly hatched avian species;
>
> (c) un-processed meat and meat products from Avian species, including domesticated, wild birds and poultry;
>
> (d) hatching eggs;
>
> (e) egg and egg products (except Specific Pathogen Free eggs);
>
> (f) un-processed feathers;
>
> (g) live pigs;
>
> (h) pathological material and biological products from birds;
>
> (i) products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use; and
>
> (j) semen of domestic and wild birds including poultry:
>
> Provided that the Central Government may allow the import of processed poultry meat after satisfactory conformity assessment of the exporting country.

2.33. Paragraph (2) of S.O. 1663(E) refers to products with respect to which the import prohibition in paragraph (1) does not apply:

> The prohibition specified in paragraph (1) shall not be applicable to the import of –

[70] India's response to Panel question No. 20(c).
[71] G/SPS/N/IND/73.
[72] Annex-A to India's request for a preliminary ruling and Exhibit US-80.

(i) processed pet food containing ingredients of meat and meat products from birds intended for use in animal feeding.

(ii) the import of pathological materials and biological products for use in research purposes exclusively used by the National Referral Laboratories.

2.4 Factual context

2.4.1 India's notifications of its AI measures to the WTO Secretariat

2.34. The table below provides information regarding measures India notified to the WTO Secretariat as affecting the importation of agricultural products into India because of concerns related to AI.[73]

WTO document symbol G/SPS/N/	Legal Instrument	Date of entry into force	Date of submission to the WTO	Date of distribution by the WTO	Description of content
IND/10	S.O. 801(E)/F No. 109-6/2001	17/08/2001	22/03/2002	11/04/2002	"Prohibits, for a period of six months, the imports of domestic/wild birds and their products … from China (including Hong Kong), Honduras, Italy, Laos, Pakistan and any other country reporting the outbreak of Avian Influenza."
IND/13	S.O. 155(E)/F No. 109-3/2004	03/02/2004	12/03/2004	17/03/2004	"Prohibits, for a period of six months, the imports of domestic/wild birds and their products … from all countries in wake of outbreak of Avian Influenza."
IND/13/Add.1	S.O. 800(E)	07/07/2004	05/08/2004	12/08/2004	"Exempts from prohibition, with effect from the date of publication of this notification, import into India from such countries which have been declared free from Highly Pathogenic Avian Influenza (Fowl Plague) as per Office of International Epizo[o]tics (OIE) guidelines, the livestock product, namely, 'Hatching eggs (only Specific pathogen free chicken and duck hatching eggs)'."
IND/14	S.O. 899(E)/F No. 109-16/2004	06/08/2004	24/08/2004	26/08/2004	"Prohibits, for a period of six months, the imports of the [certain] livestock and their products from … countries reporting the outbreak of Highly Pathogenic Avian Influenza. Also prohibits the import of the [certain] livestock and their products … except processed meat …."

[73] The text of the notifications, as well as dates of their submission to, and distribution by, the WTO Secretariat are accessible from the SPS Information Management System (SPS IMS) at http://spsims.wto.org.

WTO document symbol G/SPS/N/	Legal Instrument	Date of entry into force	Date of submission to the WTO	Date of distribution by the WTO	Description of content
IND/17	S.O. 175(E)/F No. 109-16/2004	07/02/2005	17/02/2005	18/02/2005	"Prohibits, for a period of six months, the import of [certain] livestock and their products … from countries reporting the outbreak of Highly Pathogenic Avian Influenza. And also prohibits the import of [certain] livestock and their products … except processed meat from all countries."
IND/31	S.O. 1104(E)/F No. 109-16/2004 and S.O. 1112(E)/F No 109-16/2004	06/08/2005	12/08/2005	16/08/2005	"Prohibits, for a period of six months, the import of [certain] livestock and their products … from countries reporting the outbreak of Highly Pathogenic Avian Influenza. Also prohibits the import of [certain] livestock and their products … except live poultry … and … unprocessed meat from avian species including wild birds except that of poultry from all countries."
IND/46	S.O. 1256(E)	03/08/2006	09/08/2006	11/08/2005	"Prohibits, for a period of six months, the import of [certain] livestock and their products … from countries reporting the outbreak of Highly Pathogenic Avian Influenza. And also prohibits the import of [certain] livestock and their products … from all countries."
IND/46/Add.1	Includes the text but not the name of S.O. 102(E)	Not provided in the notification. In IND/46/Add. 2 specified as 02/02/2007	15/02/2007	19/02/2007	"1. … [P]rohibits … the import into India from all countries in view of Avian Influenza (both Highly Pathogenic Avian Influenza and Low Pathogenic Avian Influenza), [of certain] … livestock and livestock products. 2. Further … prohibits also the import into India from the countries reporting Avian Influenza (both Highly Pathogenic Avian Influenza and Low Pathogenic Avian Influenza), [of certain] … livestock and livestock products. 3. The prohibition shall be in force for a period of six months…."

WTO document symbol G/SPS/N/	Legal Instrument	Date of entry into force	Date of submission to the WTO	Date of distribution by the WTO	Description of content
IND/46/Add.2	S.O. 367(E)/F No. 109-16/2004	14/03/2007	03/04/2007	17/04/2007	"This regulation … is an amendment to the earlier Gazette Notification No. S.O.102 (E) dated 2 February 2007… Through this amendment, prohibition shall not be applicable to import into India of dried processed pet food containing the ingredient of meat and meat products from avian species, pig and product of animal origin (from birds) intended for use in animal feeding from the countries reporting Avian Influenza (both Highly Pathogenic Avian Influenza and Low Pathogenic Avian Influenza)."
IND/46/Add.3	Amendment of S.O. 102(E) (no other reference provided).	Not provided	05/07/2007	11/07/2007	"… [A]mends the notification … S.O. 102, dated 2 February, 2007, as follows: In the said notification, for item number (vii) the following item shall be substituted, namely, "(vii) live pig and pig products (including pig bristles)."
IND/46/Add.4	Not provided	Not provided	24/08/2007	27/08/2007	"The Central Government of India is extending, for a period of six months, the prohibition to import the products referred to in notifications G/SPS/N/IND/46/Add.1 and Add.3."
IND/46/Add.5	Not provided	Not provided	12/02/2008	15/02/2008	"The Central Government of India is extending, for a period of six months, the prohibition to import the products referred to in notifications G/SPS/N/IND/46/Add.1 dated 19 February 2007, Add.3 dated 11 July 2007 and Add.4 dated 27 August 2007. Through this amendment, the ban on processed pig bristles has been lifted."

WTO document symbol G/SPS/N/	Legal Instrument	Date of entry into force	Date of submission to the WTO	Date of distribution by the WTO	Description of content
IND/46/Add.6	The notification provides an internet link to S.O. 1892(E)[74]	30/07/2008 (according to the text of S.O. 1892 (E))	11/08/2008	12/08/2008	"The Central Government of India is extending, for a period of six months, the prohibition to import the products referred to in notifications G/SPS/N/IND/46/Add.1 of 19 February 2007, Add.3 of 11 July 2007, Add.4 of 27 August 2007 and Add.5 of February 2008. Through this amendment certain changes have been brought in."
IND/46/Add.7	The internet link is provided to S.O. 419(E)[75]	9/02/2009 (according to the text of S.O. 419 (E))	27/03/2009	31/03/2009	"The Central Government of India is extending, for a period of six months, the prohibition to import the products referred to in notifications G/SPS/N/IND/46/Add.1 of 19 February 2007, Add.3 of 11 July 2007, Add.4 of 27 August 2007, Add.5 of 15 February 2008 and Add.6 of 12 August 2008. Through this amendment certain changes have been brought in."
IND/73	S.O. 1663(E)/F No 109-21/2007	19/07/2011	07/10/2011	11/10/2011	"Prohibits the import of [certain] livestock and their products … from countries reporting avian influenza (both highly pathogenic notifiable avian influenza and low pathogenic notifiable avian influenza) and also prohibits the import of wild birds except those reared and bred in captivity from all countries."

2.4.2 India's other measures affecting importation of agricultural products

2.4.2.1 S.O. 655(E)

2.35. S.O. 655(E), issued by the DAHD in exercise of powers conferred by Section 3A of the Livestock Act, applies to the import of all livestock into India. It was published in the Gazette of India on 9 July 2001 and came into effect on that same date.[76] S.O. 655(E) was notified to the WTO SPS Committee on 11 April 2002.[77]

2.36. S.O. 655(E) begins with the following paragraph:

> In exercise of the powers conferred by Section 3A of the Live-stock Importation Act, 1898 (9 of 1898), the Central Government hereby restricts, with effect from the date

[74] The link provided is <http://dahd.nic.in/flu/gazetteofindiajul310708.pdf>.
[75] The link provided is <http://dahd.nic.in/flu/gazetteofindia9Feb2009.pdf>.
[76] S.O. 655(E), (Exhibits US-116 and IND-18).
[77] G/SPS/N/IND/9.

> of publication of this notification in the Official Gazette, the import into India of all live-stock products, including –
>
> (i) meat and meat products of all kinds including fresh, chilled and frozen meat , tissue or organs of poultry, pig, sheep, goat;
>
> (ii) egg and egg powder;
>
> (iii) milk and milk products;
>
> (iv) bovine, ovine and caprine embryos, ova or semen; and
>
> (v) pet food products of animal origin.[78]

2.37. The Schedule to S.O. 655(E) entitled "Procedure for import of livestock products into India" provides that "[n]o live-stock product shall be imported into India without a valid sanitary import permit [SIP] issued under clause (3)".[79] Clause (3) prescribes the conditions that must be satisfied before the DAHD issues a SIP.[80] Among these conditions is that "the import permit shall lay down specific conditions that will have to be fulfilled in respect of the consignment, including pre-shipment certifications and quarantine checks."[81]

2.4.2.2 Office Memorandum No. 109-21/2007-Trade

2.38. As was described in paragraph 2.29 above, once the DAHD publishes a notification, it informs other government departments of the promulgation of that notification through office memoranda.[82] Among these is Office Memorandum No. 109-21/2007-Trade[83] that "enclose[s] a copy of Notification No. S.O. 1663(E) dated 19th July, 2011 banning the import of poultry and poultry products from countries reporting Avian Influenza".[84]

2.39. The DAHD sent this office memorandum on 2 August 2011 to several other central government and state departments. It is entitled "Notification on ban on import of poultry and poultry products from the countries due to Notifiable Avian Influenza (both Highly Pathogenic Notifiable Avian Influenza and Low Pathogenic Notifiable Avian Influenza) – Regarding".[85]

2.40. The memorandum refers to the earlier issued S.O. 2976(E), dated 16 December 2010, which had been valid for six months from the date of publication or until such time as it was reviewed (whichever was earlier). Accordingly, the memorandum confirmed that S.O. 2976(E) had been reviewed and the DAHD had decided to continue, through S.O. 1663(E), the ban on import from countries reporting AI (both HPAI and LPAI).[86]

2.4.3 India's AI measures affecting domestic agricultural products

2.4.3.1 The Prevention and Control of Infectious and Contagious Disease in Animals Act 2009 (Prevention of Diseases Act)

2.41. The Prevention of Diseases Act gained assent on 20 March 2009.[87] It provides for:

> [T]he prevention, control and eradication of infectious and contagious diseases affecting animals, for prevention of outbreak or spreading of such diseases from one

[78] S.O. 655(E), (Exhibit US-116), first paragraph.
[79] S.O. 655(E) further states that "[t]he import of these livestock products into India is allowed only against a sanitary import permit (SIP) issued by the DAHD as per the procedure set out in the Schedule annexed to S.O. 655(E)". S.O. 655(E), (Exhibit US-116), para. 2.
[80] S.O. 655(E), (Exhibit US-116), Schedule, paras. (1) and (3).
[81] S.O. 655(E), (Exhibit US-116), Schedule, para. (3)(iv). India's response to Panel question No. 19(a).
[82] India's first written submission, para. 26; India's response to Panel question No. 20(b).
[83] Office Memorandum No. 109-21/2007-Trade (Exhibit IND-17).
[84] Office Memorandum No. 109-21/2007-Trade (Exhibit IND-17), para. 1.
[85] Office Memorandum No. 109-21/2007-Trade (Exhibit IND-17), para. 1.
[86] Office Memorandum No. 109-21/2007-Trade (Exhibit IND-17), para. 2.
[87] Prevention of Disease Act, Central Act No. 27 of 2009, (Prevention of Diseases Act), (Exhibit IND-46).

> State to another, and to meet the international obligations of India for facilitating import and export of animals and animal products and for matters connected therewith or incidental thereto.[88]

2.42. The Prevention of Diseases Act contains provisions governing, *inter alia*, the appointment of veterinary officers, reporting of scheduled diseases, disease control and eradication measures, notification of controlled and disease-free areas, and vaccination. The Act includes a Schedule of diseases containing 12 categories including avian diseases.[89] Among the covered avian diseases are "highly pathogenic avian influenza and low pathogenic avian influenza in poultry".[90]

2.4.3.2 The National Action Plan of 2012 (NAP 2012)

2.43. In 2006, "[i]n view of a threat of global outbreak of AI and apprehensions of a human pandemic"[91], the DAHD prepared a national action plan (NAP) to deal with "any eventuality".[92] Further to successive outbreaks of AI in 2008 and 2009, the NAP was revised in 2012, "taking into account the new experiences, the lessons learnt from the past and the contemporary scientific information."[93] The NAP 2012 was issued pursuant to the Prevention of Diseases Act.[94]

2.44. The NAP 2012 is comprised of five chapters. Chapter I explains India's states of preparedness against AI outbreaks and AI surveillance. Chapter II prescribes the actions to be taken if an outbreak of AI is suspected. Chapter III describes the actions required in the event of an outbreak of the disease. Chapter IV discusses the post-operation surveillance and the declaration of freedom from AI. Finally, Chapter V identifies the persons to handle NAI infected poultry and includes information on biosafety and biosecurity measures.

2.4.4 Parties' domestic disease situations

2.4.4.1 The United States

2.45. The United States has not notified to the OIE an outbreak of HPAI in the United States since 2004.[95]

2.46. Since January 2006, the United States notified to the OIE occurrences of LPAI in poultry in the United States.[96]

2.4.4.2 India

2.47. From the end of 2003 to 12 March 2013, India notified to the OIE 95 outbreaks of HPAI (subtype H5N1) in poultry in India.[97]

2.48. India has never notified to the OIE an occurrence of LPAI in poultry in India.

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[88] Prevention of Diseases Act, (Exhibit IND-46), p. 1.
[89] Prevention of Diseases Act, (Exhibit IND-46), Schedule, Section (f), p. 18.
[90] Prevention of Diseases Act, (Exhibit IND-46), Schedule, Section (f)(9), p. 18.
[91] National Action Plan of 2012, (NAP 2012), (Exhibit US-90), p.1.
[92] National Action Plan of 2012, (NAP 2012), (Exhibit US-90), p.1.India's first written submission, para. 74; National Action Plan of 2006, (NAP 2006), (Exhibit US-89).
[93] NAP 2012, (Exhibit US-90), p.1.
[94] India's first written submission, para. 40. The NAP 2012 does not expressly state that it is issued pursuant to the Prevention of Diseases Act. However, the NAP 2012 does refer in some provisions to the Prevention of Diseases Act, including Articles I.2.2(iii) and I.6.
[95] OIE, "Detailed country (ies) disease incidence", accessed 17 January 2014, <http://www.oie.int/wahis_2/public/wahid.php/Diseaseinformation/statusdetail>.
[96] OIE, "Disease timelines", accessed 17 January 2014, <http://www.oie.int/wahis_2/public/wahid.php/Diseaseinformation/Diseasetimelines>.
[97] Table on *Outbreaks of Highly Pathogenic Avian Influenza (subtype H5N1) in poultry notified to the OIE * from the end of 2003 to 12 March 2013,* accessed 17 January 2014, <http://www.oie.int/fileadmin/Home/eng/Animal_Health_in_the_World/docs/pdf/graph_avian_influenza/graphs_HPAI_12_03_2013.pdf>. United States' first written submission, para. 47.

2.4.5 The Terrestrial Code

2.4.5.1 The OIE and its mandate

2.49. The OIE is an intergovernmental organization founded on 25 January 1924 in response to the need to fight animal diseases at a global level. The OIE is tasked with improving animal health worldwide.[98] A total of 178 countries, including the United States and India, are members of this organization.[99]

2.50. One of the missions of the OIE is the establishment of health standards for international trade in animals and animal products. Annex A(3)(b) of the SPS Agreement indicates that the international standards for animal health and zoonoses are those developed under the auspices of the OIE. In this respect, the OIE develops international standards to deal with aspects of SPS measures as they relate to animal health including, but not limited to, their effect on human health. One such set of standards, which includes recommendations relating to AI, is embodied in the Terrestrial Code.[100]

2.4.5.2 History of the Terrestrial Code

2.51. The recommendations contained in the Terrestrial Code are the result of the continuous work since 1960 of one of the OIE's Specialist Commissions, the OIE Terrestrial Animal Health Standards Commission (the Code Commission). This Code Commission draws upon the expertise of internationally renowned specialists to prepare draft texts for new articles of the Terrestrial Code or to revise existing articles in the light of advances in veterinary science.[101]

2.52. The first edition of the Terrestrial Code was published in 1968. The Terrestrial Code is reviewed on an annual basis, with new editions adopted by the World Assembly of Delegates of OIE members each year in May. The latest edition was adopted in May 2013.[102]

2.4.5.3 Objectives of the Terrestrial Code

2.53. The aim of the Terrestrial Code is to set international "standards for the improvement of terrestrial animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals (mammals, birds and bees) and their products".[103] These standards consist of health measures based on the latest available scientific evidence[104], which should be used by the veterinary authorities[105] of importing and exporting

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[98] The OIE has six main missions:

- To ensure transparency in the global animal disease situation;
- To collect, analyse and disseminate veterinary scientific information;
- To provide expertise and encourage international solidarity in the control of animal diseases;
- Within its mandate under the WTO SPS Agreement, to safeguard world trade by publishing health standards for international trade in animals and animal products;
- To improve the legal framework and resources of national Veterinary Services; and
- To provide a better guarantee of food of animal origin and to promote animal welfare through a science-based approach.

WTO, "The WTO and the World Organization for Animal Health (OIE)", accessed 17 January 2014, <http://www.wto.org/english/thewto_e/coher_e/wto_oie_e.htm>.

[99] OIE, "About us", accessed 17 January 2014, <http://www.oie.int/about-us>.

[100] OIE, "Terrestrial Animal Health Code", accessed 17 January 2014, <http://www.oie.int/international-standard-setting/terrestrial-code>.

[101] OIE, "Terrestrial Animal Health Code", accessed 17 January 2014, <http://www.oie.int/international-standard-setting/terrestrial-code>. OIE's response to Panel question No. 3.

[102] At the time of promulgation of S.O. 1663(E), the 20th edition of the Terrestrial Code, adopted in May 2011, was in force. The edition of the Terrestrial Code in force at the time of the establishment of the panel was the 21st, adopted in May 2012. The edition of the Terrestrial Code currently in force is the 22nd, adopted in May 2013. The determination of the relevant edition of the Terrestrial Code for the purpose of the present dispute is discussed by the Panel in section 7.4.2.2.1.2 below.

[103] Foreword to the Terrestrial Code (21st edition), para. 1.

[104] Foreword to the Terrestrial Code (21st edition), para. 4.

[105] According to the Glossary of the Terrestrial Code (21st edition) the term "Veterinary Authority" is defined as "the Governmental Authority of an OIE Member, comprising veterinarians, other professionals and para-professionals, having the responsibility and competence for ensuring or supervising the implementation of

countries to, *inter alia*, prevent the transfer of agents pathogenic to terrestrial animals and/or humans via international trade in terrestrial animals and terrestrial animal products, while avoiding unjustified sanitary barriers to trade.[106] In sum, the Terrestrial Code aspires to assure sanitary safety of international trade in terrestrial animals while avoiding unjustified sanitary barriers to trade.[107]

2.54. The Terrestrial Code includes a User's Guide (the Guide) to facilitate veterinary authorities' understanding and application of the recommendations included in the Code.[108] The Guide explains that the recommendations of the Terrestrial Code are designed to prevent the disease in question from being introduced into the importing country, taking into account the nature of the commodity and the animal health status of the exporting country. The Guide proclaims that, correctly applied, these recommendations provide for trade in animals and animal products to take place with an optimal level of animal health security, based on the most up-to-date scientific information and available techniques.[109]

2.55. The Guide also clarifies that the recommendations in the Terrestrial Code make reference only to the animal health situation in the exporting country, and assume that the disease is either not present in the importing country or is the subject of a control or eradication programme.[110] According to the Guide, importing countries should not impose measures in respect of diseases that occur in the importing country and that are not subject to official control or eradication programmes.[111]

2.56. Further reference to the role of the Terrestrial Code (and other OIE standards) in relation to safe trade is contained in the OIE's publication entitled "Rights and Obligations of OIE Members", which states:

> The standards in the Codes are designed to facilitate safe international trade. The Codes are reference documents for use by veterinary authorities, aquatic animal health authorities, those responsible for making decisions on the import and export of animals and their products, and all those involved in international trade. Correctly applied, OIE standards provide for trade in animals and animal products to take place with an optimal level of animal health security, based on the most up to date scientific information and available techniques. The application of the OIE standards is the best means of avoiding disagreements, disputes and other problems in international trade.[112]

2.4.5.4 Structure of the Terrestrial Code

2.57. The 21st edition of the Terrestrial Code, adopted in May 2012, commences with a Foreword and the Guide. It also includes a Glossary with definitions of the key terms used in the Terrestrial Code. The main text of the Terrestrial Code is divided into two volumes; each volume contains sections, which are further divided into chapters containing a number of articles.

2.58. Volume I, entitled "General provisions", contains horizontal standards that apply to a wide range of species, production sectors and diseases, organized into seven Sections. For instance, this

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animal health and welfare measures, international veterinary certification and other standards and recommendations in the Terrestrial Code in the whole territory".

[106] Foreword to the Terrestrial Code (21st edition), para. 1.

[107] OIE, "Terrestrial Animal Health Code", accessed 4 November 2013, <http://www.oie.int/international-standard-setting/terrestrial-code/>. OIE's response to Panel question No. 7(a).

[108] Terrestrial Code (21st edition), User's Guide, para. A.1. OIE's response to Panel question No. 2.

[109] Terrestrial Code (21st edition), User's Guide, para. A.2.

[110] Terrestrial Code (21st edition), User's Guide, para. A.3.

[111] Terrestrial Code (21st edition), User's Guide, para. C.3(a). OIE's response to Panel question No. 7(a). Rights and Obligations of OIE Members, Section 1.3, accessed 23 January 2014, <http://www.oie.int/fileadmin/Home/eng/Internationa_Standard_Setting/docs/pdf/Legal_rights_and_obligations/A_Rights_and_obligations_April_2013.pdf>.

[112] OIE's response to Panel question No. 7(a). Rights and Obligations of OIE Members, accessed 23 January 2014, <http://www.oie.int/fileadmin/Home/eng/Internationa_Standard_Setting/docs/pdf/Legal_rights_and_obligations/A_Rights_and_obligations_April_2013.pdf>.

volume includes rules on animal disease diagnosis, surveillance and notification (Section 1), risk analysis (Section 2), quality of veterinary services (Section 3), disease prevention and control (Section 4), trade measures, import/export procedures and veterinary certification (Section 5).

2.59. Volume II, entitled "Recommendations applicable to OIE Listed diseases and other diseases of importance to international trade"[113], contains standards applicable to specific diseases, including the recommendations regarding disease surveillance and zoning and compartmentalization. The recommendations in each of the disease chapters in Volume II of the Terrestrial Code are "designed to prevent the disease in question being introduced into the importing country, taking into account the nature of the commodity and the animal health status of the exporting country".[114] This volume is organized into 15 Sections. Section 10, entitled "Aves", deals with diseases of avian species. Chapter 10.4 is specifically devoted to "Infection with viruses of notifiable avian influenza".

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States requests that the Panel find that India's measures are inconsistent with India's obligations under the GATT 1994 and the SPS Agreement.[115] In particular, in its panel request[116], the United States asserts that India's measures are inconsistent with India's commitments and obligations under the following provisions of the SPS Agreement and the GATT 1994:

a. Article 2.2 of the SPS Agreement because India's AI measures are not applied only to the extent necessary to protect human or animal life or health; because they are not based upon scientific principles; and because they are maintained without sufficient scientific evidence. Further, India's measures are not provisional measures within the scope of Article 5.7 of the SPS Agreement;

b. Article 2.3 of the SPS Agreement because India's AI measures arbitrarily or unjustifiably discriminate between Members where similar conditions prevail, including between India's own territory and that of other Members. Further, India has applied its measures in a manner that constitutes a disguised restriction on international trade;

c. Article 3.1 of the SPS Agreement because India's measures are not based on the relevant international standards, guidelines, or recommendations of the OIE, nor are they in accordance with Article 3.3 of the SPS Agreement;

d. Article 5.1 of the SPS Agreement because India's AI measures, which are not based on the relevant international standards, are not based upon an assessment, as appropriate to the circumstances, of the risks to human, animal, or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations;

e. Article 5.2 of the SPS Agreement because, in failing to make an assessment of risks as appropriate to the circumstances, India failed to take into account available scientific evidence; relevant processes and production methods; the prevalence of different types of avian influenza; the existence of NAI-free areas and HPNAI-free areas; relevant ecological and environmental conditions; and other potential options besides those imposed by its measures;

f. Article 5.5 of the SPS Agreement because India is maintaining arbitrary or unjustifiable distinctions in its appropriate levels of sanitary protection in different situations, and these distinctions result in discrimination or a disguised restriction on international trade;

[113] The Glossary of the Terrestrial Code defines "listed disease" in Article 1.2.3. as the list of transmissible diseases agreed by the World Assembly of OIE Delegates and set out in Chapter 1.2 of the Terrestrial Code (21st edition), entitled "Criteria for the inclusion of diseases, infections and infestations on the OIE List".

[114] Terrestrial Code (21st edition), User's Guide, para. A.2. OIE's response to Panel question No. 2.

[115] United States' first written submission, para. 236.

[116] United States' request for the establishment of a panel.

g. Article 5.6 of the SPS Agreement because India's AI measures are more trade-restrictive than required to achieve its appropriate level of sanitary protection;

h. Article 6.1 of the SPS Agreement because India's AI measures are not adapted to the sanitary characteristics of the area from which United States imports originated. Furthermore, in failing to assess the sanitary characteristics of particular areas from which United States imports originated, India has not taken into account disease-free areas or areas of low disease prevalence, or the existence of eradication or control programs. Moreover, India has not taken into account the relevant guidelines of the OIE in assessing the sanitary characteristics of a region;

i. Article 6.2 of the SPS Agreement because India's AI measures do not recognize disease-free areas or areas of low disease prevalence;

j. Article 7 of the SPS Agreement, and Annex B, paragraphs 2 and 5(a)-(d) of the SPS Agreement, because, *inter alia*, India has not provided the information on its AI measures in accordance with the provisions of Annex B, and to the extent any notification was made, it was not made until well after these measures entered into force. India's failure to comply with Annex B, paragraph 5 is not justified by any urgent problem of health protection that has arisen or threatened to arise for India, and that India has in any event failed to comply with the requirements of paragraph 6 of Annex B of the SPS Agreement; and

k. Article XI of the GATT 1994 because India's measures constitute import prohibitions or restrictions other than duties, taxes, or other charges.

3.2. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with its WTO obligations.[117]

3.3. India requests that "the Panel should find India's measure to be consistent with the SPS Agreement and GATT 1994".[118] India further requests the Panel to "dismiss claims made by the United States against India's measure under these Agreements".[119]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 33 of the Working Procedures adopted by the Panel (Annexes B-1, B-2, B-3, B-4, B-5, B-6, B-7 and B-8).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Australia, Brazil, the European Union, Guatemala, and Japan are reflected in their executive summaries, provided in accordance with paragraph 34 of the Working Procedures adopted by the Panel (Annexes C-1, C-2, C-3, C-4, C-5 and C-6). China, Colombia, Ecuador, and Viet Nam did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 23 May 2014, the Panel issued its Interim Report to the parties. On 6 June 2014, the United States and India each submitted written requests for the review of the Interim Report. Neither party requested an interim review meeting. On 20 June 2014, both parties submitted comments on each other's requests for review.

6.2. In accordance with Article 15.3 of the DSU, this Section of the Panel Report sets out the Panel's response to the parties' requests for review of precise aspects of the Report made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. In addition, the Panel also corrected a

[117] United States' first written submission, para. 236.
[118] India's first written submission, para. 277.
[119] India's first written submission, para. 277.

number of typographical and other non-substantive errors throughout the Report, including those identified by the parties. References to sections and paragraph numbers in this Section relate to the Interim Report, except as otherwise noted.

6.1 The purpose and scope of the interim review

6.3. Before addressing the parties' individual requests for the review of our Interim Report, the Panel notes that a significant number of India's comments are of a general nature and address entire sections, rather than precise aspects, of the Interim Report.[120] We also note that many of India's comments concerning paragraphs of the Interim Report contain requests for the insertion into the Report of lengthy recitations of the arguments and evidence submitted by India in the course of the proceedings.[121]

6.4. In this respect, the United States contends that India's interim review comments go "far beyond seeking review of precise aspects of the [I]nterim [R]eport". According to the United States, India "submits extensive rhetoric and demands [that] the Panel treat India's assertions as facts that must be incorporated throughout the [F]inal [R]eport", "makes general comments on the Panel's reasoning", and "tries to reargue various points, without making any precise comments on specific findings in the [R]eport". The United States further argues that "a panel report does not need to summarize, let alone reiterate, and explicitly respond to each and every argument or piece of evidence put forward by a party".[122] The United States expresses substantial concerns with India's suggestion that – at the interim review stage – a party should be allowed to redraft and reframe its arguments and have them included in the interim report.

6.5. The Panel observes that Article 15.2 of the DSU, and paragraph 35 of the Panel's Working Procedures, provide parties with an opportunity to request the Panel "to review precise aspects of the interim report". Previous panels have declined to expand the scope of interim review beyond that provided for in Article 15.2 and have accordingly circumscribed their review to address only those comments that relate to "precise aspects" of the interim report.[123] Previous panels have also noted that it is not appropriate to re-open, at the interim review stage, arguments already put before a panel.[124]

6.6. In keeping with our understanding of Article 15.2 of the DSU and consistent with the approach adopted by previous panels, we will review our Interim Report only in light of the comments made by the parties which relate to "precise aspects" of the Interim Report.

6.7. Regarding India's comments asking us to insert into the Report lengthy recitations of its arguments and evidence, we note that the Appellate Body has explained that panels need not refer explicitly to every argument made, or each piece of evidence adduced, by the parties.[125] We thus have the discretion to address explicitly in our reasoning only the arguments and evidence we deem necessary to resolve a particular claim and support the reasoning we are required to provide.[126] We consider it unnecessary to include in our Report the recitations of arguments and evidence re-submitted by India in the paragraphs listed in footnote 121 above.

6.8. We also note that India, in reference to paragraph 7.266 of our Interim Report, submits that the Panel has failed to make an objective assessment by not taking into consideration the Appellate Body's jurisprudence from *EC – Hormones* and the wording of Article 3 of the SPS Agreement. India does not suggest any particular language that the Panel should include in

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[120] In particular, this concerns India's interim review comments with respect to Sections 7.4.2, 7.5.3.2, 7.5.4.2, 7.6.4, 7.7 and 7.8.2 of the Interim Report.

[121] Specifically, India's comments on paragraphs 7.7, 7.178, 7.181, 7.186, 7.191, 7.197, 7.233, 7.236, 7.237, 7.238, 7.240, 7.248, 7.250, 7.251, 7.254, 7.262, 7.270, 7.277, 7.294, 7.313, 7.324, 7.326, 7.327, 7.375, 7.416, 7.431, 7.453, 7.493, and 7.639.

[122] United States' comments on India's comments on the Interim Report of the Panel, paras. 1 and 5.

[123] Panel Reports, *Japan – Alcoholic Beverages II*, para. 5.2; *Australia – Salmon*, para. 7.3; *Japan – Apples (Article 21.5 – US)*, para. 7.21; *India – Quantitative Restrictions*, para. 4.2; *Canada – Continued Suspension*, paras. 6.16-6.17; and *US – Continued Suspension*, paras. 6.17-6.18.

[124] Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; and *US – Poultry (China)*, para. 6.32.

[125] Appellate Body Reports, *EC – Poultry*, para. 135; *Dominican Republic – Import and Sale of Cigarettes*, para. 125; *EC – Hormones*, para. 138; *US – Upland Cotton*, para. 446; *US – COOL*, para. 410; and *EC – Seal Products*, para. 5.288.

[126] Appellate Body Reports, *EC – Poultry*, para. 135; and *US – COOL*, para. 414.

that paragraph. The United States disagrees with India's comments and notes that this paragraph does not reference *EC – Hormones*. The Panel considers that India's comment on paragraph 7.266 does not qualify as a request to review precise aspects of our Interim Report in terms of Article 15.2 of the DSU. In any event, the Panel observes that the previous paragraph, i.e. paragraph 7.265, takes into account both the Appellate Body's jurisprudence from *EC – Hormones* and the wording of Article 3 of the SPS Agreement.

6.2 Factual aspects

6.9. We note that India puts forward a number of requests for review of the language in Section 2 ("Factual aspects") of the Interim Report, which replicate comments submitted by India at the stage of review of the Descriptive Part. Nonetheless, we proceed to examine India's comments below.

6.10. Regarding paragraph 2.11, India submits that the Panel's description of LPAI does not accurately reflect the current scientific evidence available with respect to the systemic spread of the LPAI virus. India requests that the Panel include text referring to a study in which researchers were allegedly able to demonstrate that certain LPAI viruses can cause systemic infection and can spread to internal organs of birds.[127] The United States objects to India's request because it has contested this factual assertion. The Panel notes that Section 2 of the Report covers only those facts on which the parties agree. In light of the parties' disagreement regarding the replication of LPAI viruses, the Panel declines to make the change suggested by India.

6.11. Regarding paragraph 2.16, India submits that the Panel has not described the possibility of the transmission of the AI virus in view of the evidence provided by India and suggests additional language concerning (i) the transmission of AI viruses through contaminated materials, equipment, trays and the surface of eggs; and (ii) the possibility of cross-contamination of other carcasses with LPNAI viruses during commercial processing of infected or contaminated carcasses. The United States responds that some of the language suggested by India concerning the transmission of AI viruses is already reflected in paragraph 2.16 and objects to the insertion of further language on cross-contamination arguing that "India is trying to present its subjective contentions as established facts".[128] The Panel notes that the language of paragraph 2.16 refers to the transmission of AI viruses through "exposure to virus-contaminated materials, trays or surface of eggs". With respect to the additional language on cross-contamination suggested by India, the Panel declines to make the changes suggested by India because it refers to facts that are contested by the parties.

6.12. Regarding paragraph 2.20, India argues that the Panel's description does not completely reflect the possibility of the transmission of the AI virus in view of the evidence provided by India. India therefore requests the addition of language that describes the zoonotic aspect of the LPNAI virus and the occurrence of an LPNAI virus in China (H7N9) that "resulted in major human fatality".[129] The United States objects to India's request and argues that India neither explains why this information is relevant, nor provides reputable scientific authority to support its argument. The Panel observes that in support of its suggestion, India refers to its response to Panel question No. 4(a) citing Exhibit IND-130 with the information obtained from the official website of the WHO. The Panel agrees with India insofar as paragraph 2.20 does not fully address instances in which LPAI has caused complications or fatalities in humans. In fact, the Panel had referred to this Exhibit in its findings (paragraph 7.151). Accordingly, the Panel decides to reword paragraph 2.20, modify footnote 51 and add a new footnote 53, as follows:

> Similarly, although most AI viruses do not cause disease in humans, some are zoonotic, meaning that they can infect humans and cause disease.[51] However, transmission between humans appears to have occurred only on very rare, exceptional occasions and in nearly all reported cases of human infection with AI viruses there has been a close association with infected birds or infective carcasses.[52] Generally, serious complications or fatal cases in humans have been reported ~~only~~ in cases of infection with certain strains of HPAI viruses. Nonetheless, there have been

[127] Post et al., "Systemic distribution of different low pathogenic avian influenza (LPAI) viruses in chicken", *Virology Journal*, Vol. 10(23) (2013) (Exhibit IND-68).
[128] United States' comments on India's comments on the Interim Report of the Panel, para. 11.
[129] India's comments on the Interim Report of the Panel, p. 3.

outbreaks of LPNAI (H7N9) in China resulting in fatalities and illness to humans.[53] In most other cases, ~~I~~illness from infection with LPAI viruses has been clinically mild and has ranged from focal mild signs and symptoms (e.g., conjunctivitis) to more acute systemic illness (fever and upper respiratory trace disease) with full recovery.[54]

Footnote 51: WHO, "Avian influenza in humans", accessed 17 January 2014, <http://www.who.int/influenza/human_animal_interface/avian_influenza/en/> (Exhibit US-36); WHO, "Human infection with avian influenza A (H7N9) virus – update", accessed 30 March 2014, <http://www.who.int/csr/don/2013_07_20/en/index.html> (Exhibit IND-130).

New footnote 53: WHO, "Human infection with avian influenza A (H7N9) virus – update", accessed 30 March 2014, <http://www.who.int/csr/don/2013_07_20/en/index.html> (Exhibit IND-130).

6.13. Regarding paragraph 2.53, India requests that the Panel include certain quotations from Article 5.1.1 of Chapter 5.1 of the Terrestrial Code in order to reflect India's arguments concerning the objectives of the Terrestrial Code. The United States opposes India's request and submits that, because the interpretation of the Terrestrial Code is a matter of dispute between the parties, "any substantive interpretations on disputed aspects of the [Terrestrial] Code belongs in the Panel's Findings, not the descriptive part of the [R]eport".[130] The Panel observes that Section 2.4.5.3 of the Interim Report, commencing with paragraph 2.53, addresses the objectives of the Terrestrial Code as reflected in its Foreword and its User's Guide. Chapter 5.1 of the Terrestrial Code deals with "[g]eneral obligations related to certification". The Panel is of the view that the context of paragraph 2.53 does not support the incorporation of quotations from Chapter 5.1 of the Terrestrial Code.

6.14. Regarding paragraph 2.55, India requests that the Panel delete the first sentence and replace it with certain extracts from Section C of the User's Guide. The United States objects to India's request and reiterates that the descriptive part of the Report is not the appropriate place in which to incorporate parties' argumentation. The Panel considers that a quote from the User's Guide does not constitute parties' arguments. Nevertheless, we note that India does not explain why we should delete the first sentence of paragraph 2.55 or why the insertion of extracts from Section C of the User's Guide dealing with international veterinary health certificates is relevant in the context of paragraph 2.55. The Panel is of the view that paragraph 2.55 accurately summarizes the objectives of the Terrestrial Code. For these reasons, the Panel declines to make the changes suggested by India.

6.3 Preliminary Issues

6.15. Regarding paragraph 7.4, the United States submits that the Panel did not include the text of its "first preliminary ruling" and instead incorporated that ruling by reference. The United States submits that the inclusion of "both preliminary rulings" is appropriate to afford the parties the opportunity to comment on those findings and would be helpful for WTO Members and others reading the Panel's report. The United States suggests that, in the alternative, the Panel could append the preliminary ruling to the Report as an annex. India does not address the United States' suggestion. The Panel is not persuaded by the arguments presented by the United States. The reasons for the Panel's approach are clearly set out in paragraph 7.4 of the Report. Accordingly, the Panel declines to make the changes suggested by the United States.

6.16. Regarding paragraph 7.7, India requests that the Panel add a sentence from India's first written submission in which India explains its understanding of the United States' claim under Article 2.3 of the SPS Agreement. The United States opposes India's request and submits that the Panel correctly notes the Article 2.3 claim raised by the United States. The Panel is of the view that paragraph 7.7 accurately summarizes the arguments of India and therefore declines to make the changes suggested by India.

[130] United States' comments on India's comments on the Interim Report of the Panel, para. 13.

6.4 Whether India's AI measures are SPS measures within the scope of the SPS Agreement

6.17. Regarding paragraphs 7.151 and 7.152, India requests the addition of information about the recent occurrence of an LPNAI virus in China (H7N9) which, according to India, "resulted in major human fatality".[131] The United States objects to India's request and argues that (i) the information suggested by India does not change the Panel's analysis; (ii) India's AI measures could not have taken into account events post-dating the enactment of the measures; and (iii) India's proposal is supported only by its own response to a Panel question. The Panel notes that it has added pertinent information about the occurrence of H7N9 LPNAI in China to paragraph 2.20 of the descriptive part of its Report. In addition, the Panel recalls that paragraphs 7.151 and 7.152 of the Interim Report concern the issue of whether India's AI measures are SPS measures. In both paragraphs, the Panel found that India's AI measures are aimed at protecting, *inter alia*, human life or health from the risks related to AI viruses. We consider the addition of the information suggested by India would not alter or benefit the Panel's analysis. The Panel thus declines to make the changes suggested by India.

6.5 Whether India's AI measures are inconsistent with Article 3.1 of the SPS Agreement

6.18. Regarding paragraphs 7.163 and 7.165, India requests that the Panel make a number of changes to the arguments of the United States summarized therein on the basis that the United States "differentiated between the HPNAI and the LPNAI", and "[t]he same has not been correctly mentioned in the Interim Report".[132] The United States opposes India's request and submits that the paragraphs as currently drafted are correct statements concerning the United States' position. The Panel is of the view that paragraphs 7.163 and 7.165 accurately reflect the arguments of the United States and therefore declines to make the changes suggested by India.

6.19. Regarding paragraph 7.171, India requests that the Panel clarify the submission of the United States that, according to the Terrestrial Code, "the exporting status of a territory is simply a factor to be taken into account in ensuring that the specific recommendation is tailored to achieve the appropriate level of protection".[133] The United States objects to India's request on the basis that India does not specify the revision it seeks, but summarily states that the referenced sentence is unclear. The Panel is of the view that paragraph 7.171 correctly summarizes the arguments of the United States. Accordingly, the Panel declines India's request.

6.20. Regarding paragraph 7.178, India requests that the Panel include India's arguments that the United States' claim under Article 3.1 of the SPS Agreement is limited to eggs and fresh meat of poultry. India also submits that the Interim Report "does not correctly mention many of the arguments made by India"[134] and thus requests that the Panel include after paragraph 7.178 nine additional paragraphs that reproduce India's arguments from its written submissions and oral statements. The United States opposes India's requests. Concerning the first suggestion made by India, the United States submits that the change is unwarranted because the Panel addresses India's arguments that the United States' claims were limited to fresh meat and eggs in paragraphs 7.184, 7.193, 7.277 and 7.278 of the Interim Report. The United States argues that India has not suggested that the Panel is incorrect or that substantive findings would be affected or even clarified by the inclusion of the proposed text. Concerning the second suggestion made by India, the United States argues that (i) these comments go beyond seeking interim review; (ii) the present description in the Panel Report is adequate and correct; (iii) there is no requirement for a panel report to repeat every argument that a party makes in a dispute; (iv) these arguments in many instances appears to be irrelevant or undefined with respect to the issues in this dispute; and (v) these arguments are disorganized and repetitive. With regard to India's request concerning the scope of the United States' claim under Article 3.1, the Panel notes that India's arguments are reflected in paragraph 7.184. The Panel considers that paragraph 7.178 accurately summarizes India's arguments. We also refer to our decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

[131] India's comments on the Interim Report of the Panel, p. 7.
[132] India's comments on the Interim Report of the Panel, pp. 5-6.
[133] India's comments on the Interim Report of the Panel, p. 8.
[134] India's comments on the Interim Report of the Panel, p. 8.

6.21. Regarding paragraph 7.181, India submits that its argument with respect to the interpretation of the Terrestrial Code as a treaty has not been addressed and thus requests that the Panel include seven additional paragraphs after paragraph 7.181 that reflect India's arguments from its written submissions and oral statements. The United States does not specifically address India's request. However, in the context of its comment on India's suggestions for paragraph 7.178, the United States submits that India has not explained why it is necessary to determine whether the Terrestrial Code is a treaty and how this would change the Panel's analysis. The Panel considers that paragraph 7.181 adequately summarizes India's arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.22. Regarding paragraph 7.186, India asserts that it responded in its submissions to the United States' argument concerning the explicit prohibitions contained in the Terrestrial Code. India submits that this response "has not been correctly mentioned in the [I]nterim [R]eport"[135], and requests that the Panel include four additional paragraphs after paragraph 7.186 that reflect India's arguments from its written submissions and oral statements. The United States does not specifically address India's request. The Panel considers that paragraph 7.186 adequately summarizes India's arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.23. Regarding paragraph 7.191, India asserts that it responded in its submission to the United States' argument that "importing from zones/compartments is condition[ed] on the fulfillment [*sic*] of certain obligation[s] under the SPS Agreement". India argues that this "has not been correctly mentioned in the [I]nterim [R]eport".[136] India therefore requests that the Panel add to paragraph 7.191 three additional sentences that reflect certain arguments from India's first written submission. The United States opposes India's request and submits that India does not explain why this Section of the Panel Report should recite this argument, noting that such a recitation in this Section of the Report "would be off point and confusing".[137] The Panel considers that paragraph 7.191 adequately summarizes India's arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.24. Regarding paragraph 7.193, India submits that "the Panel has not examined whether the United States has raised specific claims with respect to each poultry product and how India's measure for each of such poultry product does not conform/based on the [Terrestrial] Code".[138] The United States disagrees with India and submits that in Sections 7.4.2.2.3 and 7.4.2.2.4, the Panel makes the appropriate examination, including by explicitly considering each of the products referenced in S.O. 1663(E) with respect to the Terrestrial Code. The Panel refers to paragraph 7.193 and observes that the scope of the products at issue is addressed expressly therein, as well as by cross-reference to the Panel's Preliminary Ruling of 22 May 2013.

6.25. Regarding paragraph 7.197, India requests that the Panel add several sentences summarising India's arguments with respect to the interpretation of Article 3 of the SPS Agreement. The United States objects to India's request and submits that India does not explain the basis for its request. The United States also notes that this paragraph (and those that immediately follow) contains the Panel's application of the Appellate Body's findings, such that there is no reason for or benefit to incorporation into this paragraph of a description of India's arguments. The Panel observes that paragraph 7.197 constitutes part of the Panel's analysis of Article 3 of the SPS Agreement. India's arguments with respect to the United States' claim under Article 3.1 are appropriately summarized in Section 7.4.1.2. Accordingly, the Panel declines to make the changes suggested by India.

6.26. Regarding paragraph 7.205, India requests that the Panel add a number of sentences that would appear to criticize the Panel's interpretation and analysis under Article 3 of the SPS Agreement and its use of the panel and Appellate Body reports in *EC – Hormones* and the Appellate Body report in *EC – Sardines*. The United States opposes India's request and submits that the reasoning cited by the Panel is directly on point. The Panel considers that the context of

[135] India's comments on the Interim Report of the Panel, p. 15.
[136] India's comments on the Interim Report of the Panel, p. 16.
[137] United States' comments on India's comments on the Interim Report of the Panel, para. 33.
[138] India's comments on the Interim Report of the Panel, p. 17.

paragraph 7.205 does not support the incorporation of the language proposed by India. Accordingly, the Panel declines to make the suggested changes.

6.27. Regarding paragraph 7.233, India submits that its arguments with respect to the interpretation of the Terrestrial Code "have not been correctly mentioned"[139] by the Panel. India thus requests that the Panel add a number of sentences to paragraph 7.233 which reflect certain of India's arguments in its written submissions and oral statements. The United States objects to India's request and argues that "[n]ot only is a lengthy recitation regarding India's views unnecessary, but the precise language proffered by India go well beyond India's own arguments regarding the [Terrestrial] Code and delves into what it views as being the position of the United States and the OIE".[140] The Panel considers that paragraph 7.233 adequately summarizes India's arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.28. Regarding paragraph 7.236, India requests that the Panel add eleven paragraphs in order to correctly reflect its arguments with respect to the interpretation of Article 10.4.1.10 of the Terrestrial Code. The United States opposes India's request and submits that such addition is unnecessary in order to properly capture India's argument, and that the proposed text does not clarify or assist in better understanding the subsequent findings made by the Panel. The Panel considers that paragraph 7.236 accurately summarizes India's arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.29. Regarding paragraphs 7.237 and 7.238, India requests that the Panel add respectively three and four paragraphs in order to correctly reflect India's arguments in response to the opinions expressed by the OIE concerning the interpretation of Article 10.4.1.10 of the Terrestrial Code and concerning whether restrictions recommended by Terrestrial Code are explicitly provided therein. The United States opposes India's request and submits that India has not specified where the Panel incorrectly reflected India's arguments, or how these additions would resolve any supposed misstatements. The Panel notes that paragraphs 7.237 and 7.238 describe the clarifications provided by the OIE with respect to the interpretation of Article 10.4.1.10 of the Terrestrial Code and not the comments of the parties in this regard. The Panel observes that India's disagreement with the opinion of the OIE is evident in the paragraphs preceding paragraphs 7.237 and 7.238. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel does not find it appropriate to include India's proposed additional language and thus declines to make the changes suggested by India.

6.30. Regarding paragraph 7.240, India requests that the Panel add a number of sentences to the end of the paragraph in order to correctly reflect India's arguments with respect to its understanding of the product-specific recommendation in Chapter 10.4 of the Terrestrial Code. The United States opposes India's request and argues that India fails to explain why these additional sentences are necessary, and that India ignores that the Panel has recounted India's arguments on these points through the proposed additions in paragraphs 7.183 and 7.185. The Panel observes that paragraph 7.240 is intended to briefly describe India's arguments with respect to the product-specific recommendations in Chapter 10.4 of the Terrestrial Code. Other arguments made by India in this regard are summarized in Section 7.4.1.2. Accordingly, the Panel declines to make the changes suggested by India.

6.31. Regarding paragraph 7.248, India requests that the Panel delete two sentences and replace them with three paragraphs in order to correctly reflect India's arguments with respect to the product-specific recommendations in Chapter 10.4 of the Terrestrial Code. The United States objects to India's request and submits that the Panel's description of India's position is correct, and notes that the existing language simply restates India's position from the preceding paragraph, which quotes or directly tracks the language in India's submissions. The United States adds that "the revisions India proposes go far beyond the precise point that the Panel is paraphrasing from the preceding paragraph".[141] The Panel considers that paragraph 7.248 summarizes the element of India's argument that is relevant to the discussion in that Section of the Interim Report. Other relevant arguments made by India in that regard are accurately

[139] India's comments on the Interim Report of the Panel, p. 18.
[140] United States' comments on India's comments on the Interim Report of the Panel, para. 41.
[141] United States' comments on India's comments on the Interim Report of the Panel, para. 46.

summarized in Section 7.4.1.2. Accordingly, the Panel declines to make the changes suggested by India.

6.32. Regarding paragraph 7.250, India submits that the summary of the opinion of the OIE provided in the paragraph "does not mention the comments of India on the OIE's opinion".[142] India therefore requests that the Panel include five additional paragraphs after paragraph 7.250 summarizing India's comments on the responses of the OIE and the individual experts. The United States opposes India's request and argues that the Panel is not required to include India's arguments whenever it makes reference to the OIE in its analysis. The Panel notes that paragraph 7.250 sets out the OIE's interpretation of Article 10.4.19 of the Terrestrial Code and not the comments of the parties. The Panel also notes that the summary of India's arguments provided in the paragraphs preceding paragraphs 7.250 illustrates India's disagreement with the OIE. The Panel therefore declines to make the changes suggested by India.

6.33. Regarding paragraph 7.251[143], the United States suggests the inclusion of a statement to make clear that the Panel has made its own assessment of the meaning of the Terrestrial Code. India disagrees and submits that the Panel has not undertaken a "review and assessment of the Terrestrial Code". India argues that it "had provided significant material and references to other chapters of the [Terrestrial] Code explaining why the [United States'] argument and OIE's agreement with the same was misleading".[144] According to India, the Panel did not consider these arguments. The Panel observes that paragraph 7.251 provides that the Panel "examined the text of each of the product-specific recommendations in Chapter 10.4" and that paragraph 7.252 describes the Panel's understanding of the relevant product-specific recommendations. In our view, it is evident from the text and the context of these paragraphs that the Panel has made its own assessment regarding the meaning of the product-specific recommendations in Chapter 10.4 of the Terrestrial Code. Accordingly, the Panel declines to make the changes suggested by the United States.

6.34. Regarding paragraph 7.251, India requests that the Panel include eight additional paragraphs in order to correctly reflect India's arguments regarding the OIE's interpretation of the product-specific recommendations in Chapter 10.4 of the Terrestrial Code. The United States does not respond to India's request. The Panel notes that neither paragraph 7.251 nor the subsequent paragraphs in that Section are intended to serve the purpose of summarizing the parties' arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.35. Regarding paragraph 7.252, India submits that the Panel has not analysed India's arguments regarding Article 10.4.5 of the Terrestrial Code. India requests that the Panel address these arguments in its analysis. The United States opposes India's request and submits that it fails to see what changes India seeks in the Interim Report. The United States also points out that India does not cite the specific submission in which this argument is made, or otherwise explains the value of this argument in the context of paragraph 7.252. The Panel agrees with the United States and further notes that paragraph 7.252 contains the Panel's analysis of the product-specific recommendations in Chapter 10.4 of the Terrestrial Code and is not intended to serve the purpose of addressing the parties' arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.36. Regarding paragraphs 7.254 and 7.262, India requests that the Panel add a number of sentences at the end of these paragraphs in order to correctly reflect India's arguments with respect to zones and compartments as referred to in Chapter 10.4 of the Terrestrial Code. The United States opposes India's request on the basis that "India requests the inclusion of an irrelevant argument".[145] The Panel notes that India's arguments with respect to zones and compartments are already summarized in paragraph 7.191 of the Interim Report. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India. Regarding paragraph 7.269, India submits that the Panel's reliance on *EC – Sardines* is "misconstrued" because "the decision was made in the context of a different agreement"; namely, the TBT Agreement, "while on the same issue guidance is already

[142] India's comments on the Interim Report of the Panel, p. 25.
[143] The United States erroneously refers to 7.521.
[144] India's comments on United States' comments on the Interim Report of the Panel, p. 10.
[145] United States' comments on India's comments on the Interim Report of the Panel, para. 55.

available"[146] in the Appellate Body's report in *EC – Hormones*. The United States does not respond to India's request. The Panel observes that the Appellate Body's ruling in *EC – Sardines* is relevant in the present dispute for the reasons explained in paragraph 7.269 of the Interim Report.

6.37. Regarding paragraph 7.270, India requests that the Panel add several sentences in order to correctly reflect India's arguments with respect to zones and compartments as referred to in Chapter 10.4 of the Terrestrial Code. The United States opposes India's request for the same reasons it noted with respect to paragraphs 7.191, 7.525, and 7.262. The Panel notes that India's arguments with respect to zones and compartments are already summarized in paragraph 7.191 of the Interim Report. Moreover, the Panel observes that paragraph 7.270 is not intended to serve the purpose of summarizing the parties' arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.6 Whether India's AI measures are inconsistent with Articles 5.1, 5.2 and 2.2 of the SPS Agreement

6.38. Regarding paragraph 7.277, India requests that the Panel add one paragraph after paragraph 7.277 in order to correctly reflect India's arguments with respect to the order of analysis under Articles 5.1 and 2.2 of the SPS Agreement. The United States opposes India's request and submits that this paragraph is drafted in a manner that accurately captures the United States' claims and the order of analysis decided upon by the Panel. The Panel notes that paragraph 7.277 is not directed to the parties' arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.39. Regarding paragraph 7.294, India submits that the Panel has not correctly summarized its arguments with respect to Article 5.1 of the SPS Agreement. India therefore requests that the Panel include two additional paragraphs after paragraph 7.294 that reflect certain paragraphs of India's first written submission. The United States objects to India's request and submits that the Panel has accurately captured India's response to the United States' claims under Articles 5.1 and 5.2 of the SPS Agreement. The Panel is of the view that paragraph 7.294 accurately summarizes India's arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.40. Regarding paragraph 7.313, India submits that this paragraph does not correctly reflect India's arguments regarding the Australian risk assessment. India requests that the Panel add to paragraph 7.313 several corrections and additional sentences related to Australia's risk assessment. The United States opposes India's request and submits that the Interim Report correctly notes that India did not argue that its measures are based on the Australian risk assessment. The Panel considers that paragraph 7.313 accurately summarizes India's arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.41. Regarding paragraphs 7.324, 7.326 and 7.327, India submits that these paragraphs do not correctly reflect India's arguments regarding Article 2.2 of the SPS Agreement. India requests that the Panel add a number of sentences and / or paragraphs to each paragraph summarizing certain of India's arguments from its written submissions. The United States objects to India's request and submits that India's proposed inclusions are not relevant to the Panel's analysis or findings in the subsequent paragraphs. The Panel is of the view that paragraphs 7.324, 7.326 and 7.327 accurately reflect India's arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.7 Whether India's AI measures are inconsistent with Articles 2.3 and 5.5 of the SPS Agreement

6.42. Regarding paragraph 7.372, India requests that the Panel add two sentences in order to correctly reflect India's arguments with respect to its assertion that LPNAI is exotic to India. The United States opposes India's request on the basis that the first proposed addition amounts to an

[146] India's comments on the Interim Report of the Panel, p. 31.

oversimplification and incomplete presentation of the United States' arguments, and that the second proposed addition does not accurately describe India's arguments. The Panel considers that paragraph 7.372 accurately summarizes India's arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.43. Regarding paragraph 7.375, India requests that the Panel add three paragraphs after that paragraph in order to correctly reflect India's arguments with respect to India's AI status and the study by Pawar et al. The United States opposes India's request and submits that the proposed additions are unnecessary. The United States also submits that India had the opportunity to summarize its arguments in executive summaries, which are included as an annex to the Interim Report. The Panel is of the view that paragraph 7.375 accurately summarizes India's arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.44. Regarding paragraph 7.406, the United States observes that this paragraph states that the NAP 2006 was promulgated pursuant to the Prevention and Control of Infectious and Contagious Disease in Animals Act, 2009. The United States notes that the Act post-dates the NAP 2006 by three years. Accordingly, the United States suggests that the reference to the Prevention and Control of Infectious and Contagious Disease in Animals Act, 2009 be removed. India disagrees with the United States' suggestion and submits that the NAP 2012 was issued pursuant to the Prevention and Control of Infectious and Contagious Disease in Animals Act, 2009. India thus proposes that the paragraph be modified such that the paragraph makes clear that the NAP 2012 was issued pursuant to this Act. The Panel agrees with India and modifies paragraph 7.406 as follows:

> The NAP was first issued in 2006 by India's DAHD ~~pursuant to the Prevention and Control of Infectious and Contagious Disease in Animals Act 2009.~~[726] A revised version was issued in 2012 (NAP 2012) pursuant to the Prevention and Control of Infectious and Contagious Disease in Animals Act, 2009.[727]

6.45. Regarding paragraphs 7.412 to 7.425, India asserts that the Panel did not take into account India's argument regarding the role of migratory flyways in introducing infections in poultry, and regarding surveillance in wild and migratory birds. India requests that the Panel address these arguments in its final report. The United States opposes India's request and submits that arguments mentioned by India are irrelevant because the cited paragraphs deal with the adequacy of India's surveillance regime. The Panel considers that the arguments mentioned by India are not relevant in the context of the cited paragraphs. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.46. Regarding paragraph 7.416, India requests that the Panel add two paragraphs after that paragraph in order to correctly reflect India's arguments with respect to the opinions of the Panel's individual experts concerning India's AI surveillance regime. The United States objects to India's request and submits that India is seeking to have the paragraphs included in the middle of text setting out the Panel's analysis, not in the portion of the Panel Report reciting the parties' arguments, with the effect that these statements would "be interpreted as conclusions of the Panel, not as arguments of India".[147] The Panel notes that neither paragraph 7.416 nor the subsequent paragraphs in that Section are intended to serve the purpose of summarizing the parties' arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to adopt India's proposal.

6.47. Regarding paragraphs 7.417 and 7.418, the United States requests that the Panel clarify and provide additional support for the Panel's assessment of whether India's domestic surveillance regime is capable of reliably detecting LPNAI because, in the United States' view, this is a key factual issue in this dispute. As an example, the United States proposes to include three paragraphs setting out additional findings between paragraphs 7.417 and 7.418. India objects to the United States' request and disagrees with the content of the United States' proposal on the basis that they are "not consistent in view of the evidence at hand".[148] The Panel is of the view

[147] United States' comments on India's comments on the Interim Report of the Panel, para. 71.
[148] India's comments on United States' comments on the Interim Report of the Panel, p. 3.

that its analysis of whether India's surveillance regime is adequate to detect LPNAI is sufficient and does not require further clarification. The Panel thus declines to make the changes suggested by the United States.

6.48. Regarding paragraph 7.418, the United States submits that while India's exhibits illustrate its surveillance regime, they do not "describe" that regime, and the regime is described in the NAP 2012. The United States therefore proposes that the word "describe" be replaced with the word "illustrate". India does not respond to the United States proposal. The Panel has decided to accept the proposed modification of the text in paragraph 7.418, and has thus replaced the word "describe" with the word "illustrate".

6.49. Regarding paragraph 7.423, the United States requests that the Panel indicate more clearly that it made its own assessment of whether India's domestic surveillance regime is capable of reliably detecting LPNAI, by stating that the Panel "has reviewed the evidence and has come to the same conclusion as the three individual experts".[149] India disagrees with the United States' suggestion and argues that the sentence as proposed by the United States is highly misleading, because "[w]hether the Panel agrees with the individual experts and in what aspects should be left to the judgment of the Panel and not to the complaining party".[150] The Panel observes that paragraph 7.423 provides that "we cannot conclude, on the basis of the evidence before us, that the surveillance regime that exists under India's NAP 2012 is adequate to reliably detect LPNAI". In our view, it is evident from the text and the context of this paragraph that the Panel has made its assessment, based on the evidence before it, as to whether India's domestic surveillance regime is capable of reliably detecting LPNAI. We are also not persuaded that the mere statement that the Panel has made its own review and assessment of evidence would have added clarity to the Panel's analysis in this regard. Accordingly, the Panel declines to make the changes suggested by the United States.

6.50. Regarding paragraphs 7.430 to 7.436, India submits that the Panel's analysis does not take into account the argument of India that a number of countries take domestic control measures similar to those maintained by India which are, according to India, "also permitted by the [Terrestrial] Code".[151] The United States submits that the Panel does not need to set out these arguments, because "[a]n objective assessment of the evidence [does] not require consideration of arguments, such as this, that are legally irrelevant".[152] The Panel considers that the arguments mentioned by India are not relevant in the context of the cited paragraphs. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.51. Regarding paragraph 7.431, India suggests that the Panel change the order in which India's arguments appear in order to correctly reflect those arguments. The United States submits that India's arguments, as summarized in paragraph 7.431, "accurately capture[] the order of India's arguments in paragraphs 210-212 of India's First Written Submission".[153] The Panel considers that paragraph 7.431 accurately summarizes India's arguments and therefore declines to make the changes suggested by India.

6.52. Regarding paragraph 7.433, the United States suggests the addition of a sentence in order to highlight that the statements of Indian officials confirm that there is no avenue available for a Member notifying NAI to demonstrate that certain exports of its products do not pose an NAI-related risk. India opposes the United States' suggestion and submits that the proposed statement "is misleading as the Panel has not relied on the statements made by the Indian officials to ascertain that S.O. 1663 provides for prohibition".[154] The Panel does not consider that the sentence proposed by the United States is useful in the context of paragraph 7.433. Accordingly, the Panel declines to make the changes suggested by the United States.

[149] United States' comments on the Interim Report of the Panel, para. 8.
[150] India's comments on United States' comments on the Interim Report of the Panel, p. 4.
[151] India's comments on the Interim Report of the Panel, p. 40.
[152] United States' comments on India's comments on the Interim Report of the Panel, para. 74.
[153] United States' comments on India's comments on the Interim Report of the Panel, para. 75.
[154] India's comments on United States' comments on the Interim Report of the Panel, p. 5.

6.53. Regarding paragraph 7.434, the United States suggests adding language at the end of the paragraph to show that "India has categorically refused"[155] to engage in efforts to assess the measures applied by its trading partners that aim to address AI outbreaks within their territories. India objects to the United States' suggestion and submits that the proposed statement "is misleading and factually incorrect as the United States has not provided any evidence as per which the United States has communicated the details of its control and containment procedure to India and subsequently had asked India to evaluate the same".[156] The Panel is of the view that the sentence proposed by the United States is not useful in the context of paragraph 7.434. Accordingly, the Panel declines to make the changes suggested by the United States.

6.54. Regarding paragraphs 7.444 and 7.445, the United States suggests amendments to make clearer that the Panel has made its own assessment of the evidence concerning the opinions of the individual experts. India disagrees with the United States' suggestions and submits that the proposed modifications "are highly misleading", and that "[w]hether the Panel agrees with the individual experts and in what aspects should be left to the judgment of the Panel and not to the complaining party".[157] The Panel observes that paragraphs 7.444 and 7.445 contain the Panel's summary of the experts' views. The Panel's own conclusions, based on its assessment and on the experts' views as summarized Section 7.6.4.2.1.2, are contained in paragraphs 7.454 and 7.455. Accordingly, the Panel declines to make the changes suggested by the United States.

6.55. Regarding paragraph 7.453, India requests that the Panel add several sentences in order to correctly reflect its arguments with respect to the opinions of Professor Brown and Dr Guan concerning the study by Pawar et al. The United States opposes India's request and submits that paragraph 7.453 does not set out the arguments made by India, and therefore it would be inappropriate to include a listing of India's arguments in this paragraph. The United States adds that India's proposed language is phrased in a manner that could lead it to be interpreted as part of the Panel's assessments, rather than argument by India. The Panel does not consider that paragraph 7.453 is the appropriate place to include the parties' arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.56. Regarding paragraph 7.454, the United States suggests the addition of one sentence to this paragraph in order to make clearer that the Panel has made its own assessment of the evidence submitted by India and the opinions of the individual experts. India disagrees with the United States suggestion and submits that the proposed modifications "are highly misleading". According to India, "[w]hether the Panel agrees with the individual experts and in what aspects should be left to the judgment of the Panel and not to the complaining party".[158] The Panel is of the view that the text and context of paragraph 7.454 indicate that the Panel has reached its conclusions based on the evidence before it. Accordingly, the Panel declines to make the changes suggested by the United States.

6.57. Regarding paragraph 7.457, the United States suggests certain revisions to the first three sentences in order to make clearer that the Panel has made its own assessment of the evidence. The United States further proposes that the Panel insert a new paragraph after paragraph 7.457, which provides that "India's imposition of LPNAI-based import prohibitions would constitute arbitrary or unjustifiable discrimination even if LPNAI were exotic to India". The United States submits that such "findings" would assist the Appellate Body in the event of appellate review "by setting out further the Panel's analysis".[159] India objects to the United States' suggestion and argues that the proposed changes "add[] a new aspect to the analysis of the Panel in the [I]nterim [R]eport which was not there earlier", and that this "cannot be proposed by the complaining party as it is the prerogative of the Panel to decide how to base its findings in the [I]nterim [R]eport".[160] The Panel is of the view that it is evident from the text and the context of paragraph 7.457 that the Panel has reached its conclusion based on the evidence before it. The Panel also considers that the additional findings proposed by the United States are not necessary for the Panel to discharge its obligation to make an objective assessment of the matter before it, or to assist the DSB to

[155] United States' comments on the Interim Report of the Panel, para. 10.
[156] India's comments on United States' comments on the Interim Report of the Panel, p. 6.
[157] India's comments on United States' comments on the Interim Report of the Panel, p. 6.
[158] India's comments on United States' comments on the Interim Report of the Panel, p. 7.
[159] United States' comments on the Interim Report of the Panel, para. 14.
[160] India's comments on United States' comments on the Interim Report of the Panel, p. 8.

make the recommendations or rulings provided for in the covered agreements. Accordingly, the Panel declines to make the changes suggested by the United States.

6.58. Regarding paragraph 7.460, the United States submits that the discussion of the relationship between elements of claims under Article 5.5 and Article 2.3 in this paragraph is unnecessary to the Panel's analysis. The United States also posits that the Panel's discussion could give rise to confusion about whether the presence or absence of arbitrary or unjustifiable distinctions in ALOPs for purposes of Article 5.5 has necessary consequences for an analysis of whether similar conditions prevail or there is arbitrary or unjustifiable discrimination between products for purposes of Article 2.3. For the United States, the Panel's analysis appears to overstate the definitiveness with which the panel in *Australia – Salmon (Article 21.5 – Canada)* treated dissimilarities in disease status when considering similarity of conditions for the purpose of Article 2.3. The United States suggests making certain revisions to the text of paragraph 7 in order to address this. India disagrees with the United States' suggestion and argues that it is contrary to the observation of the panel in *Australia – Salmon (Article 21.5 – Canada)* and "misstates that panel's position entirely". According to India, "[t]he United States would like the Panel to ignore the significance of the absence of a disease and its relevance to the disease status of a particular country" as highlighted by the *Australia – Salmon (Article 21.5 – Canada)* panel, "which clearly amounts to an erroneous understanding of the panel's ruling in that case".[161] The Panel disagrees with the United States' interpretation of paragraph 7.460. As noted in that paragraph, the Panel is concerned with whether factors considered in an analysis under Article 5.5 can also be considered in an analysis under Article 2.3. As also noted in that paragraph, the Panel is concerned with what may constitute a relevant "condition" for the purpose of Article 2.3. For these reasons, the Panel does not share the United States' concern and thus declines to adopt the changes proposed by the United States.

6.59. Regarding paragraph 7.467, the United States suggests that the panel report in *Australia – Salmon (Article 21.5 – Canada)* should not be read as categorically as the first sentence of this paragraph would suggest, and that this sentence is unnecessary. According to the United States, if the relevant disease is present only in one region of a country (such as, in the case of the United States, Hawaii), then similar or identical conditions may well prevail between the rest of the country and the other Member. Accordingly, the United States suggests making certain revisions to the text of paragraph 7.467. India disagrees with the United States' suggestion and submits that "the United States has not taken this line of argument till date and thus cannot be allowed to argue the same now". According to India, the United States confuses the difference in disease situation of two countries as required for an analysis under Article 2.3 of the SPS Agreement with maintaining zones/compartment for the purpose of trade under Article 6 of the SPS Agreement, which are "two different obligations and each is independent of the other and addresses different issues".[162] The Panel agrees with the United States in that the presence of a disease in one country, but its absence in another, will not *always* mean that identical or similar conditions do not exist between those countries. The Panel does not agree, however, that the sentence to which the United States refers is unnecessary. The Panel therefore makes the following adjustment to the first sentence of paragraph 7.467:

> We agree with India that the panel report in *Australia – Salmon (Article 21.5 – Canada)* supports the notion that <u>if the relevant disease is present in one country but not in another, this may be an indication that</u> identical or similar conditions ~~will~~ <u>do</u> not exist ~~in the event that the relevant disease is present in one country but not in another~~.

6.60. Regarding footnote 838, the United States suggests that the Panel distinguish the conclusion of the Appellate Body in *Australia – Salmon* on the additional basis that "there is simply no double-counting involved in the Panel's analysis".[163] India opposes the United States' suggestion and submits that it is "factually incorrect". According to India, it is incorrect "[t]o suggest that the breach of Article 2.3 is also a breach of Article 5.5"[164] of the SPS Agreement. The Panel is of the view that the change suggested by the United States is not necessary in the context of this footnote.

[161] India's comments on United States' comments on the Interim Report of the Panel, pp. 8-9.
[162] India's comments on United States' comments on the Interim Report of the Panel, p. 9.
[163] United States' comments on the Interim Report of the Panel, para. 19.
[164] India's comments on United States' comments on the Interim Report of the Panel, pp. 9-10.

6.61. Regarding paragraph 7.477, the United States requests that the Panel replace "poultry products" with "agricultural products" in the second sentence of the paragraph to make clear that this statement is referring to all products covered by India's AI measures. India does not object the United States' request, but proposes clarifying the statement by referring to "agricultural products as covered under S.O. 1663(E)". The Panel observes that the purpose of this passage is to recall the Panel's finding in paragraph 7.457 of the Interim Report, namely, that "the discrimination India maintains, through its AI measures, against foreign products on account of LPNAI is arbitrary and unjustifiable contrary to Article 2.3 of the SPS Agreement". In light of the relationship between these paragraphs, the Panel amends the second sentence of paragraph 7.477 as follows:

> We recall our finding in paragraph 7.457 that India's AI measures arbitrarily and unjustifiably discriminate against foreign ~~poultry~~ products.

6.8 Whether India's AI measures are inconsistent with Article 5.6 and, consequently, Article 2.2 of the SPS Agreement

6.62. Regarding paragraph 7.493, India requests that the Panel add several sentences in order to correctly reflect its arguments that the United States' claim under Article 5.6 of the SPS Agreement is limited to eggs and fresh meat of poultry from countries notifying LPNAI. The United States opposes India's request for the reasons identified in the United States' comments on India's requests for review of paragraphs 7.178 and 7.193. The Panel considers that paragraph 7.493 accurately summarizes India's arguments. The Panel also refers to its decision in paragraph 6.7 above, and its Preliminary Ruling of 22 May 2013. For these reasons, the Panel declines to make the changes suggested by India.

6.63. Regarding paragraph 7.580, the United States requests that the Panel make two changes to this paragraph. First, the United States requests the deletion of the sentence in which the Panel interprets the OIE's explanation that its standards facilitate "safe trade" as meaning trade undertaken pursuant to those standards is "free from risk". The United States expresses concern that this statement implies that the OIE's recommendations embody a level of zero risk. Second, the United States suggests clarifying that the Terrestrial Code provides that this safe level of trade is achieved irrespective of the AI status of the exporting country. India objects to the United States' request and submits that the "argument of the United States is misleading". According to India, "there are only few recommendation as per which the AI status of the exporting country is not relevant. For all other recommendations, the status of the exporting country is relevant and the same is also affirmed through Article 5.1.1.2 of the … Terrestrial Code".[165] The Panel does not share the United States' concern regarding potential misinterpretation of this passage and declines to make the changes suggested by the United States.

6.9 Whether India's AI measures are inconsistent with Articles 6.1 and 6.2 of the SPS Agreement

6.64. Regarding paragraph 7.626, the United States requests that the Panel add language from its submissions in which the United States highlighted statements by Indian officials that India would not consider applying its AI measures to only some parts of an exporting country. India disagrees with the United States' suggestion and submits that it "is misleading as the Panel has not relied on the statements made by the Indian officials to ascertain that S.O. 1663 provides for prohibition".[166] The Panel observes that the United States' arguments are summarized in paragraphs 7.621 and 7.622. The Panel considers that paragraph 7.626 accurately summarizes the United States' arguments and thus declines to make the changes suggested by the United States.

6.65. Regarding paragraph 7.639, India requests that the Panel add one paragraph after paragraph 7.639 in order to correctly reflect its arguments with respect to its stated ALOP and its assertion that "should an exporting country make a proposal for zones/compartments, the same would be considered by the Central Government pursuant to Section 3 and 3A of the Livestock Act".[167] The United States opposes India's request and submits that India had the opportunity to

[165] India's comments on United States' comments on the Interim Report of the Panel, p. 11.
[166] India's comments on United States' comments on the Interim Report of the Panel, p. 11.
[167] India's comments on the Interim Report of the Panel, p. 42.

summarize its arguments in executive summaries, which are included as an annex to the Interim Report. The United States also submits that India's proposed paragraph contains its arguments in response to the United States' point, on which the Panel did not rely in the Interim Report. The Panel is of the view that paragraph 7.639 accurately summarizes India's arguments. The Panel also refers to its decision in paragraph 6.7 above. For these reasons, the Panel declines to make the changes suggested by India.

6.66. Regarding paragraph 7.675, the United States notes that this paragraph's description of Article 6.1 may include statements that are more categorical than necessary to support the Panel's conclusions, and that could give rise to misinterpretation. The United States submits that in some circumstances, a Member may be able to satisfy its obligations under Article 6.1 by adapting a measure that has already been taken in light of information supplied by an exporting Member. The United States therefore suggests a number of revisions to the text of paragraph 7.675. India disagrees with the United States' suggestion and submits that the proposed deletion removes the reasoning of the Panel behind its conclusion. The Panel observes that its reasoning in paragraph 7.675 is based on the wording of Article 6.1 of the SPS Agreement. The Panel also notes that its observations in paragraph 7.675 are appropriately qualified by the language of paragraph 7.676, in which the Panel discusses the relationship between Article 6.1 and the provision of information by an exporter pursuant to Article 6.3. Accordingly, the Panel declines to make the changes suggested by the United States.

6.67. Regarding paragraph 7.693, the United States requests that the Panel add that the United States' made arguments based both on the phrasing of the measure and statements of Indian officials. India objects to the United States' request and submits that the proposed "statement is misleading as the Panel has not relied on the statements made by the Indian officials to ascertain that S.O. 1663 provides for prohibition".[168] The Panel notes that the United States' arguments regarding the comments of Indian officials are described in footnote 1165. The Panel therefore declines the United States' request.

6.68. Regarding paragraph 7.704, the United States notes that the final sentence of this paragraph may go further than necessary to support the Panel's conclusion, which could give rise to misinterpretation. The United States proposes certain revisions in order to avoid a suggestion that there are no aspects of the obligation in the first sentence of Article 6.1, "including the obligation to recognize specific disease free areas", which could be accomplished by means of a separate measure. India disagrees with the United States' proposal and submits that "the Panel's original language is germane to its finding of what amounts to recognizing the concept of regionalization".[169] The Panel observes that its analysis in paragraph 7.704 is based on the wording of Article 6.1 of the SPS Agreement. Moreover, the Panel does not share the United States' view that its analysis suggests that "there are no aspects of the obligation in the first sentence of Article 6.1 … which could be accomplished by means of a separate measure".[170] Accordingly, the Panel declines to make the changes suggested by the United States.

6.69. Regarding paragraph 7.705, India requests that the Panel delete the reference in the third sentence to India not disputing in substance the evidence referred to in the paragraph. India submits that in its second written submission, it disputed the portrayal of its statement made on zoning at the OIE and explained that this statement was made only with reference to wild life and its epidemiological role in the spread of disease. The United States objects to India's request and submits that paragraph 7.705 accurately characterizes India's arguments. The United States notes that India's argument is addressed in the next sentence. The Panel notes that paragraph 7.705 contains the description of India's statement regarding zoning. The Panel is of the view that paragraph 7.705 accurately summarizes India's arguments and therefore declines to make the changes suggested by India.

6.70. Regarding paragraph 7.707, India requests that the Panel replace "India's AI measures" with "S.O. 1663(E)" in order to correctly reflect India's arguments. The United States opposes India's request and submits that paragraph 7.707 "is not one that recites arguments by India, but is instead one setting forth a conclusion of the Panel".[171] The United States argues that the

[168] India's comments on United States' comments on the Interim Report of the Panel, p. 11.
[169] India's comments on United States' comments on the Interim Report of the Panel, p. 11.
[170] United States' comments on the Interim Report of the Panel, para. 28.
[171] United States' comments on India's comments on the Interim Report of the Panel, para. 82.

proposed addition is contrary to the Panel's definition of the measures at issue in this dispute. The Panel agrees that paragraph 7.707 does not concern the recitation of the parties' arguments. The Panel also recalls its findings in its Preliminary Ruling of 22 May 2013 that the measures at issue are India's AI measures, which include those measures that prohibit the importation of various agricultural products into India from those countries reporting NAI. Accordingly, the Panel declines to make the changes suggested by India.

6.71. Regarding paragraph 7.715, India comments that the Panel in its analysis has come to the conclusion that the Livestock Act "provides a scope to the Indian authorities to recognize the disease and pest free concepts", while S.O. 1663(E) "rather than recognizing the same, prohibit[s] it". India interprets this to mean that "that the violation in the opinion of the Panel is due to S.O. 1663(E) and not due to the Livestock Act. India thus requests the Panel "to clearly specify that the Indian measure which has led to the violation is S.O. 1663(E)".[172] The United States objects to India's request and submits that India's AI measures, as a whole, breach Articles 6.1 and 6.2 of the SPS Agreement. Accordingly, in the United States view, it was proper for the Panel to refer to "India's AI measures" in paragraph 7.715 and in the other paragraphs of Section 7.9.2.6. The Panel's findings in paragraph 7.715 and in the other paragraphs of Section 7.9.2.6 concern India's AI measures as a whole and not only S.O. 1663(E). Accordingly, the Panel declines to make the changes suggested by India.

7 FINDINGS

7.1 Preliminary Issues

7.1.1 First request for a preliminary ruling by India

7.1. On 4 March 2013, India submitted to the Panel a request for a preliminary ruling concerning the consistency of the United States' panel request with Article 6.2 of the DSU.[173]

7.2. On 22 May 2013, the Panel issued a preliminary ruling to the parties and third parties. After consulting the parties to the dispute, the Panel decided to inform the DSB of the content of its preliminary ruling. The ruling was circulated on 28 June 2013 as document WT/DS430/5.

7.3. In its preliminary ruling of 22 May 2013, the Panel made the following findings:

> 4.1 The Panel preliminarily concludes as follows:
>
> > a. the panel request is sufficiently precise in identifying S.O. 1663(E) as a specific measure at issue as required by Article 6.2 of the DSU, insofar as S.O. 1663(E) prohibits the importation of various agricultural products into India from those countries reporting NAI (both HPNAI and LPNAI);
> >
> > b. the listing of the products prohibited by S.O. 1663(E) in paragraph 3 of the panel request together with the reference to "these products" immediately following that listing do not suggest that the United States intended to limit its challenge to those products;
> >
> > c. the word "orders" included in the panel request does not render the panel request inconsistent with the specificity requirement of Article 6.2 of the DSU, and it does not prejudice the ability of India to defend itself;
> >
> > d. under the circumstances, there can be no uncertainty on India's part at this stage of the proceedings as to whether the United States is challenging measures that were not in force as of the date of the panel request. The United States is challenging only the measures that were in force as of the date of the panel request, namely 11 May 2012; and

[172] India's comments on the Interim Report of the Panel, p. 43.
[173] Details on the procedural aspects can be found in section 1.3.

> e. the panel request has not failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the claims under Articles 2.3, 5.5 and 5.6 of the SPS Agreement.

4.2 The Panel declines to provide a preliminary ruling at this time with respect to certain matters raised by India. Specifically, the Panel considers that:

> a. in the circumstances of the present case, it is premature and indeed unnecessary to make a determination in the abstract, at this preliminary stage, as to precisely which measures fall within the Panel's terms of reference by virtue of the inclusion of the terms "related measures, or implementing measures" in the panel request. The Panel will revisit this issue in the course of these proceedings should a relevant challenge arise; and
>
> b. it is premature for us to make a determination, in the abstract, as to whether any "orders" not specifically listed in the panel request fall within the Panel's terms of reference. The Panel will revisit this issue in the course of these proceedings should a relevant challenge arise.

4.3 Finally, we note that this preliminary ruling will become an integral part of the Panel's final report, subject to any changes that may be necessary in the light of comments received from the parties during the interim review.

7.4. Further to paragraph 4.3 of our preliminary ruling of 22 May 2013, the Panel confirms that this ruling, as set forth in document WT/DS430/5, forms an integral part of the present findings. In line with the approach adopted by the panels in *EC – Seal Products*[174] and *Canada – Renewable Energy / Feed-In Tariff Programme*[175], and for efficiency purposes, we have decided not to reproduce in its entirety our previously circulated preliminary ruling of 22 May 2013 and instead incorporates it by reference into the present Report. Accordingly, we reproduce only those excerpts from our preliminary ruling of 22 May 2013 that we find to be indispensable to complete the analysis on the issues listed in paragraph 4.2 of our preliminary ruling, in respect of which the Panel declined to rule on a preliminary basis. These issues are addressed in section 7.1.2 below.

7.1.2 Second request for a preliminary ruling by India

7.1.2.1 Introduction

7.5. On 31 May 2013, as part of its first written submission, India submitted to the Panel a second request for a preliminary ruling concerning the consistency of the United States' panel request with Article 6.2 of the DSU.[176] Specifically, India argued that the United States, in its first written submission, raised claims concerning (i) India's NAP 2012, and (ii) health certificate requirements for products listed in paragraphs (1)(ii)(a) to (1)(ii)(j) of S.O. 1663(E), notwithstanding the fact that none of these measures was mentioned in the panel request.[177]

7.6. The Panel's reasoning and findings on India's second preliminary ruling request are set out below.

7.1.2.2 Arguments of the parties

7.1.2.2.1 India

7.7. India challenges the adequacy of the United States' panel request on the basis that the United States did not identify the NAP 2012 as a measure at issue. To India, this deficiency arises in the context of the United States' claim under Article 2.3 of the SPS Agreement, in which the United States asserts that India does not apply similar AI controls with respect to like domestic

[174] Panel Report, *EC – Seal Products*, para. 1.21.
[175] Panel Report, *Canada – Renewable Energy / Feed-In Tariff Program*, para. 6.7.
[176] Details on the procedural aspects are found in section 1.3.
[177] India's first written submission, paras. 67-68.

products and their internal movement within India.[178] India argues that, as the object of the United States' claim is the discrimination caused by the different measures applied to imported and domestic products respectively, the United States has to "necessarily adduce and impugn such of India's measures which it believes are the cause of this arbitrary or unjustifiable discrimination".[179]

7.8. India argues that "the statutory basis for this alleged discrimination is not S.O. 1663(E), it is the [NAP]".[180] India points out that S.O. 1663(E) does not regulate control measures to be taken domestically during an outbreak of NAI and hence is not either directly or indirectly capable of violating Article 2.3 of the SPS Agreement.[181] In India's view, by failing to identify the NAP 2012, the United States has failed to identify the measure that is alleged to be causing the violation of Article 2.3 of the SPS Agreement, and has therefore failed to discharge its obligations under Article 6.2 of the DSU.[182]

7.9. India further argues that the United States cannot rely on the reference to "related and implementing measures" in its panel request to incorporate the NAP 2012 within its panel request. According to India, the NAP 2012 is not related to, nor does it implement, S.O. 1663(E) as the NAP 2012 is promulgated under the Prevention of Diseases Act and therefore has a different "sphere of activity".[183]

7.10. India argues that, while Panels have held that "attendant circumstances" may be examined to determine whether the respondent had received adequate notice that an unnamed measure is within a panel's terms of reference[184], no attendant circumstances exist that might otherwise justify the United States' failure to identify the NAP 2012 in its panel request. India infers from the United States' questions during consultations, and United States Department of Agriculture (USDA) publications, that it was aware of the NAP 2006. India also referred the United States to the DAHD website such that it might obtain up-to-date information on relevant Indian measures.[185] Moreover, India argues that the United States' description of the measures at issue cannot be read as describing the "substantive nature" of the NAP 2012.[186] India notes that it is "doubly prejudiced because it has had to engage its already finite resources in making assumptions about the nature and scope of claims, which has seriously affected its ability to prepare its defence in a meaningful way".[187]

7.11. India concludes its arguments regarding the NAP 2012 by contending that the United States' panel request is "severely deficient" and has violated India's due process right to know what case it has to answer in respect of the United States' claim under Article 2.3 of the SPS Agreement. For these reasons, India asserts that the NAP 2012 "should be outside the Panel's terms of reference and claims under Article 2.3 in this respect should also be set aside as being outside the jurisdiction of this Panel".[188]

7.12. With regard to the health certificate requirements for products listed in paragraphs (1)(ii)(a) to (j) of S.O. 1663(E), India argues that they are not measures at issue. According to India, the United States has erroneously classified this requirement as a measure that implements S.O. 1663(E), whereas it emerges from SIPs which are issued under a separate notification, namely, S.O. 655(E). Indeed, according to India, the health certificates "are entirely unrelated to S.O. 1663(E)".[189]

[178] India's first written submission, para. 70.
[179] India's first written submission, para. 73.
[180] India's first written submission, para. 78; India's opening statement at the first meeting of the Panel, para. 55.
[181] India's first written submission, para. 78.
[182] India's first written submission, paras. 76 and 79.
[183] India's first written submission, para. 86.
[184] India's first written submission, para. 90 (citing Panel Report, *China – Audiovisual Products*, para. 7.20, and Appellate Body Report, *US – Carbon Steel*, para. 127).
[185] India's first written submission, para. 90.
[186] India's first written submission, para. 93.
[187] India's first written submission, para. 95.
[188] India's first written submission, para. 94.
[189] India's first written submission, para. 96.

7.13. India explains that S.O. 655(E) was promulgated under Section 3A of the Livestock Act and restricts trade in livestock products by requiring that an importer make an application for a SIP prior to importation of poultry products. For India, this is a condition of importation and is distinct from the prohibition on the importation of products from countries reporting NAI that exists under S.O. 1663(E).[190]

7.14. India also points out that each consignment of poultry products must be accompanied by a health certificate containing an attestation by the official veterinarian of the exporting country that sanitary requirements have been met. One of these requirements is a declaration of the HPNAI or LPNAI status of the exporting country.[191] India argues that this is distinct from S.O. 1663(E), which is implemented by customs and quarantine officials rather than through certification requirements.[192] Thus, argues India, the health certificates are not subsidiary or closely related to S.O. 1663(E) and cannot be termed as implementing measures.[193]

7.15. India argues further that the measures cannot be deemed as being related simply because they are both implemented under the Livestock Act. In India's view, the fact that the measures have the same delegating instrument is insufficient to put India on notice of the specific measures at issue.[194] India argues that a panel must not only consider whether "overarching legislation" has been identified, but also the extent to which the respondent was put on notice of the various delegated instruments challenged by the complainant.[195]

7.16. Finally, India argues that there are no circumstances that might excuse the United States' failure to adequately identify the measures. The United States had constructive notice of India's measures, given that the measures are on the DAHD website, were discussed with the United States during consultations, and feature in a 2009 report by the USDA.[196]

7.1.2.2.2 United States

7.17. The United States asserts that India has not understood its arguments under Article 2.3 of the SPS Agreement. The United States argues that it challenges only those measures that prohibit the importation of various agricultural products into India, and that it has at no stage challenged the SPS-consistency of measures applied to domestic products.[197] The United States contends that references to the NAP 2012 "help establish that the measures India applies to imported products breach Article 2.3"[198], and therefore constitute evidence that S.O. 1663(E) is inconsistent with Article 2.3 of the SPS Agreement. The United States argues that India has erroneously conflated such evidence with the measure at issue itself.[199]

7.18. The United States also states that, even though it is not challenging the NAP 2012, and was not required to reference India's avian influenza related controls with respect to domestic products and their internal movement within India, the United States' panel request referenced India's avian influenza related controls for like domestic products. Specifically, the United States cites its request for the establishment of a panel, in which it states:

> For example, while India applies the avian influenza measures at issue here to imported products, India does not apply similar avian influenza related controls with respect to like domestic products and their internal movement within India.[200]

7.19. The United States therefore argues that it is implausible to assert that India was not aware that the content of its internal controls might play a role in this dispute, or that India is prejudiced by its inclusion in the terms of reference.[201]

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[190] India's first written submission, para. 97.
[191] India's first written submission, para. 98.
[192] India's first written submission, para. 99.
[193] India's first written submission, para. 100.
[194] India's first written submission, para. 101.
[195] India's first written submission, para. 102.
[196] India's first written submission, para. 104.
[197] United States' response to India's second request for a preliminary ruling, para. 5.
[198] United States' response to India's second request for a preliminary ruling, para. 6.
[199] United States' response to India's second request for a preliminary ruling, para. 7.
[200] United States' request for the establishment of a panel, p. 2.

7.20. The United States argues that, in short, India was put on notice when the United States submitted its panel request that, in arguing that India's import prohibitions breach Article 2.3, the United States would make reference to India's AI-related controls with respect to like domestic products and their internal movement within India.[202]

7.21. As regards the health certificates, the United States makes reference to the Panel's determination in its preliminary ruling of 22 May 2013, that the measures at issue are those that prohibit the importation of various agricultural products into India from those countries reporting NAI.[203] For the United States, the health certificates for products listed in paragraph (1)(ii) of S.O. 1663(E) are within the Panel's terms of reference because they implement this prohibition. Specifically, the United States argues that while veterinary certificates must accompany every consignment of the enumerated livestock products, a certification that an exporting country is AI-free can only be provided if the veterinarian in the exporting country can truthfully attest to the extent of AI-freedom in that country. In this sense, the certificates will give effect to the prohibition in the event that certification cannot be obtained, such that the requirement is, according to the United States, a measure that relates to or implements the prohibition under S.O. 1663(E).[204] As a result of this relationship, the United States argues, it is "of no relevance that India's general requirement that importers of certain agricultural products present a certificate with each shipment" stems from S.O. 655(E), rather than S.O. 1663(E) itself.[205] The United States adds that India cannot plausibly contend that its requirement of a certification that the exporting country has a specified AI status as a condition for permitting importation of a product is "so unrelated to its Notification prohibiting import of the products from countries reporting NAI" that it could have lacked notice that these required attestations would be at issue in this dispute.[206]

7.22. Further, the United States points to the fact that the panel request states India's import prohibitions are maintained through the Livestock Act and orders implementing the Livestock Act (which includes S.O. 1663(E)), as well as related and implementing measures. The United States points out that India acknowledges that S.O. 655(E) is a notification promulgated under the Livestock Act, and refers to India's statement that "[t]he requirement to provide a health certificate with every consignment of livestock products emerges from sanitary import permits which are issued under … S.O. 655(E)".[207] On this basis, the United States argues that S.O. 655(E) was identified in the panel request through the reference to "orders issued by [the DAHD] pursuant to the Livestock Act".[208]

7.1.2.3 Arguments of the third parties

7.23. Of the third parties in this dispute, only Australia, Brazil and the European Union provided submissions regarding India's second request for a preliminary ruling.

7.1.2.3.1 Australia

7.24. Australia observes that 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 S.O. 1663(E). Australia thus agrees with the United States that the NAP 2012 "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",[209] and thus did not need to be included in the panel request.

7.1.2.3.2 Brazil

7.25. Regarding the NAP 2012, Brazil argues that in a national treatment dispute, the measure at issue should be the legislation that affords less favourable treatment to the imported products.

[201] United States' request for the establishment of a panel, p. 2.
[202] United States' response to India's second request for a preliminary ruling, para. 9.
[203] United States' response to India's second request for a preliminary ruling, para. 11.
[204] United States' response to India's second request for a preliminary ruling, para. 12.
[205] United States' response to India's second request for a preliminary ruling, para. 13.
[206] United States' response to India's second request for a preliminary ruling, para. 14.
[207] United States' response to India's second request for a preliminary ruling, para. 15 (citing India's first written submission, para. 95).
[208] United States' response to India's second request for a preliminary ruling, para. 15.
[209] Australia's third-party written submission, para. 20.

This is irrespective of those measures applied internally, such that in a national treatment dispute regarding an import ban, it is the import ban itself that constitutes the measure at issue.[210] Brazil argues further that it would be contrary to Appellate Body jurisprudence to interpret "measure at issue" in Article 6.2 of the DSU in light of the obligation under which the measure is being challenged. A panel request should not be deemed deficient because it does not cite measures (other than that which is said to be WTO-inconsistent) that fall within the scope of a panel's analysis.[211] In the present dispute, therefore, the measures at issue are those that prohibit importation of products from countries reporting NAI, and the NAP 2012 "will serve as a comparison for the Panel's substantive analysis and should not be excluded from its terms of reference".[212]

7.26. Concerning the health certificates, Brazil agrees with the United States insofar as the health certificates constitute a "related or implementing measure" within the Panel's terms of reference. For Brazil, the fact that "[t]he objective of the Livestock Act is to regulate, permit or prohibit the trade in livestock products" means that in a dispute regarding "prohibitions", export requirements "have a strong link to the questioned measure".[213]

7.1.2.3.3 The European Union

7.27. Regarding the NAP 2012, the European Union asserts that it "agrees" that the United States' panel request makes reference to "similar avian influenza related controls with respect to like domestic products and their internal movement within India".[214]

7.28. With respect to the health certificate requirements, the European Union states that it "also considers that the health certificate requirements are 'implementing and related measures' given the particular circumstances of this case".[215]

7.1.2.4 Analysis by the Panel

7.1.2.4.1 Introduction

7.29. India's second preliminary ruling request raises two separate issues. The first issue is whether India's NAP 2012 ought to have been expressly identified in the panel request. The second issue concerns the health certificates for the products listed in paragraphs (1)(ii)(a) to (1)(ii)(j) of S.O. 1663(E) and, in particular, whether they are measures at issue in this dispute.

7.30. Before discussing each of these issues, we commence by examining the legal provision at issue.

7.1.2.4.2 The legal provision at issue

7.31. Article 6.2 of the DSU provides, in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.32. As explained in our preliminary ruling of 22 May 2013[216], Article 6.2 of the DSU serves a "pivotal function" in WTO dispute settlement and sets out "two key requirements" that a complainant must satisfy in its panel request, namely, the identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint, i.e. the claims,

[210] Brazil's third-party written submission, para. 6.
[211] Brazil's third-party written submission, paras. 7-9.
[212] Brazil's third-party written submission, para. 10.
[213] Brazil's third-party submission, para. 11.
[214] European Union's third-party written submission, para. 13.
[215] European Union's third-party written submission, para. 13.
[216] Preliminary ruling of 22 May 2013, paras. 3.2-3.7.

which is sufficient to present the problem clearly.[217] India's second request for a preliminary ruling challenges the United States' panel request in respect of both of these requirements of Article 6.2 of the DSU.

7.33. We now proceed to examine whether India's NAP 2012 ought to have been expressly identified in the panel request.

7.1.2.4.3 Whether India's NAP 2012 ought to have been expressly identified in the panel request

7.34. India alleges that the United States failed to identify the NAP 2012 as a specific measure at issue in its panel request, contrary to the requirements of Article 6.2 of the DSU. Specifically, India argues that "the statutory basis for this alleged discrimination is not S.O. 1663(E), it is the [NAP]".[218] India points out that S.O. 1663(E) does not regulate control measures to be taken domestically during an outbreak of NAI and hence is not either directly or indirectly capable of violating Article 2.3 of the SPS Agreement.[219] India thus argues that the United States was required to identify the NAP 2012 in its panel request, given that the NAP 2012 is the measure allegedly causing the violation of Article 2.3 of the SPS Agreement.[220] As the NAP 2012 is not specifically mentioned in the panel request, India contends that the United States' panel request is "severely deficient" and has violated India's due process right to know what case it has to answer in respect of the United States' claim under Article 2.3 of the SPS Agreement.[221] For these reasons, India asserts that the NAP 2012 "should be outside the Panel's terms of reference and claims under Article 2.3 in this respect should also be set aside as being outside the jurisdiction of this Panel".[222]

7.35. In response, the United States rejects India's characterization of its claim under Article 2.3 of the SPS Agreement. The United States argues that it challenges only those measures that prohibit the importation of various agricultural products into India.[223] According to the United States, references to the NAP 2012 establish evidence upon which to base the comparison of the respective treatment of imported and domestic products for the purpose of demonstrating that AI-related controls applied to imports violate Article 2.3 of the SPS Agreement.[224]

7.36. In order to answer the question whether India's NAP 2012 ought to have been expressly identified in the panel request, we need to first examine whether the NAP 2012 is a measure at issue in this dispute. If we find that it is not, we will then proceed to consider whether the United States should nevertheless have identified the NAP 2012 in its panel request.

7.1.2.4.3.1 Whether the NAP 2012 is a measure at issue in this dispute

7.37. We note at the outset that the United States explained that "at no point has [it] asserted that the NAP breaches the SPS Agreement or the GATT 1994, nor has the United States requested for a recommendation from the Panel that the NAP be brought into conformity with these agreements".[225]

7.38. The United States' assertion corresponds to the wording of its panel request insofar as the description of the measures at issue is concerned. The panel request by its terms challenges measures "that India imposes on the importation of various agricultural products from the United States purportedly because of concerns relating to avian influenza".[226] The panel request then states that "India's avian influenza measures prohibit the importation of various agricultural products into India from those countries reporting [NAI] (both [HPNAI] and [LPNAI])".[227] We recall

[217] Appellate Body Report, *China – Raw Materials*, para. 219. Article 6.2 of the DSU also requires that the panel request be in writing and indicate whether consultations were held.
[218] India's first written submission, para. 78.
[219] India's first written submission, para. 78.
[220] India's first written submission, paras. 72-74 and 78.
[221] India's first written submission, para. 94.
[222] India's first written submission, para. 94.
[223] United States' response to India's second request for a preliminary ruling, paras. 5-6.
[224] United States' response to India's second request for a preliminary ruling, para. 6.
[225] United States' response to India's second request for a preliminary ruling, para. 5.
[226] United States' request for the establishment of a panel, p. 1.
[227] United States' request for the establishment of a panel, p. 1.

our determination in our preliminary ruling of 22 May 2013 that this description "delimits the scope of the measures the United States seeks to challenge in this dispute".[228] It follows that measures not covered by this description do not constitute measures at issue in this dispute.

7.39. As described in section 2.4.3.2 above, the NAP 2012 was issued pursuant to the Prevention of Diseases Act[229] and "is a domestic measure which has no effect on imports".[230] Furthermore, as the United States points out, it has not requested a recommendation from the Panel that the NAP 2012 be brought into conformity with the SPS Agreement or the GATT 1994.[231]

7.40. Based on the foregoing, we conclude that the NAP 2012 falls outside the scope of the measures at issue in this dispute, i.e. "India's [AI] measures [that] prohibit the importation of various agricultural products into India from those countries reporting [NAI]".[232]

7.1.2.4.3.2 Whether the United States should have identified the NAP 2012 in its panel request irrespective of the fact that it is not a measure at issue

7.41. Having concluded that the NAP 2012 is not a measure at issue in this dispute, we proceed to examine whether the United States should nevertheless have identified the NAP 2012 in its panel request.

7.42. We recall that, in India's view, while the object of the United States' discrimination challenge under Article 2.3 of the SPS Agreement is the NAP 2012[233], this measure is not identified in the panel request and is first referred to in the United States' first written submission.[234] According to India, it was "imperative for the United States to identify with sufficient precision in its panel request, 'the object of the challenge' or the 'direct target' of the 'relevant obligation' which is alleged to be violated".[235] As a result of this alleged deficiency in the panel request, India requests the Panel to dismiss the United States' claim under Article 2.3 of the SPS Agreement.[236] The United States, in disagreeing with India, avers that India "mistakes evidence that can be used to establish an element of a claim with the measure that is the object of the challenge".[237]

7.43. We note that the United States identifies the NAP 2012 as setting out India's response to domestic AI detections[238], and describes the operation of the NAP 2012.[239] This submission is within the context of the United States' claim that India's treatment of domestic products in the event of an AI outbreak discriminates against imported products, such that India has acted inconsistently with Article 2.3 of the SPS Agreement.[240] On this basis, we agree with the United States insofar as it characterizes its references to the NAP 2012 as argumentation in the context of its claim under Article 2.3 of the SPS Agreement.

7.44. Having concluded that the NAP 2012 is not a measure at issue, but rather is a measure used by the United States in its argumentation of its claim, we next examine whether a complainant must identify, in its panel request, a measure used in argumentation or as evidence in seeking to prove a claim.

7.45. As far as the identification of measures is concerned, Article 6.2 of the DSU explicitly requires that a complaining Member identify the measure(s) at issue. There is no explicit requirement in Article 6.2 to identify other measures. Nevertheless, as mentioned in paragraph 7.32 above, there is a second element in Article 6.2; namely, the requirement that the complaining Member provide a brief summary of the legal basis of the complaint, i.e. the claims, sufficient to present the problem clearly. We shall therefore examine whether this second element

[228] Preliminary ruling of 22 May 2013, para. 3.19.
[229] India's first written submission, para. 40.
[230] India's first written submission, para. 82.
[231] United States' response to India's second request for a preliminary ruling, para. 5.
[232] United States' request for the establishment of a panel, p. 1.
[233] India's first written submission, para. 72.
[234] India's first written submission, para. 74.
[235] India's first written submission, para. 78.
[236] India's first written submission, para. 94.
[237] United States' response to India's second request for a preliminary ruling, para. 7.
[238] United States first written submission, para. 168.
[239] United States first written submission, paras. 168-171.
[240] United States first written submission, paras. 160-184.

requires a complaining party to identify in its panel request measures other than the measures at issue. Specifically, we consider whether, in the context of this case, Article 6.2 operates such that the United States was required to identify the NAP 2012 in its panel request irrespective of the fact that it is not a measure at issue, given that it sought to rely on the NAP 2012 in its legal argumentation regarding Article 2.3 of the SPS Agreement.

7.46. Regarding this second element of Article 6.2 of the DSU, the Appellate Body in *Korea – Dairy* observed that Article 6.2 "demands only a summary – and it may be a brief one", of the legal basis of the complaint, and that the summary be sufficient to present the problem clearly.[241] The Appellate Body has further clarified that, in order to present the problem clearly, a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed"[242], and should "explain *how or why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[243] With this guidance in mind, we turn to examine the United States' panel request to consider whether it provides a summary, be it a brief one or not, of the legal basis of the complaint under Article 2.3 of the SPS Agreement in a manner that presents the problem clearly.

7.47. The United States' panel request describes the claim under Article 2.3 as follows:

> India's measures have adversely affected exports of these products from the United States to India. The United States considers that India's measures are inconsistent with India's commitments and obligations under the following provisions of the SPS Agreement
>
> ...
>
> 2. Article 2.3 because India's avian influenza measures arbitrarily or unjustifiably discriminate between Members where similar conditions prevail, including between India's own territory and that of other Members. For example, while India applies the avian influenza measures at issue here to imported products, India does not apply similar avian influenza related controls with respect to like domestic products and their internal movement within India. Further, India has applied its measures in a manner that constitutes a disguised restriction on international trade.[244]

7.48. The panel request thus identifies the challenged measures as India's AI measures, the scope of which, as described in paragraph 7.38 above, is limited to the measures that prohibit the importation of various agricultural products into India from those countries reporting NAI. The panel request then "plainly connects" India's AI measures to Article 2.3 of the SPS Agreement, which the United States claims has been infringed by the challenged measures.

7.49. The question remains whether, in spite of "plainly connecting" Article 2.3 of the SPS Agreement to India's AI measures, the panel request should have identified the NAP 2012 "in order to present the problem clearly". Or, alternatively, as the United States argues, the references to the NAP 2012 seek to serve as evidence for its discrimination claim under Article 2.3[245], and thus they should rather be characterized as forming part of the argumentation of the claim, in which case they need not be identified in the panel request in order to present the problem clearly.

7.50. Central to this debate is the distinction between claims and arguments, which the Appellate Body has explored on numerous occasions. The Appellate Body has explained that the term "claim" refers to "a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement"[246], whereas the term

[241] Appellate Body Report, *Korea – Dairy*, para. 120.
[242] Appellate Body Report, *China – Raw Materials*, para. 220 (citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).
[243] Appellate Body Report, *China – Raw Materials*, para. 226 (citing Appellate Body Report, *EC – Selected Customs Matters*, para. 130). (emphasis original)
[244] United States' request for the establishment of a panel, p. 2.
[245] United States' response to India's second request for a preliminary ruling, para. 6.
[246] Appellate Body Report, *Korea – Dairy*, para. 139.

"arguments" are the "arguments adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".[247] The Appellate Body has emphasized that Article 6.2 of the DSU requires that the claims, but *not* the arguments, be set out in a panel request in a way that is sufficient to present the problem clearly.[248] In our view, the identification of a domestic measure as evidence for the purpose of demonstrating discrimination between imported and domestic products pertains to the argumentation of the discrimination claim, as opposed to constituting a distinct claim.

7.51. Past panels have had a similar understanding of this distinction between claims and argumentation when addressing claims of discrimination under the SPS Agreement, particularly in respect of challenges under Article 5.5. For instance, in *Australia – Salmon*, the panel compared Australia's measures prohibiting the importation of "fresh, chilled or frozen salmon" challenged by Canada in its panel request[249] with Australia's treatment of other products that were known to carry the diseases against which Australia's measures were said to protect.[250] These measures were not expressly mentioned in Canada's panel request in respect of its claim under Article 5.5 of the SPS Agreement.[251] The panel nonetheless considered these respective forms of treatment in order to determine whether there were "different situations"[252], and whether distinctions in the level of treatment were "arbitrary or unjustifiable"[253] for the purpose of its analysis under Article 5.5.[254] Similarly, in *US – Poultry (China)*, the panel compared the United States' measures affecting imports of poultry products from China[255] with the measures applied to poultry products from other WTO Members.[256] As was the case with *Australia – Salmon*, the other measures were not expressly mentioned in China's panel request in respect of its claim under Article 5.5.[257] However, the panel considered these measures in determining whether the measure at issue created a distinction in ALOPs in different yet comparable situations[258], and whether the ALOPs were arbitrarily or unjustifiably different.[259] Thus, the panels in both these cases considered the treatment afforded under each of the respective instruments (that is, the measure at issue, and the other measure under discussion) to determine whether the complaining party had substantiated their claim under Article 5.5 of the SPS Agreement.

7.52. In the same vein, past panels and the Appellate Body have compared domestic measures to challenged measures affecting imported products for the purpose of examining discrimination claims under the GATT 1994 without requiring that the complaining party identify those domestic measures in its panel request.[260]

7.53. Like previous panels and the Appellate Body, we are of the view that a measure to which a party refers solely for the purpose of making a comparison with a challenged measure in respect of a discrimination claim may serve as evidence in the argumentation in support of that claim, and does not in itself constitute a measure that must be identified in a panel request by virtue of Article 6.2 of the DSU.

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[247] Appellate Body Report, *Korea – Dairy*, para. 139.

[248] Appellate Body Reports, *EC – Bananas III*, para. 143; *India – Patents (US)*, para. 88; *Korea – Dairy*, para. 139; *Dominican Republic – Import and Sale of Cigarettes*, para. 121; and *EC – Selected Customs Matters*, para. 153.

[249] Canada's request for the establishment of a panel (WT/DS18/2).

[250] Panel Report, *Australia – Salmon*, paras. 8.103-8.160.

[251] Canada's request for the establishment of a panel.

[252] Panel Report, *Australia – Salmon*, para. 8.119.

[253] Panel Report, *Australia – Salmon*, paras. 8.119 and 8.133.

[254] Panel Report, *Australia – Salmon*, para. 8.133

[255] China's request for the establishment of a panel (WT/DS392/2), para. 4.

[256] Panel Report, *US – Poultry (China)*, paras. 7.233-7.235.

[257] China's request for the establishment of a panel, p. 3, para. 12.

[258] Panel Report, *US – Poultry (China)*, paras. 7.225-7.254.

[259] Panel Report, *US – Poultry (China)*, paras. 7.255-7.269.

[260] For instance, in *US – Gasoline*, the panel and the Appellate Body compared the United States' legal regimes for foreign and domestic gasoline. However, the panel request did not cite the measures affecting the domestic products as measures at issue for the purpose of Article 6.2 of the DSU. Panel Report, *US – Gasoline*, paras. 6.5-6.16; and Appellate Body Report, *US – Gasoline*, pp. 25-29; Venezuela's request for the establishment of a panel, WT/DS2/2. Likewise, in *Korea – Various Measures on Beef*, the dual retail system for foreign and domestic beef products in Korea was at issue and the panel requests did not identify the measures affecting the domestic products as measures at issue. Panel Report, *Korea – Beef*, paras. 616-677; and Appellate Body Report, *Korea – Beef*, paras. 130-185. United States' request for the establishment of a panel, WT/DS161/5; Australia's request for the establishment of a panel, WT/DS169/5.

7.54. On the basis of the foregoing, we conclude that the NAP 2012 is not a measure at issue. Furthermore, we conclude that the United States' description of its claim under Article 2.3 of the SPS Agreement "plainly connect[s] the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".[261] We also find that, having made this plain connection between Article 2.3 and India's AI measures, the United States was not under an additional obligation to cite in its panel request the measure – the NAP 2012 – that formed the basis of a comparison between the treatment afforded to like domestic products and the treatment afforded to imported products under India's AI measures. The Panel considers that reading such an obligation into the text of Article 6.2 of the DSU would blur the line between the claim and the arguments in support of such claim, and would be inconsistent with the Appellate Body jurisprudence referred to above.

7.55. The Panel therefore declines India's request that the United States' claim under Article 2.3 of the SPS Agreement be set aside on the basis that it is outside the jurisdiction of this Panel.

7.1.2.4.4 Whether the health certificates are measures at issue in this dispute

7.56. We turn now to examine the second issue put forward by India in its second request for a preliminary ruling, namely its allegation that the United States failed to identify the health certificate requirements for products listed in paragraphs (1)(ii)(a) to (1)(ii)(j) of S.O. 1663(E) as measures at issue in this dispute as they were not explicitly mentioned in its panel request. In particular, India argues that the United States used the term "related and implementing measures" to bring within the Panel's terms of reference new measures that are entirely unrelated to S.O. 1663(E).[262] According to India, the health certificates neither "implement the prohibition" in S.O. 1663(E)[263], nor can they "legitimately be termed" measures related to those explicitly identified in the panel request.[264]

7.57. The United States provides two main arguments in response to India's challenge. First, the United States maintains that the health certificates are related to, and implement, the import prohibition in S.O. 1663(E), because an exporter who is unable to obtain a certification that the exporting country is NAI-free will be unable to export their products into the Indian market, thus giving effect to the import prohibition.[265] Second, the United States argues that the reference in the panel request to "orders issued by [the DAHD] pursuant to the Livestock Act" is sufficient to bring the health certificates within the scope of the terms of reference. This is because S.O. 655(E) is a notification issued pursuant to the Livestock Act, and because S.O. 655(E) requires the fulfilment of the conditions in a SIP, among which is the completion of a health certificate.[266]

7.58. Accordingly, we proceed to first examine whether the health certificates, although not explicitly mentioned in the panel request, are "related measures, or implementing measures" within the meaning of the panel request and on that basis constitute measures at issue in this dispute. If this is not the case, we will proceed to address whether the reference in the panel request to "orders issued by [the DAHD] pursuant to the Livestock Act" is sufficient to bring S.O. 655(E), and the health certificates issued thereunder, within the scope of the Panel's terms of reference.

7.59. Before addressing these two points, we find it useful to recall and expand upon the description of S.O. 655(E) and the health certificates issued thereunder, which we provide in section 2.4.2.1 above.

[261] Appellate Body Report, *China – Raw Materials*, para. 220 (citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).
[262] India's first written submission, para. 96.
[263] India's first written submission, para. 100.
[264] India's first written submission, para. 101.
[265] United States' response to India's second request for a preliminary ruling, paras. 12 and 13.
[266] United States' response to India's second request for a preliminary ruling, para. 15.

7.1.2.4.4.1 S.O. 655(E) and the health certificates issued thereunder

7.60. We recall that S.O. 655(E) was issued by the DAHD in exercise of powers conferred by Section 3A of the Livestock Act. It was published in the Gazette of India on 9 July 2001 and came into effect on that same date.[267] S.O. 655(E) is still in force.[268]

7.61. S.O. 655(E) states, under the heading "Notification":

> S.O. 655 (E) - In exercise of the powers conferred by Section 3A of the Live-stock Importation Act, 1898 (9 of 1898), the Central Government hereby restricts, with effect from the date of publication of this notification in the Official Gazette, the import into India of all live-stock products, including -
>
> (i) meat and meat products of all kinds including fresh, chilled and frozen meat , tissue or organs of poultry, pig, sheep, goat;
>
> (ii) egg and egg powder;
>
> (iii) milk and milk products;
>
> (iv) bovine, ovine and caprine embryos, ova or semen; and
>
> (v) pet food products of animal origin.
>
> 2. The import of these products shall be allowed only against a sanitary import permit to be issued by this Department as per the procedure laid down in the Schedule annexed to this notification – [.]

7.62. S.O. 655(E) therefore restricts, with effect from the date of publication, the importation into India of "all live-stock products".[269] S.O. 655(E) does not, on its face, contain an explicit reference to NAI or AI, or to any procedures that relate specifically to NAI or AI. Furthermore, S.O. 655(E) does not prohibit the importation of any livestock products; rather, it envisages the importation of livestock products subject to the satisfaction of certain conditions. Specifically, the Schedule to S.O. 655(E) entitled "Procedure for import of livestock products into India" provides that no livestock product shall be imported into India without a valid SIP issued under the conditions specified in Clause (3).[270] Among the conditions in Clause 3, Clause 3(iv) states that "the import permit shall lay down specific conditions that will have to be fulfilled in respect of the consignment, including pre-shipment certifications and quarantine checks".[271] These pre-shipment certifications are what both parties have referred to as health certificates or veterinary certificates.

7.63. The Panel observes that there is no standard form of health certificate annexed to S.O. 655(E). In response to a question from the Panel, India clarified that there is no separate legal instrument governing which information must be included in the health certificate.[272] Both the United States and India have provided a number of health certificates and, in India's case, SIPs, which we proceed to review below.

7.64. We commence with the health certificates provided by the United States. All five certificates consist of blank forms, each having the words "veterinary certificate" as part of its title. The blank certificates provided by the United States relate to the importation into India of captive birds (other than poultry)[273], "chicken/quail meat"[274], "duck meat"[275], "hatching eggs"[276], and "turkey

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[267] S.O. 655(E), (Exhibit US-116, Exhibit IND-18). S.O. 655(E) was notified to the WTO on 11 April 2002. G/SPS/N/IND/9, (Exhibit IND-60).

[268] India's response to Panel question Nos. 17(a) and (b).

[269] S.O. 655(E), (Exhibit US-116), first paragraph.

[270] S.O. 655(E) further states that "[t]he import of these livestock products into India is allowed only against a sanitary import permit (SIP) issued by the DAHD as per the procedure set out in the Schedule annexed to S.O. 655(E)". S.O. 655(E), (Exhibit US-116), para. 2.

[271] S.O. 655(E), (Exhibit US-116), Schedule, para. (3)(iv). India's response to Panel question No. 19(a).

[272] India's response to Panel question No. 19(a).

[273] Exhibit US-55

[274] Exhibit US-52.

meat".[277] The United States cites the DAHD website as the source for all these blank health certificates (except that for duck meat).[278]

7.65. As the United States correctly points out[279], each of these health certificates includes a requirement that a veterinarian attest to the particular AI status of the exporting country. Notwithstanding this similarity, we observe that the certificates are otherwise not uniform and, in fact, vary according to the product to which each certificate relates. For example, each form requires that the official veterinarian certify that the product being exported originates from a facility that has been free from particular diseases for a period of 12 months; however, the relevant diseases depend on the product in question. In addition to the attestation of the exporting country's AI-status, the respective requirements of the health certificates provided by the United States, based on the product in question, are as follows:

Product	Requirement
Chicken / Quail Meat	The official veterinarian must certify that (*inter alia*) the consignment comes from birds that were kept in an establishment where the incidence of the following diseases has not been reported during the last year: New Castle Disease, Marek's disease, Avian Mycoplasmosis, Haemorrhagic enteritis and Infectious synovitis/sinusitis, Avian chlamydiosis, Fowl typhoid, Avian infectious bronchitis, Avian infectious laryngotracheitis, Fowl cholera and Salmonella enteritidis Salmonella typhimurium, Avian Leucosis J virus infections, Inclusion body hepatitis ([]Hydropericardium), Infectious bursal disease, Pullorum disease, Avian tuberculosis, Fowl pox, Egg drop syndrome, Avian encephalomyelitis and Chicken anaemia virus.[280]
Turkey Meat	The official veterinarian must certify that (*inter alia*) the consignment comes from birds that were kept in an establishment that has not reported during the last year: New Castle Disease, Marek's disease, Avian Mycoplasmosis, Haemorrhagic enteritis and Infectious synovitis/sinusitis, Avian chlamydiosis, Fowl typhoid, Avian infectious bronchitis, Avian infectious laryngotracheitis, Fowl cholera and Salmonella enteritidis Salmonella typhimurium and Avian Leucosis J virus infections, Inclusion body hepatitis ([]Hydropericardium) and Chicken anaemia virus.[281]
Hatching eggs of chicken, turkey and other avian species	The official veterinarian must certify that (*inter alia*) the eggs are drawn from an establishment where: New Castle disease (Ranikhet disease), Infectious Bursal Disease (Gumboro disease), Marek's disease, Mycoplasmosis (*M. gallisepticum*), Fowl typhoid (*Salmonella gallinarum*), Pullorum disease (*Salmonella pullorum*), Fowl Pox, Avian Infectious Bronchitis, Avian infectious larynogtracheitis, Avian Tuberculosis, Psittacosis-ornithosis (Avian Chlamydiosis), Fowl cholera (Pasteurellosis), Salmonella enteritidis, West Nile Virus, Salmonella typhimurum, Egg drop syndrome, Avian encephalomyelitis, Avian leucosis J. Virus, Chickenanaemia and inclusion body hepatitis infection have not been reported for the past 12 months.[282]

[275] Exhibit US-71.
[276] Exhibit US-54.
[277] Exhibit US-53.
[278] United States' first written submission, footnotes 92-95.
[279] United States' response to India's second request for a preliminary ruling, para. 12.
[280] Exhibit US-52.
[281] Exhibit US-53.
[282] Exhibit US-54.

Product	Requirement
Captive birds other than poultry	The official veterinarian must certify that (*inter alia*): [T]the birds come from an establishment or hatchery where [] Newcastle disease (Ranikhet disease), Mycoplasmosis (M. gallisepticum), Fowl typhoid (Salmonella gallinarum), Fowl pox, Avian infectious laryngotrachitis, Avian tuberculosis, Psittacosis-Ornithosis, Fowl cholera (Pasturellosis), Avian encephalomyelitis, Avian circovirus infection Avian J virus, African Nile virus and Inclusion body hepatitis have been reported since [the] past 12 months and have been tested and found negative against these diseases 30 days prior to export.[283]
Duck meat	The official veterinarian must certify that (*inter alia*) the consignment comes from birds that were kept in an establishment where the incidence of the following diseases has not been reported during the last year: Duck Plague, Avian Leucosis J virus, New Castle Disease, Marek's disease, Avian Mycoplasmosis, Avian chlamydiosis, Fowl typhoid, Avian infectious bronchitis, Avian infectious laryngotracheitis, Fowl cholera and Salmonella enteritidis, Salmonella typhimurium, Inclusion body hepatitis (Hydropericardium) and Chicken anaemia virus.[284]

7.66. We note that none of the blank certificates provided by the United States covers all the products listed in paragraphs 1(ii)(a) to (j) of S.O. 1663(E).

7.67. For its part, India provided the Panel with 13 samples of SIPs that are accompanied by a number of health certificate forms that are actual SIPs issued in 2011 and 2012 to exporters based in a number of WTO Members.[285] The text of all of these SIPs appears to be identical save for the specific identification of each exporter and its respective products.[286] All of these SIPs also include, as annexes, at least one blank form labelled as a "veterinary certificate", the precise number of which is dependent on the number of different types of commodity being imported.

7.68. As was the case for the blank certificate forms provided by the United States, the blank veterinary certificates provided by India are not identical. Relevantly, while each of these health certificates provided by India requires an official veterinarian to make an "attestation of wholesomeness", the attestations regarding AI differ among the certificates. For instance, with respect to the health certificates for chicken or quail meat, duck meat, and turkey meat, an official veterinarian is required to certify, *inter alia*, that the "country is free from [AI]".[287] Conversely, while the health certificates relating to the importation of pork require an official veterinarian to certify that the "country is free" from a variety of diseases affecting pigs, there is no equivalent requirement to certify that the "country is free from [AI]".[288] In addition, the health certificates relating to goose meat differ between themselves. In one such certificate, an official veterinarian is required to certify, *inter alia*, that the "country is free from [AI]".[289] In another, the veterinarian is required to certify that the "country is free from HPAI".[290]

7.69. Similarly to the blank certificate forms provided by the United States, the applicable certificate depends on the product to be imported; thus, India provided health certificates[291] concerning the importation into India of "chicken/quail meat"[292], "duck meat"[293], "goose meat"[294],

[283] Exhibit US-55.
[284] Exhibit US-71.
[285] These products are sourced from several WTO Members including France, Italy, Malaysia, Netherlands, Spain, and Thailand. India's first written submission, paras. 29-33.
[286] Exhibits IND-20, IND-21, IND-25, IND-27, IND-28, IND-29, IND-30, IND-31, IND-32, IND-33, IND-34, IND-35.
[287] Exhibits IND-20, IND-21, IND-23, IND-25, IND-27, IND-28, IND-29, IND-31, IND-32, IND-33, IND-34, and IND-35, Veterinary certificates, para. 5(a).
[288] Exhibits IND-25, IND-29, IND-30, IND-32, and IND-33.
[289] Exhibit IND-27, para. 5(a).
[290] Exhibit IND-31, para. 5(a).
[291] We note that India did not provide SIPs annexing health certificates for hatching eggs of chicken, turkey and other avian species, or for captive birds other than poultry, as did the United States.
[292] Exhibits IND-29, IND-32, IND-33, and IND-34.
[293] Exhibits IND-23, IND-27, IND-28, IND-31, and IND-35.
[294] Exhibits IND-27 and IND-31.

"pork"[295], and "turkey meat".[296] As with the certificates provided by the United States, the required certifications depend on the product(s) in the consignment. We note that the health certificates for the importation of chicken/quail meat, turkey meat and duck meat require the veterinarian in the exporting country to make the same certifications as those provided by the United States and described in paragraph 7.65 above.[297] In addition to this description, we note that the requirements for goose meat (other than the exporting country's AI status) and pork[298] as per the certificates provided by India, are as follows:

Product	Requirement
Goose meat	The official veterinarian to certify that the consignment comes from birds that were kept in an establishment that has not, in the preceding year, reported the incidence of: Duck Plague, Avian Leucosis J virus, New Castle Disease, Marek's disease, Avian Mycoplasmosis, Avian chlamydiosis, Fowl typhoid, Avian infectious bronchitis, Avian infectious laryngotracheitis, Fowl cholera and Salmonella enteritidis, Salmonella typhimurium, Inclusion body hepatitis (Hydropericardium) and Chicken anaemia virus.[299]
Pork	The official veterinarian must certify that the consignment comes from animals that were kept in an establishment that in the previous two years has not reported: Enterovirus encephalomyelitis, Transmissible gastro-enteritis, Porcine Reproductive/Respiratory Syndrome, Trichinellosis, Tuberculosis, Porcine Brucellosis, Anthrax, Atrophic Rhinitis and Leptospirosis.[300]

7.70. Notably, none of the health certificates provided by India covers all the products listed in paragraphs 1(ii)(a) to (j) of S.O. 1663(E).

7.71. We note that India informed the Panel that India granted SIPs, dated 6 January 2011, for imports of unprocessed turkey meat from the United States which was being consigned through the United Arab Emirates, and that the United States was free of NAI on the date of approval of those SIPs. India provided two SIPs in support of that submission.[301] However, the United States contests this and avers that "there appears to be no evidence to support the assertion that India has issued SIPs to the United States or U.S. producers or that any shipments took place".[302] In relation to the SIPs cited by India, the United States submits that these SIPs relate to products that were actually exported from the United Arab Emirates.[303] The United States adds that it does not believe that any United States producers "made any exports of turkey meat to India in 2011 or since"[304], and emphasizes that it is unaware of any [United States] exporters requesting SIPs from India.[305] The United States also provided to the Panel data from World Trade Atlas (which, according to the United States, collects data from official sources)[306] that indicates that, in 2011, India imported turkey meat only from the United Arab Emirates, Spain and Belgium, and that in 2012 India only imported turkey meat from Belgium.[307]

7.72. The Panel reviewed the two SIPs that India alleges were issued to United States exporters, and observes that both permit the importation of products from the United Arab Emirates. The Panel also reviewed the data provided by the United States and agrees with the United States that they indicate that, in 2011, India imported turkey meat from the United Arab Emirates, Spain and

[295] Exhibits IND-25, IND-29, IND-30, IND-32, and IND-33.
[296] Exhibits IND-20, IND-21, IND-23, and IND-25.
[297] Exhibits IND-20, IND-21, IND-23, IND-25, IND-27, IND-28, IND-29, IND-31, IND-32, IND-33, IND-34, IND-35. This is with the exception of Exhibit IND-23, in relation to duck meat, which requires certification identical to that required for chicken meat in Exhibits US-52, IND-29, IND-32, IND-33, IND-34.
[298] The United States did not provide health certificates for goose meat or pork.
[299] Exhibits IND-27 and IND-31.
[300] Exhibits IND-25, IND-29, IND-30, IND-32 and IND-33.
[301] India's first written submission, para. 29 (citing Exhibits IND-20 and IND-21).
[302] United States' response to Panel question No. 12(a).
[303] United States' response to Panel question No. 12(a).
[304] United States' response to Panel question No. 12(b).
[305] United States' response to Panel question No. 12(c).
[306] United States' response to Panel question No. 12(a).
[307] United States' response to Panel question No. 12(a).

Belgium and that, in 2012, India imported turkey meat from Belgium.[308] India has not contested the validity or content of these data. Therefore, on the basis of this evidence, we conclude that none of the SIPs provided by India concerns a United States exporter. We also conclude that, during 2011 and 2012, India did not import any turkey meat from the United States.

7.1.2.4.4.2 Whether the health certificates are "related measures, or implementing measures" at issue

7.73. Bearing the above facts in mind, we proceed to examine whether the health certificates, although not explicitly mentioned in the panel request, are "related measures, or implementing measures" within the meaning of the panel request and are thus measures at issue in this dispute.

7.74. In making its second request for a preliminary ruling, India accepts that unnamed measures can fall within the scope of a Panel's terms of reference[309], as long as such measures are subsidiary or closely related to the measures enumerated in the panel request.[310] For India, this is not the case for the health certificates; India submits that they "are entirely unrelated to S.O. 1663(E)"[311] and are therefore outside the scope of what is acceptable under Article 6.2. India contends that this is because S.O. 1663(E) and the health certificates do not deal with the same subject matter.[312] In its view, S.O. 655(E) does not prohibit the importation of livestock or livestock products mentioned in S.O. 1663(E);[313] instead S.O. 655(E) requires an importer to apply for a SIP before exporting to India, and each export consignment must be accompanied by a health certificate which includes information on the disease status of the exporting country that must be certified by the official veterinarian.[314] Thus, according to India, "if a country is free from HPNAI or LPNAI, the health certificate for poultry products would nonetheless require that this fact is confirmed".[315]

7.75. The United States disagrees and claims that the requirement that the veterinary certificates accompany shipments of certain products and attest that the exporting country has a particular AI status "falls squarely within the Panel's terms of reference", because it "implements AI-based import prohibitions".[316] According to the United States, this requirement in the health certificates "serves to prevent imports from a country whose AI status precludes its veterinarians from truthfully making the required attestation".[317] Thus, the United States considers that requiring certification that the exporting country has a particular AI status is not a distinct subject matter from India's import prohibition. For the United States, it is "of no relevance that India's general requirement that importers of certain agricultural products present a certificate with each shipment" stems from S.O. 655(E), rather than S.O. 1663(E) itself.[318] Rather, the United States views S.O. 655(E) and the health certificates issued thereunder as tools for enforcing that very prohibition, such that they qualify as "related or implementing" measures.[319] The United States adds that these required attestations under the health certificates "relate to and implement the AI-based import prohibitions reflected in S.O. 1663(E)".[320]

7.76. It is undisputed that the United States' panel request does not explicitly mention S.O. 655(E), or the health certificates issued thereunder.[321] The debate before us rather focuses on whether, in spite of having not been identified in the panel request, the health certificates are measures at issue in this dispute by virtue of falling within the language "as well as amendments, related measures, or implementing measures in force as of the date of this request" in the panel

[308] United States' response to Panel question No. 12(a).
[309] India's first written submission, para. 84.
[310] India's first written submission, paras. 84 and 100.
[311] India's first written submission, para. 96.
[312] India's first written submission, para. 101.
[313] India's first written submission, para. 97.
[314] India's first written submission, para. 98.
[315] India's first written submission, para. 98.
[316] United States' response to India's second request for a preliminary ruling, para. 12.
[317] United States' response to India's second request for a preliminary ruling, para. 12.
[318] United States' response to India's second request for a preliminary ruling, para. 13.
[319] United States' response to India's second request for a preliminary ruling, para. 12.
[320] United States' response to India's second request for a preliminary ruling, para. 13.
[321] The first mention by the United States of the health certificates appears in its first written submission in the context of the United States' discussion on regionalization. United States' first written submission, para. 63. The United States thereafter makes several references to the health certificates. United States' first written submission, paras. 72 and 92.

request.[322] Indeed, according to the United States, the health certificates "relate to and implement the AI-based import prohibitions reflected in S.O. 1663(E)".[323] The answer to the question of whether the health certificates are related or implementing measures lies in discerning the relationship, if any, between S.O. 1663(E) and the health certificates.

7.77. As we discussed in our preliminary ruling of 22 May 2013, past panels and the Appellate Body have accepted that a measure not explicitly mentioned in a panel request can still constitute a measure at issue in the context of a particular dispute.[324] Indeed, it is not the explicit mention of a measure in a panel request that sets the limits of what constitutes a measure at issue. Rather, as the Appellate Body stated in *US – Carbon Steel*, "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".[325] Therefore, the reference to related or implementing measures in a panel request must likewise be assessed in the light of the circumstances of each particular case.

7.78. The panel in *Japan – Film* emphasized that an unnamed measure may fall within the scope of a panel's terms of reference under Article 6.2, provided that it has a clear relationship to a measure that is specifically described so that it can be said to be included in the measures at issue. For that panel, whose report was not appealed, the requirements of Article 6.2 would be met where a measure is subsidiary or so closely related to a measure specifically identified that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The panel stressed that two key elements – close relationship and notice – are inter-related, and therefore, "only if a 'measure' is subsidiary or closely related to a specifically identified 'measure' will notice be adequate".[326] With regard to this notion of subsidiarity, the panel referred by way of an example to a scenario in which a basic framework law dealing with a narrow subject matter that provides for implementing measures, and said that, in that example, a panel request that refers to "implementing measures" may therefore be sufficiently precise to bring those implementing measures within the terms of reference.[327]

7.79. The panel in *US – Carbon Steel* agreed with the reasoning of the panel in *Japan – Film* and applied the same "adequate notice" standard to conclude that the expedited review procedure concerned was not a "measure" that was "subsidiary" or "closely related" to "any of the measures specifically identified".[328] This was also the case with the panel in *Australia – Salmon (Article 21.5 – Canada),* which also used "adequate notice" as the standard for determining whether certain unnamed measures were within the panel's terms of reference. That panel found that the measure in question was "so closely related to [the measures specified in the panel request] that Australia can reasonably be found to have received adequate notice of the scope of the complainant's claims".[329]

7.80. We concur with the panels in *Japan – Film*, *US – Carbon Steel*, and *Australia – Salmon (Article 21.5 – Canada)* that the applicable standard when examining the conformity of a panel request with Article 6.2 of the DSU is whether the respondent has received adequate notice, particularly with regard to the inclusion of unnamed measures within a panel's terms of reference.

7.81. Although not in connection with Article 6.2 of the DSU, the Appellate Body has used the same "adequate notice" standard articulated by these panels in the context of determining the conformity of a Member's notice of appeal with Article 16.4 of the DSU and Rule 20(2) of the Working Procedures for Appellate Review. Relevantly, the Appellate Body has found that "[the] requirements under Rule 20(2) serve to ensure that the appellee also receives notice, albeit brief, of the 'nature of the appeal' and the 'allegations of errors' by the panel".[330]

[322] United States' request for the establishment of a panel, p. 1.
[323] United States' response to India's second request for a preliminary ruling, para. 13.
[324] Preliminary ruling of 22 May 2013, paras. 3.42 and 3.43.
[325] Appellate Body in *US – Carbon Steel*, para. 127.
[326] Panel Report, *Japan – Film*, para. 10.8.
[327] Panel Report, *Japan – Film*, para. 10.8.
[328] Panel Report, *US – Carbon Steel,* para. 8.11.
[329] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subpara. 27.
[330] Appellate Body Report, *EC – Countervailing Duties on Certain EC Products*, para. 62. In that case, the Appellate Body determined, at paragraph 67, that the explicit language used by the United States in its

7.82. In our view, this reasoning is probative of the more general observation, similarly suggested by the panels referred to above in the context of Article 6.2 of the DSU, that the applicable standard in WTO dispute settlement for determining whether a panel or the Appellate Body is properly vested with the jurisdiction to make the assessment in question is contingent upon, *inter alia*, whether the responding Member in a dispute has received adequate notice of the claim that has been raised. This is consistent with the due process objective of notifying the respondent and third parties of the nature of the complainant's case[331], which we discussed in our preliminary ruling of 22 May 2013.[332] We recall the Appellate Body's statement that due process is an essential feature of the WTO dispute settlement system[333], and we agree that due process is intrinsically connected to, *inter alia*, the rights of parties to be afforded an adequate opportunity to pursue their claims and make out their defences.[334]

7.83. Accordingly, we consider that, in order to establish whether the health certificates are "related or implementing measures" *vis-à-vis* S.O. 1663(E), we need to determine whether the United States' panel request provided India with adequate notice of the inclusion of the health certificates issued under S.O. 655(E) within the Panel's terms of reference. In doing so, we bear in mind that notice will be adequate if the health certificates are subsidiary to, or are in a sufficiently close relationship with, S.O. 1663(E).

7.84. We thus proceed to examine the relationship, if any, between S.O. 655(E) and the health certificates issued thereunder, and S.O. 1663(E) on the basis of the evidence before us.[335]

7.85. On its face, S.O. 655(E) is a notification issued by the DAHD pursuant to Section 3A of the Livestock Act.[336] S.O. 1663(E) is also a notification issued by the DAHD pursuant to Sections 3 and 3A of the Livestock Act.[337] We recall that the Livestock Act provides broad powers to the Central Government to regulate the importation of all livestock products. Indeed, both S.O. 1663(E) and S.O. 655(E) are instruments that regulate the importation of livestock products. In our view, that both notifications are issued pursuant to the Livestock Act creates a relationship between S.O. 1663(E) and S.O. 655(E). Whether this relationship is sufficient to consider S.O. 655(E) and more importantly, the health certificates issued thereunder, as measures that are subsidiary to, or are in a sufficiently close relationship with S.O. 1663(E), is a different matter. To us, the fact that the two notifications are both issued pursuant to the Livestock Act does not in itself amount to having a relationship which can be qualified as sufficiently close; nor does it mean that one notification is necessarily subsidiary to the other. More specifically, we consider that, were this relationship considered sufficiently close on its own, it would imply that every notification issued pursuant to Sections 3 and 3A of the Livestock Act could also fall within our terms of reference. We do not consider that this is compatible with the due process objective of ensuring that India receives adequate notice of the claim it must answer. Moreover, though both notifications are issued pursuant to the Livestock Act, thereby indicating that they are subsidiary to it, this is not probative of there being any relationship of subsidiarity between the two notifications themselves.

7.86. With this in mind, we continue our analysis by considering the timing of the respective measures. We observe that S.O. 655(E) pre-dates S.O. 1663(E) by approximately ten years. We also observe that both of them are in force at the time of writing this Report.

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notice of appeal was such that it had provided adequate notice to the European Communities of the scope of the appeal. Conversely, in *US – Offset Act (Byrd Amendment)*, the Appellate Body rejected the United States' assertion that the reference in its notice of appeal to the panel's failure to properly interpret Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement "plainly covers" a claim that the Panel exceeded its terms of reference. The Appellate Body said that "[g]eneric statements such as that relied upon by the United States *cannot serve to give the appellees adequate notice that they will be required to defend against a claim that the Panel exceeded its terms of reference*". Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 200. (emphasis added)

[331] Appellate Body Report, *US – Carbon Steel,* para. 126.

[332] Preliminary ruling of 22 May 2013, para. 1.10.

[333] Appellate Body Report, *US – Continued Suspension*, para. 433.

[334] Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 147.

[335] A detailed description of S.O. 1663(E) can be found in section 2.3.2 above. The description of S.O. 655(E), the SIPs and the health certificates thereunder can be found in section 7.1.2.4.4.1 above.

[336] Exhibit US-116; India's first written submission, paras. 23 and 25.

[337] Exhibit US-80.

7.87. Considering the wording of the measures, we note that although S.O. 655(E) *restricts* the importation into India of *all* livestock products, it does not, on its face, *prohibit* the importation of any livestock products. Furthermore, as it applies to "all" livestock products, the scope of S.O. 655(E) is broader than, and therefore includes, the products listed in paragraphs (1)(ii)(a) to (1)(ii)(j) of S.O. 1663(E).[338]

7.88. We recall that the health certificates are annexed to the SIPs issued pursuant to S.O. 655(E). If we examine the SIPs provided by India, we note that, although not annexed to S.O. 655(E) or its Schedule, there appears to be a standard form of SIP which is adjusted according to the product(s) in each consignment, based on the specific conditions applying to the consignment at issue.[339] We also note that, on the basis of the evidence before us, there is no single health certificate that applies to all livestock products uniformly. Rather, each health certificate is customized depending on the specific product to be imported, to reflect the specific conditions that apply to the consignment identified in any given SIP, pursuant to Clause 3(iv) of S.O. 655(E). Indeed, as is the case with the SIPs provided by India in Exhibits IND-25, IND-27, IND-29, IND-31, IND-32, and IND-33, there may be more than one health certificate issued in respect of one single SIP when the consignment includes more than one livestock product. Each health certificate will thus reflect the specific conditions that apply to the respective livestock product.

7.89. On the basis of the evidence before us, we can conclude that there is no standard health certificate that applies specifically to all the products listed in paragraphs 1(ii)(a) to (j) of S.O. 1663(E).

7.90. Continuing with our examination, we observe that the text of S.O. 1663(E) makes no reference to S.O. 655(E), to the SIP, to a health certificate, or to an attestation from a veterinarian regarding an exporting country's NAI status. Likewise, the text of S.O. 655(E) does not contain any explicit reference to S.O. 1663(E). This is also the case for the SIPs and the health certificates attached to them, as provided by India, as well as the blank health certificates provided by the United States.

7.91. The above leads us to conclude that an analysis of the various instruments on their face does not show a sufficiently close relationship or a relationship of subsidiarity between those instruments. However, our inquiry does not end here. We must examine whether we can discern from the manner in which these instruments operate a relationship that may, nonetheless, be qualified as "sufficiently close" or "subsidiary", in particular with respect to AI. In doing so, we will examine whether, as argued by the United States, the health certificates implement the import prohibition imposed by S.O. 1663(E) because of concerns related to AI.

7.92. As we observed above, S.O. 1663(E) contains an express prohibition by the Indian government on the importation of a number of livestock products because of concerns related to AI. We observe that S.O. 1663(E) does not make explicit provision for the enforcement or implementation of the import prohibition reflected therein. Nonetheless, as we described in section 2.3.2 above, S.O. 1663(E) is a notification issued by the DAHD pursuant to the Livestock Act. Such a notification operates as if it has been issued under Section 11 of the Customs Act 1962, and becomes a customs notification.[340] Such notifications empower customs officials to implement the Act according to those orders, instructions and directions that are issued to them by the CBEC.[341] Therefore, although there is no language relating to its implementation in S.O. 1663(E) itself, the relationship between S.O. 1663(E) and the Customs Act is such that the prohibition is implemented by customs authorities acting pursuant to the Customs Act. The same would be the case for S.O. 655(E) as it is also a notification issued by the DAHD pursuant to the Livestock Act.[342]

[338] These products are described in detail in para. 2.32 above.

[339] Exhibits IND-20, IND-21, IND-25, IND-27, IND-28, IND-29, IND-30, IND-31, IND-32, IND-33, IND-34, IND-35.

[340] India's response to Panel question No. 20(a); Exhibits US-114, Section 3(2); and US-115, Section 4. Customs Act 1962, accessed on 20 January 2014, <http://www.cbec.gov.in/customs/cs-act/custom-act-1962.pdf>.

[341] Customs Act 1962, Section 151A. India's response to question no 20(a).

[342] India's response to Panel question No. 20(a).

7.93. However, the *modus operandi* of both notifications is very different. Indeed, we recall India's repeated submission that the NAI status of an exporting country is a condition of entry for the products enumerated in S.O. 1663(E).[343] Significantly, S.O. 1663(E) is a prohibitive measure, and contains the threshold requirement that an exporting country be NAI-free as a precursor to any importation of the products enumerated in S.O. 1663(E). By contrast, S.O. 655(E) contains no explicit reference to a prohibition because of concerns of NAI, or to any procedures that relate specifically to AI. Rather, S.O. 655(E) governs the procedures for the importation of all livestock products into India, including the importation of products that are the subject of this dispute.

7.94. We understand this to mean that a country, the products of which are prohibited through the operation of S.O. 1663(E), cannot access the procedures prescribed under S.O. 655(E) (including the health certificates). In other words, it is only once an exporting country satisfies the threshold condition of entry in S.O. 1663(E) that S.O. 655(E) becomes operational with respect to the products in S.O. 1663(E) from that particular country, and that the exporting country would have cause to complete and provide a health certificate. To this extent, we are persuaded by India's argument that "S.O. 655(E) and the sanitary certificates are relevant only if the product originates from a NAI[-]free country because it is only when the product originates from a NAI[-]free country [that the product can] be imported and be accompanied with a veterinary certificate".[344]

7.95. Not only is there no sufficiently close or subsidiary relationship between S.O. 1663(E) and S.O. 655(E) in terms of implementing India's concerns related to AI, but, in fact, there is no scope for the application of S.O. 655(E) (including the requirement to provide a health certificate) if a product, and the country from which the product is exported, fail to satisfy the condition of entry in S.O. 1663(E). Put another way, S.O. 655(E) is inapplicable in circumstances where a product is blocked by India's prohibition in S.O. 1663(E) on imports of products from countries reporting AI.

7.96. There is a sequence to the operation of the respective measures that manifests through the condition of entry. A country must necessarily be excluded from the scope of the prohibition in S.O. 1663(E) – that is, it must be AI-free – in order for its exporters to be subject to the specific procedures laid out in S.O. 655(E), among which is the provision of a health certificate with each consignment of products (the content of which depends on the specific product(s) being exported). Conversely, given that a country blocked by S.O. 1663(E) on account of NAI, such as the United States in this present dispute, cannot access S.O. 655(E), the situation would not arise where exporters in the United States (or any other country notifying AI) would be subjected to the requirement to provide a health certificate pursuant to S.O. 655(E). The prohibition would operate to prevent importation of all products listed in paragraphs 1(ii)(a) to (j) of S.O. 1663(E), such that there would be no consignment of those same products to which the exporter to India could attach a health certificate.

7.97. We recall that India informed the Panel that its authorities had granted SIPs to United States exporters in respect to unprocessed turkey meat in 2011. However, as discussed in paragraphs 7.70 and 7.72 above we reviewed the evidence provided by India and concluded that the SIPs provided by India were issued to exporters in the United Arab Emirates. As we also discussed, the United States presented data that appear to disprove India's argument, as no imports of unprocessed turkey meat into India from the United States are recorded for 2011 or 2012. Given the evidence before us, we thus agree with the United States' contention that "there appears to be no evidence to support the assertion that India has issued SIPs to the United States or U.S. producers or that any shipments took place".[345] Accordingly, the Panel understands that, up until the date of the panel request, India had not actively applied the health certificates as a tool to effect the prohibition on the importation of various agricultural products into India from the United States due to AI-related concerns.

7.98. On the basis of the foregoing, we are not persuaded that the health certificates are subsidiary to, or in a sufficiently close relationship with, S.O. 1663(E), to have provided India with adequate notice of the inclusion of these health certificates as "related measures, or implementing measures". Accordingly, we find that the health certificates that accompany a SIP and that are

[343] For instance, India's response to Panel question No. 17(b).

[344] India's response to Panel question No. 17(b); India's closing statement at the first meeting of the Panel, para. 6.

[345] United States' response to Panel question No. 12(a).

issued pursuant to S.O. 655(E) are not "related to" or "implementing" the import prohibition reflected in S.O. 1663(E) and, therefore, are not measures at issue in this dispute.

7.1.2.4.4.3 Whether S.O. 655(E) and the health certificates qualified as "orders issued by [the DAHD] pursuant to the Livestock Act"

7.99. We now proceed to the second question, namely whether the reference in the panel request to "orders issued by [the DAHD] pursuant to the Livestock Act" is sufficient to bring the health certificates issued thereunder within the scope of the Panel's terms of reference. The United States argues that the reference in the panel request to "orders issued by [the DAHD] pursuant to the Livestock Act" is sufficient because S.O. 655(E) is a notification issued pursuant to the Livestock Act, and because S.O. 655(E) requires the fulfilment of the conditions in a SIP, among which is the completion of a health certificate.[346] The United States also considers it appropriate for the Panel, in reviewing India's second request for a preliminary ruling, to keep in mind India's alleged failure to respond to the United States' request pursuant to Article 5.8 of the SPS Agreement for a statement of the measures through which India maintains import restrictions on account of AI.[347] India does not respond specifically to the United States' argument regarding the inclusion of the health certificates through the reference in the panel request to "orders".

7.100. As we emphasized in our preliminary ruling of 22 May 2013, fulfilment of the requirements of Article 6.2 of the DSU are "not a mere formality".[348] In addition to forming the basis of a panel's terms of reference, a panel request serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case. Moreover, due process considerations inform the inquiry into the sufficiency of the panel request in that the request must serve to allow the respondent to "begin" preparing its defence.[349] Given this significant role of the panel request, we must scrutinize it carefully to ensure that it complies not only with the letter but also the spirit of Article 6.2 of the DSU.[350]

7.101. Bearing this in mind, the Panel recalls that in our preliminary ruling of 22 May 2013 we addressed, *inter alia*, India's complaint that the use of the term "orders" in the plural renders the panel request unclear, in contravention of Article 6.2 of the DSU.[351] In responding to this challenge by India, the United States explained that it used the plural form of the word "orders" in the panel request "to ensure that it captured new, replacement, or additional orders or notifications in force as of the time of which the United States was not aware".[352] The United States added that this inclusive terminology was particularly necessary in the present case given India's failure to respond to the United States' request pursuant to Article 5.8 of the SPS Agreement for a statement of the measures through which India maintains import restrictions on account of AI.[353]

7.102. We noted in paragraph 7.60 above that S.O. 655(E) was issued by the DAHD and published in the Gazette of India on 9 July 2001, and therefore predates S.O. 1663(E) by ten years.[354] Therefore, S.O. 655(E) cannot be said to be a "new" or a "replacement" measure in relation to S.O. 1663(E). Furthermore, S.O. 655(E) was notified to the WTO on 11 April 2002.[355] This notification was circulated to all WTO Members. In addition, as India points out, the United States Department of Agriculture (USDA) was aware of and made reference to S.O. 655(E)

[346] United States' response to India's second request for a preliminary ruling, para. 15.
[347] United States' response to India's second request for a preliminary ruling, para. 16. United States' first written submission, para. 212, footnote 299; and preliminary ruling of 22 May 2013, para. 3.61.
[348] Preliminary ruling of 22 May 2013, para. 3.2 (citing Appellate Body Report, *China – Raw Materials*, paras. 219, 220 and 233 (citing Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22; *US – Carbon Steel*, paras. 125 and 126; *Australia – Apples*, para. 416; *Guatemala – Cement I*, paras. 72 and 73; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and *EC and certain member States – Large Civil Aircraft*, para. 786)).
[349] Preliminary ruling of 22 May 2013, para. 3.3 (citing Appellate Body Report, *Thailand – H-Beams*, para. 88).
[350] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.143 (citing Appellate Body Reports, *US – Carbon Steel*, para 126; and *EC – Bananas III*, para. 142).
[351] Preliminary ruling of 22 May 2013, Section 3.2.5.
[352] United States' first written submission, para. 218, footnote 299. Preliminary ruling of 22 May 2013, para. 3.61.
[353] United States' first written submission, para. 218, footnote 299; and United States' response to India's second request for a preliminary ruling, para. 16. Preliminary ruling of 22 May 2013, para. 3.61.
[354] S.O. 655(E), (Exhibit US-116, Exhibit IND-18).
[355] G/SPS/N/IND/9, 11 April 2002, (Exhibit IND-60).

in a report published prior to the initiation of this dispute.[356] Under the circumstances, the Panel is not persuaded that S.O. 655(E) was an "additional order or notification in force as of the time of which the United States was not aware". Simply put, not referring specifically to S.O. 655(E) and relying instead on bringing it within the panel request through the reference to "orders" does not square with the United States' explanation for its use of the word "orders" in plural.

7.103. For the above reasons, the Panel finds that the health certificates that accompany a SIP and that are issued pursuant to S.O. 655(E) do not qualify as "orders issued by [the DAHD] pursuant to the Livestock Act" within the meaning of the panel request and therefore they are not measures at issue in this dispute.

7.1.2.5 Conclusion

7.104. With respect to India's allegations in its second request for a preliminary ruling that the panel request fails to comply with the requirements of Article 6.2 of the DSU, the Panel concludes as follows:

a. the NAP 2012, being a measure that applies only to India's domestic agricultural products, falls outside the previously delimited scope of "India's [AI] measures [that] prohibit the importation of various agricultural products into India from those countries reporting NAI", and, therefore, is not a measure at issue in this dispute within the meaning of Article 6.2 of the DSU;

b. the health certificates that accompany a SIP and that are issued pursuant to S.O. 655(E) are not "related to" or "implementing" the import prohibition reflected in S.O. 1663(E) and, therefore, are not measures at issue in this dispute;

c. the health certificates that accompany a SIP and that are issued pursuant to S.O. 655(E) do not qualify as "orders issued by [the DAHD] pursuant to the Livestock Act" within the meaning of the panel request and, therefore, are not measures at issue in this dispute.

7.105. The Panel further finds that, having plainly connected Article 2.3 and India's AI measures, the United States was not under an additional obligation to identify the NAP 2012 in its panel request and thus India's request that the United States' claim under Article 2.3 of the SPS Agreement be set aside as outside the jurisdiction of the Panel is denied.

7.1.3 Other preliminary issues

7.106. As indicated in paragraph 7.3 above, the Panel determined, at the time of issuance of its preliminary ruling on 22 May 2013, that it was premature to decide in the abstract certain issues raised by India in its first preliminary ruling request. Having received all submissions from the parties and having completed our examination in this dispute, we are now in a position to respond to India's request for a ruling on these items, to which we turn below.

7.1.3.1 Whether the "related measures" and "implementing measures" mentioned in the panel request are included in the Panel's terms of reference

7.107. We recall that, in its first preliminary ruling request, India alleged that the United States failed to identify the specific measures at issue in its panel request, contrary to the requirements of Article 6.2 of the DSU. Specifically, India requested that the Panel find that the United States' reference in its panel request to the term "related measures, or implementing measures" fell short of the requirement of specificity in Article 6.2 of the DSU.[357] We refer to Section 3.2.4 of our preliminary ruling of 22 May 2013 for an account of the parties' arguments and the Panel's review of the text of the panel request, the applicable legal provision, and its interpretation by prior panels and the Appellate Body.

[356] India's first written submission, para. 104; and USDA Global Agricultural Information Network (GAIN) Report, 7 May 2009, (USDA GAIN Report), (Exhibit IND-61), p. 2.

[357] India's request for a preliminary ruling, paras. 29-31 and 34.

7.108. We also recall our earlier findings as follows:

> 3.50 Thus, the Panel considers that, in the circumstances of the present case, it is premature and indeed unnecessary to make a determination in the abstract, at this preliminary stage, as to precisely which measures fall within the Panel's terms of reference by virtue of the inclusion of the terms "related measures, or implementing measures" in the panel request. The Panel will revisit this issue in the course of these proceedings should a relevant challenge arise.[358]
>
> 3.51 This is not to say, however, that the panel request is not sufficiently precise to meet the requirements of Article 6.2 simply by virtue of the inclusion of the terms "related measures, or implementing measures". As we have explained above, the panel request makes clear that the measures at issue in this case are the avian influenza measures that prohibit the importation of various agricultural products into India from those countries reporting NAI. Whether a particular "related" or "implementing" measure (i.e., one not specifically mentioned in the panel request) may be included within the panel's terms of reference is a matter that can be addressed in the course of these proceedings as the need arises.

7.109. The Panel thus postponed its decision to later in the proceedings "should a relevant challenge arise". With the exception of the argumentation concerning the health certificates, which we examined in section 7.1.2.4.4 above, the United States has not put forward any challenge concerning potentially "related measures, or implementing measures in force as of the date of [the panel] request" in the course of the proceedings. Accordingly, as the condition for addressing this issue has not arisen in the course of these proceedings, we need not rule on this issue.

7.1.3.2 Implication of the use of the word "orders" in the plural in the panel request

7.110. We recall that, in its first preliminary ruling request, India alleged that the use of the word "orders" in the panel request created uncertainty, given that S.O. 1663(E) is a notification, not an order, issued by the DAHD pursuant to Section 3 and Section 3A of the Livestock Act.[359] India further alleged that the use of the word "orders" in the plural renders the panel request unclear as to the types of notifications that the United States seeks to implicate in its panel request.[360]

7.111. We refer to Section 3.2.5 of our preliminary ruling of 22 May 2013 for an account of the parties' arguments and the Panel's review of the text of the panel request[361], the applicable legal provision, and its interpretation by prior panels and the Appellate Body.

7.112. In our preliminary ruling of 22 May 2013, we examined whether, by using the word "orders" instead of "notifications" in identifying the legal instruments issued by the DAHD pursuant to the Livestock Act, the United States would have created uncertainty for India. Our examination of the corresponding text of the panel request lead us to conclude that "the word 'orders' included in the panel request does not render the panel request inconsistent with the specificity requirement of Article 6.2 of the DSU, and it does not prejudice the ability of India to defend itself".[362] This conclusion is further reinforced by India's response to a question from the Panel at the first substantive meeting on what the acronym "S.O." stands for; according to India, the abbreviation "S.O." refers to "statutory order".[363]

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[358] (*footnote original)* The Panel notes that the United States has referred to "attendant circumstances" that, in its view, would justify the inclusion of related and implementing measures that are currently not specifically listed in the panel request (United States' first written submission, paras. 201 and 208, citing Exhibit US-4). Given the Panel's decision not to make a preliminary decision in the abstract on whether specific related or implementing measures form part of its terms of reference, the Panel sees no need to address this argument here.

[359] India's request for a preliminary ruling, paras. 36 and 37.

[360] India's request for a preliminary ruling, paras. 29 and 35.

[361] The relevant text in the panel request reads as follows:

> – orders issued by India's Department of Animal Husbandry, Dairying, and Fisheries ("DAHD") pursuant to the Livestock Act, most recently S.O. 1663(E), which was published in the Gazette of India on July 19, 2011

[362] Preliminary ruling of 22 May 2013, para. 3.59.

[363] India's response to Panel question No. 20(c).

7.113. We then examined India's additional allegation that the use of the word "orders" in the plural renders the panel request unclear as to the types of notifications that the United States seeks to implicate in its panel request.[364] We recall that the United States responded to this argument by explaining that its panel request refers to the word "orders" in the plural "to ensure that it captured new, replacement, or additional orders or notifications in force as of that time of which the United States was not aware".[365] We found as follows:

> 3.62 We echo our reasoning in Section 7.1.3.2 above on the use of the term "related measures, or implementing measures" and conclude that it is premature for us to make a determination, in the abstract, as to whether any "orders" not specifically listed in the panel request fall within the Panel's terms of reference. The Panel will revisit this issue in the course of these proceedings should a relevant challenge arise.

7.114. The Panel thus postponed its decision to later in the proceedings "should a relevant challenge arise". The United States did not put forward during these proceedings any challenge concerning any "new, replacement, or additional" orders in force at the time of the panel request "of which the United States was not aware". Therefore, as the condition for addressing this issue has not arisen in the course of these proceedings, we need not rule on it.

7.2 Order of analysis

7.115. Before commencing our analysis of the United States' legal claims, we first consider the order of our analysis.

7.116. In its panel request, the United States puts forward claims under Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.5, 5.6, 6.1, 6.2, 7 and Annex B of the SPS Agreement[366], as well as under Article XI:1 of the GATT 1994.[367] When responding to the United States' claim pursuant to Article 3.1 of the SPS Agreement, India invokes Article 3.2 of the SPS Agreement.[368] Additionally, in response to the United States' claims under Articles 6.1 and 6.2, India raises Article 6.3 of the SPS Agreement.

7.117. A question before us is whether there is a particular sequencing of the legal claims that should be followed in examining the United States' claims and India's response. The United States raised claims under both the SPS Agreement and the GATT 1994, but did not indicate that its Article XI claim under the GATT 1994 is made in the alternative to its SPS claims. Hence, our first step is to decide whether to commence our analysis by examining the claims under the SPS Agreement, or the claim under the GATT 1994. The parties have not argued for any particular order of analysis in this regard. However, the United States discussed its claims under the SPS Agreement before addressing its claim under Article XI:1 of the GATT 1994.[369] Furthermore, India's response to this latter claim is that its AI measures are consistent with the SPS Agreement and therefore are presumed to be consistent with the GATT 1994.[370]

7.118. In determining the order in which we examine the various provisions at issue, we concur with the panel in *India – Autos* that it is important to first consider "if a particular order is compelled by principles of valid interpretative methodology, which, if not followed, might constitute an error of law".[371] Moreover, we observe that the order we choose may have an impact on the potential for us to apply judicial economy in making our determinations in this case.[372]

7.119. We recall that, in *EC – Bananas III*, the Appellate Body identified the test to be applied in determining the order of analysis where two or more provisions from different covered Agreements appear *a priori* to apply to the measure in question. The Appellate Body concluded that the

[364] India's request for a preliminary ruling, para. 29.
[365] United States' first written submission, para. 212, footnote 299.
[366] United States' request for the establishment of a panel, pp. 2-3, paras. 1-10.
[367] United States' request for the establishment of a panel, p. 3, para. 11.
[368] India's first written submission, para. 141.
[369] United States' first written submission, para. 203; United States' second written submission, para. 126.
[370] India's first written submission, para. 141.
[371] Panel Report, *India – Autos*, para. 7.154.
[372] Panel Report, *India – Autos*, para. 7.161.

provision from the Agreement that "deals specifically, and in detail" with the measures at issue should be analysed first.[373]

7.120. In *EC – Hormones*, where claims under both the GATT 1994 and the SPS Agreement were raised by the complainant, the panel, in a finding not reviewed by the Appellate Body, determined that the SPS Agreement should be examined first because it "specifically addresses the type of measure in dispute".[374] This approach was also followed by the panels in *Australia – Salmon*[375]*, EC – Approval and Marketing of Biotech Products*[376]*,* and *US – Poultry (China)*.[377]

7.121. The order of analysis of the claims before us, therefore, hinges upon whether we find that the measures at issue in this dispute are SPS measures. In such a case, the SPS Agreement would be *lex specialis* as it would "deal specifically, and in detail" with the type of measures at issue, i.e. SPS measures. Should we find that India's AI measures are SPS measures subject to the disciplines of the SPS Agreement, we would then need to decide the order of analysis for the numerous claims under the SPS Agreement raised by the United States.

7.122. India urges the Panel to commence with an examination of Article 3 of the SPS Agreement on the grounds that its AI measures conform to the relevant international standard.[378] The United States does not put forward a preferred order of analysis for its claims under the SPS Agreement, although it commenced its argumentation in its first written submission with its claims under Articles 5.1, 5.2 and 2.2 of the SPS Agreement, and its second written submission with argumentation regarding Article 3 of the SPS Agreement.

7.123. We understand from the Appellate Body Report in *US – Zeroing (EC) (Article 21.5 – EC)* that panels are not bound by the order of claims made by the complainant. As the Appellate Body said, "in fulfilling its duties under Article 11 of the DSU, a panel may depart from the sequential order suggested by the complaining party, in particular, when this is required by the correct interpretation or application of the legal provisions at issue".[379]

7.124. We are not inclined to follow the order used by the United States in its first written submission, which would entail commencing our analysis by looking into the risk assessment provisions, i.e. Articles 5.1, 5.2 and 2.2 of the SPS Agreement. The present case suggests a different approach, for it is the first time that a respondent, in response to a claim under Article 3.1 of the SPS Agreement that its measures are not "based on" the relevant international standard, argues that its measures "conform to" that international standard, within the meaning of Article 3.2 of the SPS Agreement. Article 3.2 embodies a presumption of consistency with the remainder of the SPS Agreement and the GATT 1994. This means that, were the Panel to find that India's AI measures "conform to" an international standard within the meaning of Article 3.2 of the SPS Agreement, India's AI measures will be presumed to be consistent with the relevant provisions of the SPS Agreement and the GATT 1994 identified in our terms of reference, obviating any further analysis on our part.

7.125. In the light of these considerations, we will commence our analysis by determining whether India's AI measures are SPS measures within the scope of the SPS Agreement. If they are, we will proceed to examine the United States' claims under Article 3.1, including India's

[373] Appellate Body Report, *EC – Bananas III*, para. 204.

[374] Panel Report, *EC – Hormones*, paras. 8.41-8.42.

[375] Panel Report, *Australia – Salmon*, para. 8.39, Panel Report, *EC – Sardines*, para. 7.16 (in the context of the TBT Agreement).

[376] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1679.

[377] Panel Report, *US – Poultry (China)*, para. 7.68. This panel drew guidance from Article 2.4 of the SPS Agreement, which provides that SPS measures that conform to the provisions of the SPS Agreement shall be presumed to be in accordance with the provisions of the GATT 1994 which relate to the use of SPS measures, in particular the provisions of Article XX(b). Article XX(b) had been raised as a defence by the complainant in that dispute. In *US – Continued Suspension*, the panel stated that the reference to presumption in Article 2.4 of the SPS Agreement is intended to address potentially conflicting interpretations between two provisions. Panel Report, *US – Continued Suspension,* para. 7.327, footnote 471.

[378] India's first written submission, para. 107. India further argues that if the Panel were to find that its measure is not consistent with Article 3, the Panel should look at Articles 2 and 2.3 of the SPS Agreement. In India's view, only after having examined those provisions can the Panel examine the claims under Articles 5 and 6. India's first written submission, paras. 110-111.

[379] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277.

contention that its measures are presumed to be consistent with the SPS Agreement as a whole by virtue of Article 3.2. In the event that we conclude that India's measures do not benefit from the presumption of consistency set out in Article 3.2, our next step will be to examine the United States' claims under Articles 5.1, 5.2 and 2.2 of the SPS Agreement to establish whether India's SPS measures are based on a risk assessment and are thus based on scientific principles and are not maintained without sufficient scientific evidence. We will then proceed to examine the United States' claim of discrimination under Article 2.3, along with the United States' alternative claim under Article 5.5. Thereafter, the Panel will examine the claims under Article 5.6, which the United States argues would result in a separate consequential breach of Article 2.2. We will then examine the United States' claims under Articles 6.1 and 6.2, as well as India's reliance on Article 6.3. Finally, the Panel will examine the United States' claims under Article 7 and Annex B.

7.126. Once we have concluded our examination of the United States' claims under the SPS Agreement, we will turn to the United States' claim under Article XI:1 of the GATT 1994.

7.3 Whether India's AI measures are SPS measures within the scope of the SPS Agreement

7.3.1 Arguments of the parties

7.3.1.1 United States

7.127. The United States claims that India's AI measures are SPS measures subject to the disciplines of the SPS Agreement because (i) they fall within the definition of an SPS measure in Annex A(1)(a) through (c) of the SPS Agreement, and (ii) they affect international trade by imposing import prohibitions.[380]

7.128. For the United States, "India's measures, both on their face and as described by India itself, have ostensible purposes corresponding to those in subparagraphs (a) through (c)" of Annex A(1) of the SPS Agreement. The United States submits that India's Livestock Act, which India invokes as the authority for its import prohibitions, authorizes India's central government to regulate, restrict, or prohibit the import of "any live-stock product, which may be liable to affect human or animal health".[381]

7.129. The United States further argues that the notifications made by India to the WTO provide additional confirmation regarding the objectives of India's measures. In this respect, the United States observes that India notified its most recent publication of AI import prohibitions, S.O. 1663(E), to the SPS Committee, and in the notification form ticked the following under the heading "Objective and rationale": (1) food safety, (2) animal health, and (3) to protect humans from animal/plant pest or disease. The United States further explains that, under the same heading, India included a narrative explanation of S.O. 1663(E)'s "objective and rationale" as follows: "[t]o ensure food safety and protect domestic and wild birds from avian influenza (both from [HPNAI] and [LPAI])".[382] The United States indicates that in the same notification, under the heading "Nature of the urgent problem(s) and reason for urgent action", India writes that the reason for the urgent action was "to prevent the ingress of this virus to protect human health as well as health of poultry in India".[383] For the United States, such measures are SPS measures under the terms of Annex A(1)(a) through (c) of the SPS Agreement.[384]

7.130. Finally, asserting that India's measures constitute an import ban and relying on a statement of the panel in *EC – Hormones,* the United States contends that "[i]t cannot be contested tha[t] an import ban affects international trade".[385]

[380] United States' first written submission, paras. 101-102.
[381] United States' first written submission, para. 101.
[382] United States' first written submission, para. 101.
[383] United States' response to Panel question No. 11.
[384] United States' first written submission, para. 101; United States' response to Panel question No. 11.
[385] United States' first written submission, para. 102.

7.3.1.2 India

7.131. India agrees that its AI measures are SPS measures subject to the disciplines of the SPS Agreement. India asserts that S.O. 1663(E) was notified to the WTO pursuant to Annex A(1)(a) through (c) of the SPS Agreement. India adds that the Livestock Act is an SPS measure as it can be classified under Annex A(1)(a) through (c).[386] Furthermore, India acknowledges that both the Livestock Act and S.O. 1663(E) affect international trade within the meaning of Article 1 of the SPS Agreement.[387]

7.3.2 Analysis by the Panel

7.3.2.1 Introduction

7.132. As we detailed in section 7.2 above, the United States has raised claims under the SPS Agreement and the GATT 1994. As discussed, we intend to commence our analysis by addressing the United States' claims under the SPS Agreement because this Agreement "specifically addresses the type of measure in dispute".[388] A threshold issue in our examination of these claims is therefore whether India's AI measures are SPS measures subject to the disciplines of the SPS Agreement.

7.133. At the outset, we note that both parties agree that India's AI measures are SPS measures subject to the disciplines set out in the SPS Agreement. In particular, the parties agree that India's AI measures are SPS measures falling within the definitions provided in Annex A(1)(a) through (c) of the SPS Agreement. Nevertheless, bearing in mind our duty, pursuant to Article 11 of the DSU, to make an objective assessment of the applicability of the relevant covered agreements, we will proceed to examine whether we agree with the parties on this threshold issue.

7.134. We commence by examining the legal provision at issue.

7.3.2.2 The legal provision at issue

7.135. Article 1 of the SPS Agreement sets out the scope of application of the Agreement as follows:

> 1. This Agreement applies to all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade. Such measures shall be developed and applied in accordance with the provisions of this Agreement.
>
> 2. For the purposes of this Agreement, the definitions provided in Annex A shall apply.

7.136. We concur with prior panels that Article 1 of the SPS Agreement identifies two requirements that "need to be fulfilled" for the SPS Agreement to apply, namely, that (i) the measure at issue is an SPS measure and thus falls within one or more of the definitions provided in Annex A(1) of the SPS Agreement; and (ii) the measure at issue directly or indirectly affects international trade.[389] The Panel will thus consider in turn whether India's AI measures comply with both requirements.

7.3.2.3 Whether India's AI measures are SPS measures within the definitions provided in Annex A(1) of the SPS Agreement

7.137. We turn first to examine whether India's AI measures fall within one or more of the definitions provided in Annex A(1) of the SPS Agreement. In doing so, we recall that both parties

[386] India's response to Panel question No. 14.
[387] India's response to Panel question No. 14.
[388] Panel Reports, *EC – Hormones (Canada)*, para. 8.45; and *EC – Hormones (US)*, para. 8.42.
[389] Panel Reports, *EC – Hormones (Canada)*, para. 8.39; *EC – Hormones (US)*, para. 8.36; *EC – Approval and Marketing of Biotech Products*, para. 7.2554; and *US – Poultry (China)*, para. 7.82.

agree that India's measures are SPS measures falling within the definitions provided in Annex A(1)(a) through (c).[390]

7.138. Annex A[391] bears the title "Definitions". Annex A(1), in relevant part, defines SPS measures as follows:

> 1. *Sanitary or phytosanitary measure* – Any measure applied:
>
> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;
>
> (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;
>
> (c) to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests;
>
> ...
>
> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, *inter alia*, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

7.139. The Appellate Body in *Australia – Apples* considered that a fundamental element of the definition of "SPS measures" in Annex A(1) is that such a measure must be one applied to protect at least one of the listed interests or to prevent or limit specified damage.[392] The Appellate Body further found that "the word 'applied' points to the application of the measure and, thus, suggests that the relationship of the measure and one of the objectives listed in Annex A(1) must be manifest in the measure itself or otherwise evident from the circumstances related to the application of the measure".[393] This led the Appellate Body to conclude that "the purpose of a measure is to be ascertained on the basis of objective considerations".[394]

7.140. Regarding the second sentence of paragraph 1, beginning with "Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures ...", the Appellate Body in *Australia – Apples* also explained that the list of instruments included therein "serves to illustrate, through a set of concrete examples, the different types of measures that, when they exhibit the appropriate nexus to one of the specified purposes, will constitute SPS measures and, accordingly, be subject to the disciplines set out in the [SPS Agreement]".[395]

7.141. We first consider whether India's AI measures fall within the scope of the list of instruments in the second sentence of Annex A(1). We recall that India's AI measures are maintained through the Livestock Act and S.O. 1663(E). Both legal instruments thus qualify as either "laws", "decrees" or "regulations" listed in the second sentence of Annex A.

7.142. As explained by the Appellate Body, these measures need also to "exhibit the appropriate nexus to one of the specified purposes" in Annex A(1) in order to be subject to the disciplines of

[390] The Panel agrees with the parties that the definition in Annex A(1)(d) does not apply in this dispute.
[391] We recall that Article 1.2 of the SPS Agreement provides that "[f]or the purposes of [the SPS] Agreement, the definitions provided in Annex A shall apply".
[392] Appellate Body Report, *Australia – Apples*, para. 172.
[393] Appellate Body Report, *Australia – Apples*, para. 172.
[394] Appellate Body Report, *Australia – Apples*, para. 172.
[395] Appellate Body Report, *Australia – Apples*, para. 176.

the SPS Agreement. Therefore, we turn to consider whether this nexus exists (be it manifest either in the measure itself, or otherwise evident from the circumstances related to the application of the measure) with the Livestock Act and in S.O. 1663(E).

7.143. The Livestock Act "extends to the whole of India"[396], and was enacted "to make better provision for the regulation of the importation of live-stock which is liable to be affected by infectious or contagious disorders".[397] In particular, Section 3A of the Livestock Act provides:

> The Central Government may, by notification in the Official Gazette, regulate, restrict or prohibit in such manner and to such extent as it may think fit, the import into the territories to which this Act extends, of any live-stock product which may be liable to affect human or animal health.[398]

7.144. It is apparent from the text of Section 3A of the Livestock Act that it concerns the regulation of imports that may affect human or animal health, although Section 3A makes no specific mention of AI.

7.145. S.O. 1663(E) was issued by the DAHD in the exercise of powers conferred by Sections 3 and 3A of the Livestock Act.[399] S.O. 1663(E) prohibits the importation of various livestock products from countries reporting NAI.[400] As mentioned by the United States, in its notification of S.O. 1663(E) to the SPS Committee, India ticked the following boxes under the heading "Objective and rationale": "food safety", "animal health", and "protect humans from animal/plant pest or disease". India also provided the following narrative explanation under that same heading: "[t]o ensure food safety and protect domestic and wild birds from [AI] (both from [HPNAI] and [LPAI])". In addition, under the heading "Nature of the urgent problem(s) and reason for urgent action", India further specified: "[u]rgent action has been taken to prevent the ingress of this virus to protect human health as well as health of poultry in India".[401]

7.146. The purpose of S.O. 1663(E), on its face, and as notified by India to the SPS Committee, is purportedly to protect human and animal health from the ingress of AI and to ensure food safety. Furthermore, while there is nothing on the face of the Livestock Act to indicate that it regulates imports that may affect human or animal health specifically because of AI, it is evident that Section 3A of the Livestock Act has been *applied*, through S.O. 1663(E), specifically with a view to protecting human and animal health from the ingress of AI and to ensure food safety. These purported objectives fall squarely within the definitions in Annex A(1)(a) through (c). Moreover, the nexus between the measure and these objectives is manifest – in the case of S.O. 1663(E), in the measure itself and, in the case of the Livestock Act, in the circumstances surrounding its application.

7.147. The Panel proceeds to consider whether these purported objectives bring India's AI measures within the scope of Annex A(1)(a) through (c) of the SPS Agreement.

7.148. As indicated above, both parties consider that the Livestock Act and S.O. 1663(E) fall within the definitions provided in Annex A(1)(a) through (c). This means that, if the parties are correct, India's AI measures would serve more than one of the purposes enumerated in Annex A(1). We recall that the Appellate Body has explained that an SPS measure must be one applied to protect "at least one of the listed interests" set out in Annex A(1).[402] We understand this to mean that SPS measures may be applied to protect more than one of the listed purposes in Annex A(1).[403]

[396] Livestock Act, (Exhibit US-114), Section 1(2).
[397] Livestock Act, (Exhibit US-114), Preamble.
[398] Livestock Amendment Act, (Exhibit US-115), Section 5.
[399] Section 2.3.2 above.
[400] Section 2.3.2 above.
[401] G/SPS/N/IND/73.
[402] Appellate Body Report, *Australia – Apples*, para. 172.
[403] This was also the view of the panel in *EC – Approval and Marketing of Biotech Products*. Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.285, explaining that the potential adverse effects covered by Annex A(1)(a) may also fall within the scope of other subparagraphs of Annex A(1).

7.149. There is no debate as to whether AI is a "disease". Indeed, both parties agree on this point. As explained in section 2.2.1 above, AI, "flu" or "bird flu", is described by the WHO as "an infectious viral disease of birds often causing no apparent signs of illness".[404] The OIE[405] describes AI as "a highly contagious viral disease affecting several species of food producing birds".[406] Similarly, AI is identified in the Terrestrial Code as one of the "listed diseases" recognised by the OIE.[407] NAI, as depicted in section 2.2.3 above, is a subset of AI; it encompasses the types of AI (i.e. HPNAI and LPNAI), the presence of which must be notified to the OIE. In the light of these agreed definitions, we accept that AI, which encompasses its notifiable form, is a "disease" within the meaning of Annex A(1)(a) and (c) of the SPS Agreement.

7.150. Annex A(1)(a) also requires that the measure concern the protection of animal life or health from risks arising from the entry, establishment or spread of, *inter alia*, diseases. As explained in section 2.2.4 above, AI is a disease transmissible to and among animals; India's AI measures may therefore be said to be applied to protect animal life or health from a disease within the scope of Annex A(1)(a) of the SPS Agreement.

7.151. We turn next to Annex A(1)(c), which concerns the protection of human life or health and specifically refers to risks arising from diseases "carried by animals". The ordinary meaning of "carry" is to "bear from one place to another, convey, transport".[408] We recall that birds are the "natural reservoir" of AI.[409] Therefore, birds can be said to carry AI. We further recall that AI viruses are transmitted by direct contact between infected and susceptible birds or indirect contact through aerosol droplets or exposure to virus-contaminated objects.[410] Additionally, as described in section 2.2.4 above, although AI is a disease carried by animals, it is transmissible to humans (i.e. it is a zoonosis).[411] According to the WHO, some AI viruses have been reported to cross the species barrier and cause disease or subclinical infections in humans and other mammals.[412] Both parties as well as the OIE provided the Panel with information supporting the possibility of transmission of AI, and particularly NAI, from animals (particularly poultry) to humans.[413] This information also illustrates that NAI poses a danger to human life and health once the human is infected with an NAI virus. In the light of this evidence and these considerations, we conclude that some strains of NAI are transmissible to humans and, therefore, that AI is a disease that is carried by animals and transmissible to humans, thus posing a danger to human life and health. This leads

[404] WHO, "Avian Influenza", accessed 17 January 2014, <http://www.who.int/mediacentre/factsheets/avian_influenza/en/index.html>.

[405] According to Annex A(3)(b) of the SPS Agreement, the international standards for animal health and zoonoses are those developed under the auspices of the OIE and that one such set of standards, which includes recommendations relating to NAI, is embodied in the Terrestrial Code. The Terrestrial Code defines "disease" as the "clinical and/or pathological manifestation of infection", while referring to "infection" as "the entry and development or multiplication of an infectious agent in the body of humans or animals". Glossary of the Terrestrial Code, pp. 3 and 6.

[406] OIE, "About AI", access 6 March 2014, <http://www.oie.int/animal-health-in-the-world/web-portal-on-avian-influenza/about-ai/>.

[407] Terrestrial Code (21st edition), Article 1.2.3.6.

[408] Online Oxford English Dictionary, accessed 25 February 2014, <http://www.oed.com/view/Entry/28252?rskey=tMzpMj&result=3#eid>.

[409] FAO, "Avian Flu is …", accessed 17 January 2014, <http://www.fao.org/avianflu/en/background.html>; Causey & Edwards, (Exhibit US-14), p. S29.

[410] FAO, "How is avian influenza transmitted?", accessed 17 January 2014, <http://www.fao.org/avianflu/en/qanda.html#7>, (Exhibit US-28); Swayne & Halvorson, (Exhibit US-6), p. 165; CFSPH, (Exhibit US-32), p. 3.

[411] The OIE defines a zoonosis as "any disease or infection which is naturally transmissible from animals to humans". Glossary of the Terrestrial Code, p. 13.

[412] WHO, "Avian Influenza", accessed 17 January 2014, <http://www.who.int/mediacentre/factsheets/avian_influenza/en/index.html>; WHO, "Avian influenza in humans", accessed 17 January 2014, <http://www.who.int/influenza/human_animal_interface/avian_influenza/en/> (Exhibit US-36).

[413] United States' first written submission, paras. 41-45; India's response to Panel question No. 4(a) and No. 4(b); OIE's response to Panel question No. 3; Cox & Uyeki, (Exhibit US-37), pp. 454-455; Swayne, Control Strategies, (Exhibit US-24), p. 294; D. Swayne and C. Thomas, "Trade and Food Safety Aspects for Avian Influenza Viruses", in D. Swayne (ed.) *Avian Influenza* (Blackwell Publishing, 2008) (Swayne & Thomas) (Exhibit US-31), p. 501; G. Neumann, T. Horimoto, Y. Kawaoka, "Reverse Genetics of Viruses – Applications in Research and Vaccine Design", in H.-D. Klenk, M. Matrosovich, and J. Stech, *Avian Influenza*, (Karger, 2008) (Exhibit US-38). FAO-OIE-WHO Technical Update: Current evolution of avian influenza H5N1 viruses (September 7, 2011) (Exhibit US-41); and WHO, "Human infection with avian influenza A(H7N9) virus – update", accessed 30 March 2014, <http://www.who.int/csr/don/2013_07_20/en/index.html> (Exhibit IND-130).

us to conclude that India's AI measures are applied to protect human life or health from a disease carried by animals within the meaning of Annex A(1)(c) of the SPS Agreement.

7.152. Finally, we turn to Annex A(1)(b), which does not refer to "diseases". Rather, this provision concerns the protection of human or animal life or health from risks arising from "additives, contaminants, toxins or disease-causing organisms" that may be present in "foods, beverages or feedstuffs". It is our understanding that AI viruses may be characterized as "disease-causing organisms". Indeed, as described in section 2.2.2 above, AI viruses may cause disease, the likelihood of which is contingent on whether the virus strain in question is HPAI or LPAI. Whereas HPAI viruses are extremely infectious and lead to necrobiotic, haemorrhagic or inflammatory lesions in multiple visceral organs, the brain and skin of infected birds[414], LPAI viruses may be asymptomatic or have very mild symptoms, including ruffled feathers, reduced egg production, or mild effects on the respiratory system.[415] In addition, LPAI viruses can mutate into HPAI viruses, which, as noted above, cause more severe forms of the disease. Accordingly, we understand that AI viruses may cause disease. We therefore believe that India's measures may be classed as those that are applied to protect against risks arising from disease-causing organisms within the scope of Annex A(1)(b) of the SPS Agreement.

7.153. We note that Annex A(1)(a) also addresses the protection of animal life or health from risks arising from the entry, establishment or spread of, *inter alia,* disease-causing organisms. Accordingly, measures applied to protect against risks from AI viruses also fall within the scope of Annex A(1)(a) of the SPS Agreement on this basis.

7.154. On the basis of the foregoing, the Panel concludes that India's AI measures are measures applied for the protection of animal and human life or health from risks arising from the entry and spread of AI as well as from risks of AI viruses in food and feedstuffs. The Panel therefore finds that India's AI measures are SPS measures falling within the definitions in Annex A(1)(a) through (c) of the SPS Agreement.

7.3.2.4 Whether India's AI measures directly or indirectly affect international trade

7.155. The Panel will now consider the second requirement of Article 1.1 of the SPS Agreement identified in paragraph 7.136 above; namely, whether India's measures directly or indirectly affect international trade.

7.156. Both parties are in agreement that India's AI measures directly affect international trade. In particular, the United States refers to the finding of the panel in *EC – Hormones* and argues that because India's measures prohibit the importation of the relevant products from the United States, "[i]t cannot be contested tha[t] an import ban affects international trade".[416] Furthermore, India acknowledges that both the Livestock Act and S.O. 1663(E) affect international trade within the meaning of Article 1 of the SPS Agreement.[417]

7.157. We agree with the approach of the panel in *EC – Hormones* cited by the United States and consider that an import ban such as the one imposed by India's AI measures affects international trade.[418] Indeed, an import ban is, by its very nature, intended to affect international trade.

7.158. Consequently, the Panel concludes that India's AI measures, being those measures that "prohibit the importation of various agricultural products into India from those countries reporting [NAI]"[419] directly affect international trade.

[414] Swayne & Suarez, (Exhibit US-19), p. 463.
[415] OIE "What is Avian Influenza?", accessed 28 January 2014, <http://www.oie.int/fileadmin/Home/eng/Media_Center/docs/pdf/Disease_cards/AI-EN.pdf>, (Exhibit US-23), p. 3.
[416] United States' first written submission, para. 102.
[417] India's response to Panel question No. 14.
[418] Panel Reports, *EC – Hormones (Canada)*, para. 8.26; *EC – Hormones (US)*, para. 8.23.
[419] Panel's Preliminary Ruling of 22 May 2013, paras. 3.33-3.34 and 4.1a.

7.3.3 Conclusion

7.159. Having determined that India's AI measures fall within the definitions set out in Annex A(1)(a) through (c) of the SPS Agreement, that they qualify as either "laws", "decrees" or "regulations" listed in the second sentence of Annex A(1), and that they affect international trade, the Panel finds that India's AI measures are SPS measures subject to the disciplines of the SPS Agreement.

7.160. We therefore proceed to examine the United States' claims under the SPS Agreement and commence with the claim pursuant to Article 3.1 of the SPS Agreement.

7.4 Whether India's AI measures are inconsistent with Article 3.1 of the SPS Agreement

7.4.1 Arguments of the parties

7.4.1.1 United States

7.161. The United States claims that India's AI measures are inconsistent with India's obligations under Article 3.1 of the SPS Agreement because they are not "based on" the relevant international standards, guidelines, or recommendations of the OIE, nor are they in accordance with Article 3.3 of the SPS Agreement.[420]

7.162. The United States submits that Article 3.1 imposes a positive obligation on a Member to base its measures on international standards unless the Member's measure is justified through another provision of the SPS Agreement.[421] According to the United States, both parties to this dispute agree that the relevant standard is the Terrestrial Code adopted by the OIE.[422] The United States contends that India's measures are not based on the Terrestrial Code.[423] The United States observes that "[w]hereas the OIE's recommendations provide that various products can be in fact imported with the proper control measures, India has chosen to ban those products outright".[424] Moreover, for the United States, while the OIE encourages countries to consider principles such as regionalization – i.e. limiting the territory to which a measure need be applied – India categorically rejects this consideration.[425]

7.163. The United States submits that a defining characteristic of the Terrestrial Code is that it distinguishes between HPNAI and LPNAI with respect to trade. The United States argues that India's measures deny such a distinction and impose a complete ban for certain products "regardless of whether the country is reporting HPNAI and LPNAI".[426] The United States further explains that the Terrestrial Code allows trade to occur from countries reporting LPNAI – and even HPNAI – with respect to a particular product if the appropriate control measure is applied. It contends that "[f]or every product banned by India, there is either an applicable OIE recommendation explaining how trade can be facilitated or no recommendation at all".[427] According to the United States, "[a]t no point in the [Terrestrial] Code is there any suggestion that the relevant product should be categorically prohibited from trade".[428] The United States observes that "[i]n short, the [Terrestrial] Code allows trade; India's measures do not".[429]

7.164. The United States notes that to "base something on" is defined as to "use as the foundation for".[430] It also asserts that whether or not a particular measure is "based on" an international standard is necessarily a case-by-case evaluation. According to the United States, for a measure to be "based on" a standard in the Terrestrial Code, "the measure must adopt the basic

[420] United States' request for the establishment of a panel, p. 2.
[421] United States' first written submission, para. 127.
[422] United States' opening statement at the first meeting of the Panel, paras. 2 and 5.
[423] United States' first written submission, para. 128.
[424] United States' first written submission, para. 12.
[425] United States' first written submission, para. 12.
[426] United States' first written submission, para. 128.
[427] United States' first written submission, para. 128.
[428] United States' first written submission, para. 128.
[429] United States' first written submission, para. 128.
[430] United States' response to Panel question No. 30 (referring to Concise Oxford Dictionary, p. 110 (Exhibit US-139)).

structure of the recommendation, and not contain elements that contradict the standard".[431] According to the United States, given the facts of this dispute, India's measures are so inconsistent with the Terrestrial Code that under no possible interpretation of "based on" could India's measure be seen to meet the condition in Article 3.1 of the SPS Agreement.[432]

7.165. The United States observes that India's assertion that its measures are based on international standards is flawed because India is not pointing to actual recommendations that its measures embody.[433] For the United States, there is no basis in the Terrestrial Code or in the record of the dispute to support any argument that India's measures are based on international standards. First, India has not "adopted" any recommendations of the Terrestrial Code. Second, India's measures either prohibit products for which there is no recommendation in the Terrestrial Code, such as live pigs, or prohibit the importation of products that the recommendation explicitly provides can be imported. Accordingly, the United States submits that "India's measures, at best, are either unsupported by the [Terrestrial] Code's recommendations or in outright contravention of them", and "[u]nder these circumstances, India cannot claim that its measures are based on international standards, guidelines, or recommendations in accordance with Article 3.1".[434]

7.166. As regards India's defence under Article 3.2 of the SPS Agreement, the United States avers that an examination of the plain text of the Terrestrial Code in comparison to India's measures shows that India's measures do not conform to the Code. India's measures prohibit the importation of products because of concerns relating to AI, while the Terrestrial Code provides that these same products can, in fact, be safely imported.[435]

7.167. The United States points out that according to Article 3.2 of the SPS Agreement, "a Member's standards that conform to the applicable international standards enjoy a presumption of consistency with the SPS Agreement". For the United States, central to this provision is the use of the term "conform", which in the light of the Appellate Body's findings in *EC – Hormones* means that the Member's measure must match the international standard "completely".[436] According to the United States, a WTO Member that "picks and chooses" those standards and recommendations it prefers is not entitled to the presumption. The United States submits that as India's measures are not consistent with, let alone conforming to, the Terrestrial Code, India is unable to invoke Article 3.2 as a defence to the United States' claims.[437]

7.168. The United States asserts that India's measures amount to a "fundamental departure" from the Terrestrial Code, as the relevant recommendations in the Code do not support import prohibitions, but actually provide that the products can be safely imported with the proper precautions or control measures.[438] Moreover, the United States points out that for two products subject to India's measures, namely, (1) live pigs and (2) pathological material and biological products from birds, there are no relevant international standards; and thus for those products India has no basis to make a claim of conformity with international standards under Article 3.2.[439]

7.169. The United States refers to India's assertion that the Terrestrial Code contains alternate recommendations offering different levels of protection, and submits that nothing in the Terrestrial Code's text supports that proposition. For the United States, "[e]ssentially, India suggests that the Code constitutes a menu from which countries can pick a recommendation based on their particular [appropriate level of protection (ALOP)]".[440] According to the United States, this is not how the Code works, as the provision that applies to a situation hinges on the disease status of the exporting country and the product that is being exported.[441]

[431] United States' response to Panel question No. 30.
[432] United States' response to Panel question No. 30.
[433] United States' second written submission, para. 30.
[434] United States' second written submission, para. 31.
[435] United States' opening statement at the first meeting of the Panel, para. 5.
[436] United States' first written submission, para. 108 (referring to Appellate Body Report, *EC – Hormones*, paras. 170-171).
[437] United States' first written submission, para. 108.
[438] United States' second written submission, para. 10.
[439] United States' second written submission, para. 10, footnote 6.
[440] United States' closing statement at the first meeting of the Panel, para. 3.
[441] United States' closing statement at the first meeting of the Panel, para. 3.

7.170. According to the United States, India interprets a recommendation not to impose import prohibitions on account of detections of NAI in wild birds as somehow affirmatively recommending bans on imports of poultry products.[442] The United States maintains that "[w]here the [Terrestrial] Code recommends prohibitions, it *explicitly so provides*", as it does with respect to avian chlamydiosis.[443]

7.171. The United States also explains that the recommendations in the Terrestrial Code "are designed to achieve a single, consistent appropriate level of protection, *i.e.*, *an optimal level of animal health security*".[444] Moreover, the United States maintains, the exporting status of a territory is simply a factor to be taken into account in ensuring that the specific recommendation is tailored to achieve that appropriate level of protection. The United States claims that the structure of these recommendations are such that they often allow for trade to continue if the status of the exporting territory changes, by ensuring that an alternative recommendation can take into account the new situation.[445] For the United States, India's assertion that the Terrestrial Code seeks to achieve different ALOPs is at odds with the OIE's own guidance regarding the use of the Code.[446]

7.172. According to the United States, India alleges: (i) that the Terrestrial Code recognizes India's prerogative to set its own ALOP; (ii) that the "exporting status of a country" is an ALOP; and (iii) that the admonition in a particular recommendation, Article 10.4.1.10, not to impose import prohibitions in poultry products on account of NAI detections in wild birds "somehow also means a ban should be undertaken when NAI is detected in poultry".[447]

7.173. The United States notes that with respect to India's first assertion, it generally is not the role of an international standard-setting organization to predetermine a Member's chosen ALOP, and nothing in the Terrestrial Code indicates otherwise. Rather, as recognized in the SPS Agreement, each Member has the right to set its own ALOP.[448] That right, however, is accompanied by an obligation, and where a Member chooses measures that achieve a higher ALOP than that achieved by the international standard, the Member has the obligation to ensure that the measure is supported by scientific evidence. According to the United States, the User's Guide to the Terrestrial Code supports this approach in stating that "[w]here the conditions are more restrictive [than those recommended by the Terrestrial Code], they should be based on a scientific risk analysis conducted in accordance with OIE recommendations".[449]

7.174. For the second assertion, the United States claims that India does not explain how it can be reconciled with the specific text in the Terrestrial Code. Referring to Articles 10.4.7 and 10.4.8 of the Code, the United States highlights that it is clear that the "exporting status" of a country, India's so-called "condition of entry", is not an ALOP (as India claims), but rather a factor to be taken into account in applying any measure.[450] The United States further points to Article 10.4.19 of the Terrestrial Code, applicable to the importation of fresh meat of poultry, to illustrate that the Code foresees instances where the relevant recommendation recognizes that the status of the exporting country is irrelevant with respect to the safe importation of a particular product.[451]

7.175. With respect to India's third assertion, that Article 10.4.1.10 of the Terrestrial Code supports the imposition of a ban, the United States claims that India cannot reconcile its position with the text of the recommendation. First, there is no language in Article 10.4.1.10 suggesting that countries should impose import prohibitions on account of NAI detections in poultry. Second, according to the United States, it is also legally untenable for India to pick only certain aspects of OIE recommendations and successfully invoke Article 3.2 of the SPS Agreement.[452]

7.176. The United States adds that India's failure to establish that its measures conform to the Terrestrial Code also establishes that India has not based its measures on international standards,

[442] United States' closing statement at the first meeting of the Panel, para. 3.
[443] United States' opening statement at the first meeting of the Panel, para. 13. (emphasis original)
[444] United States' second written submission, para. 16. (emphasis original)
[445] United States' second written submission, para. 16.
[446] United States' second written submission, para. 12.
[447] United States' second written submission, para. 17.
[448] United States' second written submission, para. 18.
[449] United States' second written submission, para. 18.
[450] United States' second written submission, para. 19.
[451] United States' second written submission, para. 20.
[452] United States' second written submission, para. 21.

thereby breaching Article 3.1 of the SPS Agreement. Specifically, "because India's arguments rely only on Article [10.4.1.10] of the [Terrestrial] 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 Code".[453]

7.177. The United States further argues that India cannot avail itself of the provisions of Article 3.3 of the SPS Agreement because it lacks a risk assessment. For the United States, "[a]s India lacks a risk assessment consistent with Article 5.1 and 5.2, it cannot invoke Article 3.3 and is thus in breach of Article 3.1".[454] In addition, the United States submits that even absent the failure to conduct a risk assessment, India would be unable to invoke Article 3.3 as a result of its ALOP.[455] With reference to India's NAP, the United States explains that, viewed together with the minimal restrictions on movement of domestic products that India imposes following domestic HPAI outbreaks, it is clear that measures based on the OIE international standard would achieve India's ALOP.[456]

7.4.1.2 India

7.178. India maintains that its AI measures are in conformity with the Terrestrial Code pursuant to Article 3.2 of the SPS Agreement[457] and that, therefore, its measures are presumed to be consistent with the SPS Agreement and the GATT 1994.[458]

7.179. In particular, India argues that the OIE recognizes the prerogative of every Member to set its own level of protection.[459] In India's view, the "condition of entry" an importing country chooses is a decision to be made by the importing country alone and the Terrestrial Code provides full flexibility to an importing country to structure its regime in the manner it deems appropriate. Hence, India argues, "some countries may determine that their appropriate level of protection is met when they import from HPNAI-free compartments even though the exporting country itself is experiencing several HPNAI outbreaks in other parts of the country". India submits that "[t]his would result in an import ban on poultry products from all parts of the country except the recognized compartment when the exporting country reports HPNAI. Others may require the country to be free from both LPNAI and HPNAI which would result in an import ban on poultry products from the exporting country when it notifies HPNAI or LPNAI" while "still others may import only from compartments free from NAI even though the country itself is reporting outbreaks of LPNAI in areas outside the compartment". According to India, "[t]he OIE does not stipulate what level of freedom a country must seek from the exporting country". India submits that the OIE "leaves that choice to the importing country but only recommends sanitary conditions which should be fulfilled by the consignment and which should further be attested to by the veterinary authority of the exporting country".[460]

7.180. India further asserts that, "for all poultry products in one way or another", the standard prescribed in Chapter 10.4 of the Terrestrial Code provides a recommendation for a "condition of entry". And, depending upon an importing country's ALOP, it could "condition the entry" of the specific poultry commodity upon any one of the conditions of entry provided for in the standard. Therefore, depending on the "condition of entry" opted for, poultry products may be allowed from all of the country or some parts of the country. India thus concludes that, pursuant to the Terrestrial Code, "the ban may extend to all of the country or some parts of the country".[461]

7.181. India posits that Article 10.4.1.10 of the Terrestrial Code reinforces the understanding that depending on the importing country's ALOP, if the exporting country notifies either HPNAI or LPNAI the importing country may ban imports.[462] According to India, the standard clearly states that if there is a notification of HPAI and LPAI in birds other than poultry including wild birds, OIE

[453] United States' opening statement at the first meeting of the Panel, para. 14.
[454] United States' first written submission, para. 129.
[455] United States' first written submission, para. 130.
[456] United States' first written submission, para. 131.
[457] India's first written submission, paras. 111 and 136.
[458] India's first written submission, para. 141.
[459] India's first written submission, para. 117; India's second written submission, para. 25.
[460] India's first written submission, para. 119; India's opening statement at the first meeting of the Panel, para. 19.
[461] India's first written submission, para. 120.
[462] India's first written submission, para. 120.

members should not impose an immediate ban on trade in poultry commodities. India further argues that "[t]he standard thus stipulates that if a country notifies HPAI and LPAI in poultry, Member countries can impose [an] immediate ban on trade in poultry commodities depending on the condition of entry they have selected based on the level of protection they have deemed appropriate".[463]

7.182. India thus maintains that, according to the Terrestrial Code, a country may implement one of the "conditions of entry" reflected in the recommendations or it may choose not to condition entry at all. That is, the country may choose not to suspend imports in case of either HPNAI or LPNAI, in which case, all it may require is that the consignment is accompanied with a health certificate as recommended by the OIE. Or, a Member may implement one of the "conditions of entry" and further may choose to implement or not to implement all of the recommendations on the health certificates.[464]

7.183. India further avers that the OIE recommendations contain two risk mitigation conditions. The first suggests that "the product must originate in a free country". The second "requires that the export consignment is additionally accompanied by a veterinary certificate certifying that the export consignment has been rendered risk free through the application of additional control measures".[465] Both conditions ensure that trade in animals takes place with "an optimal level of animal health security".[466] According to India, insisting that the origin of a product be ignored and that India apply only the control measures or veterinary certificate requirements will not ensure an optimal level of health security as there is always a danger of disease introduction in the absence of the application of both risk mitigation conditions.[467]

7.184. India submits that the United States "has adduced claims starting with Article[s] 5.1 and 5.2 and 2.2 specifically alleging that as far as fresh meat of poultry and eggs are concerned there is no scientific basis to maintain a temporary import suspension of the type maintained by S.O. 1663(E)". For India, "by limiting its arguments of India's alleged violation under Article[s] 5.1, 5.2 and 2.2 to eggs and fresh meat of poultry, the United States *ipso facto* accepts that India is in compliance with the [Terrestrial] Code as far as other products under S.O. 1663(E) are concerned".[468] India thus claims that the "United States[']] arguments on deviations from the [Terrestrial] Code where the United States believes India should have conducted a risk assessment are limited to eggs and fresh meat of poultry".[469]

7.185. For example, as regards hatching eggs of poultry, and in reference to Articles 10.4.1.10, 10.4.10 and 10.4.11 of the Terrestrial Code[470], India argues that a country may condition the entry of hatching eggs of poultry either by importing from a NAI-free country, zone or compartment or from a HPNAI-free country, zone or compartment, according to the level of protection it deems appropriate. Thus, for India, clause 1(ii)(d) of S.O. 1663(E), which prohibits the importation of hatching eggs of poultry from countries reporting NAI (HPNAI or LPNAI), "conforms to 10.4.1.10 and Article 10.4.10 as it embodies the standards and converts it into a municipal standard".[471]

7.186. Responding to the United States argument that the Terrestrial Code does not recommend imposing a ban on imports on account of LPNAI, India submits that "[t]his statement is limited as far as LPNAI is concerned".[472] India further deduces that the United States' position changes when it comes to HPNAI, for the United States believes that a ban is justified against countries that report HPNAI in poultry. India alleges that this is particularly evident in the discussion on eggs and fresh meat of poultry. According to India, the evidence relied upon by the United States confirms

[463] India's first written submission, para. 125.
[464] India's first written submission, para. 133.
[465] India's second written submission, para. 19.
[466] India's second written submission, para. 19.
[467] India's second written submission, para. 20.
[468] India's first written submission, para. 137.
[469] India's first written submission, paras. 137 and 135, footnote 180; India's second written submission, para. 41.
[470] India's first written submission, para. 138. There is a similar illustration with respect to Articles 10.4.13 and 10.4.14 of the Terrestrial Code that contain recommendations for imports of eggs for human consumption in India's opening statement at the first meeting of the Panel, paras. 17-21.
[471] India's first written submission, para. 138.
[472] India's second written submission, para. 6.

that imposing bans on countries reporting HPNAI is legitimate and, as a matter of policy, the United States prohibits imports from countries declaring HPNAI (such as India) and the restriction is imposed on a permanent basis.[473]

7.187. India contends that these statements made by the United States establish the latter's belief that the origin of poultry is an important factor for purposes of trade sanctions, such that if the poultry originates from a country that is not free from HPNAI, the importing country may restrict its import. For India, this resonates with its repeated submissions that HPNAI or NAI-freedom requirements in every product-specific recommendation is the first of the risk mitigation conditions (termed as a "condition of entry" by India) contained in the Terrestrial Code, which if not fulfilled entitles the importing country to prohibit imports from such country.[474] India views the distinction made by the United States with respect to HPNAI and LPNAI as surprising because the Terrestrial Code nowhere recommends imposing a ban on account of HPNAI, yet the United States is of the opinion that the very same Code permits a ban on account of HPNAI, but does not permit a ban on account of LPNAI.[475]

7.188. India asserts that it has provided substantive arguments in support of its claim that clauses 1(ii)(c), (d) and (e) of S.O. 1663(E) conform to the product-specific recommendations in the Terrestrial Code (i.e. Articles 10.4.19, 10.4.10, 10.4.13 and 10.4.15 and with Article 10.4.1.10). India also maintains that S.O. 1663(E) pertains to the first risk mitigation condition in the product-specific recommendations, and hence product-specific measures applicable to eggs and fresh meat of poultry contained in S.O. 1663(E) should be evaluated for their conformity with the relevant standard, i.e. the "condition of entry" contained in each standard.[476]

7.189. India further submits that its AI measures are "based on" the Terrestrial Code and are consistent with Article 3.1 "on the same grounds as mentioned under the claim under Article 3.2 of the SPS Agreement".[477] India submits that this is so because "[a] measure that conforms to and incorporates an international standard is of course 'based' on such standard".[478] Moreover, for India, even if the Panel were to find that India's measures do not conform to the Terrestrial Code, they are nevertheless based on the Code.[479]

7.190. According to India, an SPS measure can be found to be "based" on the international standard if it adopts a part of the international standard or is supported by the international standard. India avers that "[i]n such a scenario, the part of the domestic measure which adopts the international standard should have the presumption of 'conforming' to the international standard and be presumed to be consistent with the SPS Agreement", while "[t]hat part of the domestic measure which does not adopt the international standard should be justified under other provisions of the SPS Agreement".[480]

7.191. In addition, India contests the United States' argument whereby "India's measure violated Article 3.1 by not importing imports from zones or compartments".[481] India argues that the Terrestrial Code and the SPS Agreement both permit a country to determine its ALOP. In India's view, the Terrestrial Code permits countries to condition the entry of a poultry product upon the exporting country being free from both HPNAI and LPNAI, and importing countries therefore may "enforce measures which implement NAI country, zone, compartment freedom or HPNAI country, zone, compartment freedom".[482]

[473] India's second written submission, para. 7.
[474] India's second written submission, para. 8.
[475] India's second written submission, para. 9.
[476] India's second written submission, para. 35.
[477] India's first written submission, para. 146.
[478] India's first written submission, para. 115.
[479] India's first written submission, paras. 143 and 146. We note that India presents this argument on an "*arguendo*" basis and "[a]ssuming but not conceding, India's measure is not in conformity with the [Terrestrial] Code".
[480] India's first written submission, para. 145.
[481] India's first written submission, para. 142.
[482] India's first written submission, para. 142.

7.4.2 Analysis by the Panel

7.4.2.1 Introduction

7.192. The question before the Panel is whether India's AI measures are inconsistent with Article 3.1 of the SPS Agreement, as claimed by the United States. In particular, the Panel must assess whether India's AI measures are "based on" a relevant international standard, guideline, or recommendation pursuant to Article 3.1 of the SPS Agreement.[483] In response, India argues that its AI measures "conform to" the Terrestrial Code and that, accordingly, their consistency with both the SPS Agreement and the GATT 1994 is to be presumed pursuant to Article 3.2 of the SPS Agreement.[484]

7.193. Before proceeding to examine the United States' claim, we note India's assertion that the "United States' arguments on deviations from the [Terrestrial] Code where the United States believes India should have conducted a risk assessment are limited to eggs and fresh meat of poultry".[485] We recall our preliminary ruling of 22 May 2013, which, as stipulated in paragraph 7.4 above, forms an integral part of the present findings. In particular, we refer to our finding that the ten categories of products listed in S.O. 1663(E) and the United States' panel request fall within the scope of this dispute.[486] Furthermore, the United States has confirmed to the Panel that its claims, including that pursuant to Article 3.1, concern all the products listed in S.O. 1663(E).[487] Accordingly, we are not persuaded by India's submission that the United States' claim under Article 3.1 of the SPS Agreement pertains only to fresh meat of poultry and eggs.

7.194. We commence our analysis by examining the legal provision at issue in order to ascertain the applicable legal test.

7.4.2.2 The legal provisions at issue

7.195. Article 3 of the SPS Agreement, entitled "Harmonization", reads, in relevant part[488], as follows:

> 1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.
>
> 2. 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.
>
> 3. Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.[2] Notwithstanding the above, all measures which result in a level of sanitary or

[483] The United States also argued that India cannot avail itself of the provisions of Article 3.3 of the SPS Agreement because it lacks a risk assessment in violation of Articles 5.1 and 5.2 of the SPS Agreement (United States' first written submission, para. 129). We do not address these arguments in our analysis because India does not invoke Article 3.3 of the SPS Agreement.

[484] India's first written submission, para. 141.

[485] India's first written submission, para. 137; India's first written submission, para. 135, footnote 180; India's second written submission, para. 41.

[486] WT/DS430/5, paras. 3.27-3.30, 3.37, 3.92-3.93 and 3.140.

[487] United States' response to Panel question No. 12(e).

[488] Article 3 includes two additional paragraphs: Article 3.4, which provides that "Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies"; and Article 3.5, which reads that the WTO SPS Committee "shall develop a procedure to monitor the process of international harmonization and coordinate efforts in this regard with the relevant international organizations". These paragraphs are not at issue in the present dispute.

> phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provision of this Agreement.
>
> (footnote original) [2] For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

7.196. The first three paragraphs of Article 3 of the SPS Agreement set out the obligation of Members to harmonize[489] their SPS measures by either basing them on or conforming them to international standards, while leaving open some leeway for departing from those standards, subject to consistency with the remainder of the SPS Agreement.

7.197. The interplay of these three paragraphs, including whether a measure is "based on" or "conform[s] to" an international standard, is highly relevant to the present dispute. The Appellate Body explained in *EC – Hormones* the relationship between these paragraphs as follows:

> Under Article 3.2 of the *SPS Agreement*, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the *SPS Agreement* and of the GATT 1994.
>
> Under Article 3.1 of the *SPS Agreement*, a Member may choose to establish an SPS measure that is based on the existing relevant international standard, guideline or recommendation. Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2; but, as earlier observed, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a *prima facie* case of inconsistency with Article 3.1 or any other relevant Article of the *SPS Agreement* or of the GATT 1994.
>
> Under Article 3.3 of the *SPS Agreement*, a Member may decide to set for itself a level of protection different from that implicit in the international standard, and to implement or embody that level of protection in a measure not "based on" the international standard. The Member's appropriate level of protection may be higher than that implied in the international standard. The right of a Member to determine its own appropriate level of sanitary protection is an important right.[490]

7.198. The Appellate Body thus defined three separate scenarios. The first scenario is where a Member adopts an SPS measure that embodies an international standard completely and thus "conforms to" such standard, as provided in Article 3.2. In that case, the conforming SPS measure benefits from a rebuttable presumption of compliance with the SPS Agreement and the GATT 1994.

7.199. The second scenario is where the SPS measure adopts some, but not all, of the elements of that standard. In this case, the SPS measure would not "conform to" the standard but rather would be "based on" it, as provided in Article 3.1. The SPS measure would thus not benefit from

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[489] In *EC – Hormones,* the Appellate Body explained that:
> In generalized terms, the object and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people. The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both 'necessary to protect' human life or health and 'based on scientific principles', and without requiring them to change their appropriate level of protection.

Appellate Body Report, *EC – Hormones*, para. 177.

[490] Appellate Body Report, *EC – Hormones*, paras. 170-172.

the above presumption of compliance but, as clarified by the Appellate Body, the burden of proof would still lie on a complainant to make a *prima facie* case of violation of Article 3.1.

7.200. Finally, as a third scenario, a Member may decide to deviate from the recommendations of an international standard and adopt an SPS measure which results in a higher level of protection than the one prescribed in the standard, as provided in Article 3.3. In this case, the Member must ensure that its measure is consistent with the other relevant provisions of the SPS Agreement. This would entail, for instance, the need to base the SPS measure on science, including having a risk assessment in accordance with Articles 5.1 and 5.2 of the SPS Agreement.

7.201. The Appellate Body has clarified that there is no "general rule – exception" relationship between the three relevant paragraphs of Article 3. Accordingly, these three alternative scenarios are equally available to WTO Members.[491]

7.202. In *EC – Hormones*, the Appellate Body defined the terms "based on" and "conform to" as forming concentric circles. It found that "[a] measure that 'conforms to' and incorporates a … standard is, of course, 'based on' that standard".[492] A measure that is "based on" a standard may not necessarily "conform to" that same standard, as some elements of the standard may not be present in the measure at issue. Indeed, while it may be sufficient to adopt only *some* of the elements of an international standard for the measure to be "based on" such standard, Article 3.2 requires that an SPS measure embodies the standard completely to be said to "conform to" it. Hence, the language in Article 3.1 whereby an SPS measure may be "based on" an international standard establishes a less rigorous threshold than that contemplated in Article 3.2 ("conform to"). We understand this to mean that failure to meet the "based on" threshold in Article 3.1 would also result in not meeting the more rigorous "conform to" threshold in Article 3.2.

7.203. With this approach in mind, we proceed to examine India's AI measures. As noted above, India claims that its AI measures conform to an international standard and hence it relies on Article 3.2. Given that the "based on" threshold in Article 3.1 is lower than the "conform to" threshold in Article 3.2, we will examine first whether India's AI measures meet the lower threshold. If they do, we will then proceed to examine whether they meet the higher threshold. If India's AI measures do not meet the lower threshold, it will not be necessary to examine whether the measures meet the higher threshold, for it would be clear that they do not.

7.4.2.2.1 Whether India's AI measures are based on an international standard pursuant to Article 3.1 of the SPS Agreement

7.204. In order to ascertain whether India's AI measures are based on an international standard pursuant to Article 3.1 of the SPS Agreement, we need to establish whether a relevant international standard exists for AI. If the answer is in the affirmative, we will proceed to examine the meaning and the scope of the relevant recommendations of that international standard, and whether India's AI measures are "based on" these recommendations within the meaning of Article 3.1 of the SPS Agreement.

7.4.2.2.1.1 Whether an international standard for AI exists

7.205. In determining whether an international standard for AI exists, we concur with the panels' reasoning in *EC – Hormones* that, in establishing whether or not a Member has an obligation to base its SPS measure on international standards in accordance with Article 3.1, a panel need only determine whether such standard exists; we do not need to consider the levels of protection or types of SPS measures recommended by the standard, the consensus behind it, or its adoption process.[493]

[491] The Appellate Body explained that "this right of a Member to establish its own level of sanitary protection under Article 3.3 of the *SPS Agreement* is an autonomous right and *not* an 'exception' from a 'general obligation' under Article 3.1". (emphasis original) Appellate Body Report, *EC – Hormones*, para. 172.

[492] Appellate Body Report, *EC – Hormones*, para. 163.

[493] Panel Reports, *EC – Hormones (Canada)*, para. 8.72; and *EC – Hormones (US)*, para. 8.69.

7.4.2.2.1.2 The Terrestrial Code as the relevant international standard for AI

7.206. In the present case, both parties agree that the relevant international standard in this dispute is the Terrestrial Code.[494] As explained by the Appellate Body in *US/Canada – Continued Suspension*, "[t]he relevant 'international standards, guidelines or recommendations' that are referred to in Articles 3.1 and 3.2 are those set by the international organizations listed in Annex A, paragraph 3 of the *SPS Agreement*"[495], which includes the OIE as the relevant standard-setting organization for matters of animal health and zoonoses.[496] As described in section 2.4.5.1 above, the OIE develops international standards to deal with aspects of SPS measures as they relate to animal health including, but not limited to, their effects on human health. One such set of standards, which includes recommendations relating to AI, is embodied in the Terrestrial Code. The Terrestrial Code and, in particular, Chapter 10.4 thereof, is, as confirmed by the OIE[497], the only international standard for AI.[498] We therefore endorse the parties' view that the relevant international standard for the purpose of this dispute is the Terrestrial Code.

7.4.2.2.1.3 The relevant edition of the Terrestrial Code for the purpose of this dispute

7.207. As described in section 2.4.5.2 above, the Terrestrial Code is reviewed on an annual basis; new editions are adopted by the World Assembly of the Delegates of OIE members each year in May, and become publicly available in June or July of the same year. Accordingly, given the facts in this dispute and the parties' arguments, there are three editions that may be of relevance for the purposes of this dispute, namely (i) the 20th edition, adopted in May 2011, which was the edition of the Terrestrial Code in force at the time of adoption of S.O. 1663(E) on 19 July 2011; (ii) the 21st edition, adopted in May 2012, which was the edition of the Terrestrial Code in force at the time of the establishment of this Panel on 25 June 2012; and (iii) the 22nd edition, adopted in May 2013, which is the edition of the Terrestrial Code in force during the deliberations of this Panel. Each of these editions, and most particularly the 22nd edition[499], differs to a certain extent in the language and structure of the recommendations in Chapter 10.4.[500]

7.208. The question arises regarding which of these editions we should consider as being the relevant international standard for the purpose of this dispute. The Panel sought the parties' views in this respect. The United States is of the view that the relevant edition is the 21st edition because it was the edition in force at the time of the establishment of the Panel.[501] Whilst not objecting to

[494] For instance, United States' first written submission, paras. 127-128; United States' opening statement at the first meeting of the Panel, paras. 2 and 5; India's first written submission, paras. 114, 119-123 and 136.

[495] Appellate Body Reports, *US/Canada – Continued Suspension*, para. 693.

[496] Annex A(3)(b) of the SPS Agreement provides that "for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics". The International Office of Epizootics is now known as the World Animal Health Organization although it kept its historical French acronym, OIE. More information about the OIE can be found in section 2.4.5.1 above.

[497] OIE's response to Panel question No. 6.

[498] The Terrestrial Code is a complex document. It consists of two volumes, numerous sections and several chapters. Not all of the recommendations provided in the Code are relevant to India's AI measures. Chapter 10.4 in Volume II of the Terrestrial Code, entitled "Infection with viruses of notifiable avian influenza", addresses the management of health risks associated with infection caused by NAI viruses and provides product-specific recommendations in this regard. Thus, as far as India's AI measures are concerned, the recommendations provided in Chapter 10.4 are directly relevant.

[499] OIE, "Terrestrial Animal Health Code", accessed 31 March 2014, <http://www.oie.int/international-standard-setting/terrestrial-code>.

[500] For instance, Article 10.4.1.1, concerning notifications, is only present in the 21st edition and no equivalent provision appears in the 20th and 22nd editions. Another example is the use of the term "NAI" in both the 20th and 21st editions, while the 22nd edition only refers to AI. Nevertheless, the OIE confirmed that the modifications introduced in the 22nd edition did not result in any significant changes to the requirements. OIE's response to Panel question No. 3.

[501] In its first written submission, the United States referred to the 21st edition of the Terrestrial Code, formally adopted by the World Assembly of the Delegates of the OIE members in 2012, which was the latest edition at that time of the establishment of the Panel. However, also in its first written submission, the United States relied on the Glossary of the 19th edition of the Terrestrial Code (adopted in 2010 with respect to the meanings of certain terms. During the first substantive meeting, in response to a question from the Panel, the United States clarified that the first written submission had erroneously referred to the glossary of the 19th edition of the Terrestrial Code. The United States requested the Panel to refer only to the 21st edition of the Terrestrial Code as the relevant international standard because that edition was in force at the time of establishment of the Panel. United States' response to Panel question No. 10(a); United States' first written

the Panel referring exclusively to the 21st edition for the purposes of the present dispute, India pointed out that the edition of the Terrestrial Code that was in force at the time of adoption of S.O. 1663(E) was the 20th edition.[502]

7.209. We note that, to date, no panel or Appellate Body report has specifically addressed the issue of the relevant edition of an international standard for the purposes of assessing claims raised under the SPS Agreement. In examining the existing jurisprudence under the SPS Agreement, we note that SPS measures are to be reviewed in the light of the latest available scientific evidence and not judged in the light of the scientific evidence available at the time of their adoption if this has become obsolete. For instance, the panel in *Japan – Apples* urged parties not to lose sight of the purpose of a risk assessment as the basis for regulatory action and hence the need for this assessment to be renewed in view of new scientific evidence.[503]

7.210. We believe that, in the circumstances of this case, the same principle may be applied to the determination of the relevant edition of the international standard. Similarly to the panel in *Japan – Apples*, in our view, it is appropriate for the Panel to examine the United States' claim under Article 3.1 of the SPS Agreement in the light of the edition of the Terrestrial Code that reflects the latest science. As explained by the OIE, the Terrestrial Code is updated on an annual basis to reflect any changes in available scientific evidence. As the OIE describes, the various bodies of the OIE collaborate closely with each other "to ensure the recommendations contained in the Terrestrial Code are based upon the latest scientific information".[504] The Code Commission draws upon the expertise of internationally renowned specialists to prepare draft texts for new articles of the Terrestrial Code or to revise existing articles "*in the light of advances in veterinary science*".[505] Accordingly, the latest edition of the Terrestrial Code, the 22nd edition, is the edition that reflects the latest science at the time of making these findings, as included in the Interim Report of the Panel.

7.211. However, we must bear in mind that any changes to the 21st edition that were reflected in the 22nd edition were not known by the parties at the time of establishment of the Panel. Moreover, were the panel process to be delayed for any number of reasons, including where the complainant requested suspension for a matter of months under Article 12.12 of the DSU, it is possible that the 23rd edition would be current at the time our findings are issued, and that the science could have changed from what it is today. In our view, to determine that the prism through which the respondent's measure will be judged is, in effect, a moving target would offend the fundamental principle of due process as the complainant and the respondent have a right to know with some certainty the standard against which the measures will be assessed in this panel process. In other words, the scope of this dispute cannot expand or contract depending upon the science that informs the Terrestrial Code as the dispute moves through its various procedural steps. Under the circumstances, we believe that this Panel should determine which edition reflects

submission, para. 3, footnote 6, para. 62, footnote 90 (referring to Chapters 4.3, 4.4 and 10.4 of the 21st edition of the Terrestrial Code in Exhibits US-1, US-50, US-51), para. 4, footnote 7 (referring to the Glossary of the 19th edition of the Terrestrial Code in Exhibit US-2).

[502] In its first written submission, India referred to the 21st edition of the Terrestrial Code. For instance, India's first written submission, para. 3, footnote 5, and para. 20, footnote 30 (referring to Exhibits US-1 and US-50). During the first substantive meeting, in response to a question from the Panel, India responded that "[t]he OIE Terrestrial Code which was in effect when S.O. 1663(E) was promulgated was the 20th Edition of the Terrestrial Code including the Glossary. But the United States has referred to Chapter 10.4 of the 21st edition. India has no objection to reliance on the 21st as the relevant international standard for trade in poultry commodities from NAI countries". India's response to Panel question No. 10(a).

[503] The panel reasoned as follows:

> One must not lose sight of the purpose of a risk assessment, which is to serve as a basis for regulatory actions. If the scientific evidence evolves, this may be an indication that the risk assessment should be reviewed or a new assessment undertaken. It would be also legally inconsistent to require, on the one hand, that phytosanitary measures not be maintained without sufficient scientific evidence pursuant to Article 2.2 while, on the other hand, accepting that risk assessments not be renewed in the face of new scientific evidence.

Panel Report, *Japan – Apples*, para. 7.12.

[504] OIE's response to Panel question No. 3.

[505] OIE's response to Panel question No. 3. (emphasis added)

the latest science at a point in time that would not only allow the complainant to make its case, but would also avail the respondent of the opportunity to defend itself.[506]

7.212. We recall that the panel request sets our terms of reference and thus informs the respondent of the case to which it must respond.[507] With this in mind, we should identify the edition of the Terrestrial Code in force at the time of the establishment of the Panel.

7.213. The edition that was in force at the time of the establishment of this Panel is the 21st edition adopted in May 2012. Therefore, we determine that relevant edition of the Terrestrial Code for the purpose of our examination of the United States' claim pursuant to Article 3.1 of the SPS Agreement is the 21st edition of the Terrestrial Code.

7.4.2.2.2 Whether the Terrestrial Code provides AI recommendations for all the products covered by India's AI measures

7.214. We now proceed to examine the United States' contention that the Terrestrial Code does not include recommendations related to AI for all of the products covered by India's AI measures.

7.215. According to the United States, the Terrestrial Code does not apply to two of the categories of products listed in S.O. 1663(E), namely, (i) live pigs and (ii) pathological material and biological products from birds. For the United States, there are no relevant international standards applicable to these two categories of products and thus India has no basis to make a claim of conformity with international standards under Article 3.2 of the SPS Agreement in respect of these products.[508]

7.216. India responds that its assertion that India's measures are in conformity with the Terrestrial Code is limited to standards pertaining to eggs and fresh meat of poultry as "it is evident that the United States claims pertain only to these products".[509] As explained in paragraph 7.193 above, further to our preliminary ruling of May 2013, we are not persuaded that the United States' claim under Article 3.1 of the SPS Agreement pertains only to fresh meat of poultry and eggs.

7.217. We recall that the products covered by S.O. 1663(E) are the following:

(a) domestic and wild birds (including poultry and captive birds);

(b) day old chicks, ducks, turkey, and other newly hatched avian species;

(c) un-processed meat and meat products from avian species, including domesticated, wild birds and poultry;

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[506] This view sits comfortably with long-standing jurisprudence whereby due process demands that the measure at issue is not turned into a "moving target" through constant legislative or regulatory changes. We recall the Appellate Body's oft-cited statement in *Chile – Price Band System* that "generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'". Appellate Body Report, *Chile – Price Band System,* para. 144. We also find useful guidance in the approach adopted by the panel in *EC – Approval and Marketing of Biotech Products*, when considering the requirement under Article 5.1 of the SPS Agreement that a risk assessment be "appropriate to the circumstances". In that dispute, the panel decided that it would conduct its analysis by examining the circumstances that existed at the time of establishment of the panel. The panel reasoned:

> What matters is that the relevant risk assessment was appropriate to the circumstances existing at the time this Panel was established. In the light of this, in our analysis of whether there are risk assessments on which individual safeguard measures were based at the relevant time, we will consider assessments which were carried out before these measures were adopted as well as assessments which were carried out after these measures were adopted.

Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3034.

[507] Appellate Body Report, *China – Raw Materials*, paras. 219, 220 and 233 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22; *US – Carbon Steel*, paras. 125 and 126; *Australia – Apples*, para. 416; *Guatemala – Cement I*, paras. 72 and 73; *US – Continued Zeroing*, para. 160; *US – Zeroing (Article 21.5 – Japan)*, para. 107; and *EC and certain member States – Large Civil Aircraft*, paras. 786); Appellate Body Report, *Thailand – H-Beams*, para. 88.

[508] United States' second written submission, para. 10, footnote 6.

[509] India's first written submission, para. 135, footnote 180, and para. 137; India's second written submission, para. 41.

(d) hatching eggs;

(e) eggs and egg products (except Specific Pathogen Free eggs);

(f) un-processed feathers;

(g) live pigs;

(h) pathological material and biological products from birds;

(i) products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use; and

(j) semen of domestic and wild birds including poultry.[510]

7.218. With respect to "pathological material and biological products from birds", although paragraph (1)(ii)(h) above prohibits their importation, paragraph (2)(ii) of S.O. 1663(E) exempts from the prohibition "the import of pathological materials and biological products for use in research purposes exclusively used by the National Referral Laboratories". Accordingly, S.O. 1663(E) prohibits the importation of "pathological material and biological products from birds" that are not exclusively used by the National Referral Laboratories for research purposes.

7.219. In response to the Panel's questions, the OIE confirmed that "[a]ll standards for avian influenza relating to products are in Chapter 10.4" of the Terrestrial Code.[511] Specifically, the OIE confirmed that Chapter 10.4 includes specific recommendations on the health measures that should be applied due to concerns related to AI when importing the following products:

a. live *poultry* (as defined) in Article 10.4.5

b. live birds other than poultry (Article 10.4.6)

c. day-old live poultry (Articles 10.4.7 and 10.4.8)

d. day-old live birds other than poultry (Article 10.4.9)

e. hatching eggs of poultry (Articles 10.4.10 and 10.4.11)

f. hatching eggs of birds other than poultry (Article 10.4.12)

g. eggs for human consumption (Articles 10.4.13 and 10.4.14)

h. egg products (Article 10.4.15)

i. poultry semen (Articles 10.4.16 and 10.4.17)

j. semen of birds other than poultry (Article 10.4.18)

k. fresh meat of poultry (Article 10.4.19)

l. meat products of poultry (Article 10.4.20)

m. products of poultry origin other than feather meal and poultry meal, intended for use in animal feeding, or for agricultural or industrial use (Article 10.4.21)

n. feathers and down of poultry (Article 10.4.22)

o. feathers and down of birds other than poultry (Article 10.4.23)

[510] Annex-A to India's request for a preliminary ruling and Exhibit US-80.
[511] OIE's response to Panel question No. 6.

p. feather meal and poultry meal (Article 10.4.24).[512]

7.220. Comparing this list of products with the product coverage of S.O. 1663(E), we observe that the list of products in Chapter 10.4 includes eight of the ten categories of products listed in S.O. 1663(E). The two categories included in S.O. 1663(E) but not in the list of products covered by Chapter 10.4 are "live pigs" and "pathological material and biological products from birds".

7.221. The OIE confirmed that Chapter 10.4 contains no product specific recommendations for live pigs.[513] The OIE clarified that the Terrestrial Code does not include specific AI recommendations with respect to the importation of pigs "because even if they can be infected, they have been found not to play a significant epidemiological role in avian influenza".[514] On the basis of the evidence before us, the Panel understands that there is no relevant international standard for AI that would cover live pigs. Accordingly, we agree with the United States that there is no relevant international standard for AI applicable to live pigs.

7.222. Likewise, the OIE confirmed that Chapter 10.4 contains no product specific AI recommendations for "pathological material and biological products from birds".[515] The OIE explained that this is because the risk presented by these products is covered by Chapter 5.8 of the Terrestrial Code entitled "International transfer and laboratory containment of animal pathogens".[516] Chapter 5.8 of the Terrestrial Code deals with the international transfer and laboratory containment of animal pathogens, pathological materials or organisms carrying the pathogens. For instance, Article 5.8.4.1 provides the recommendations with respect to the importation of any animal pathogen, pathological material or organisms carrying the pathogen, which "should be permitted only under an import licence issued by the relevant authority". The Glossary of the Terrestrial Code defines "pathological material" as "samples obtained from live or dead animals, containing or suspected of containing infectious or parasitic agents, to be sent to a laboratory". We do not see any reference to "biological products" in Chapter 5.8. Nor is this term defined in the Glossary.

7.223. Chapter 5.8 of the Terrestrial Code does not contain any reference to AI or to NAI, and thus does not deal specifically with the international transfer or laboratory containment of AI pathogens or pathological materials from birds. Hence, as the OIE explained, Chapter 5.8 does not specifically address AI. Nevertheless, we will examine whether Chapter 5.8 of the Terrestrial Code could be considered as the relevant international standard for pathological materials of birds for the purpose of Article 3 of the SPS Agreement.

7.224. The recommendations in Chapter 5.8 speak, *inter alia*, of laboratory containment of pathological materials. In fact, the definition of pathological materials in the Glossary refers to these materials being destined for laboratories. We note that the exception to the import prohibition in paragraph (2)(ii) of S.O. 1663(E) is with regard to pathological materials destined for "National Reference Laboratories". Hence, India exempts from the import prohibition pathological materials destined for those laboratories. Given the absence of evidence before us, however, we are not in a position to determine whether this exception in paragraph (2)(ii) of S.O. 1663(E) corresponds to the recommendations of Chapter 5.8. Indeed, we have no information concerning how this exception is implemented. For instance, we do not know, nor has it been explained to us, whether there is a licensing system in place that corresponds to that described in Article 5.8.4.1 of the Terrestrial Code. The lack of information on the record is consistent with the absence of argumentation by the parties on this matter, even in the face of the Panel's queries about the product scope of Chapter 10.4 compared with that of S.O. 1663(E).[517] India had the opportunity to respond to the United States' contention that there is no relevant international standard for these materials; it did not do so. The Panel gave India the opportunity to comment on the OIE's responses to the Panel's questions in this regard. India did not avail itself of this opportunity.

[512] OIE's response to Panel question No. 5.
[513] OIE's response to Panel question No. 5.
[514] OIE's response to Panel question No. 6.
[515] OIE's response to Panel question No. 5.
[516] OIE's response to Panel question No. 6.
[517] For instance, Panel question Nos. 6, 28(a), 28(b), 28(c).

7.225. On the basis of the foregoing, we conclude that there is no product-specific recommendation in Chapter 10.4 of the Terrestrial Code for pathological materials. Furthermore, even in the event that Chapter 5.8 of the Terrestrial Code could be considered as the relevant international standard in respect of pathological materials for birds for the purpose of Article 3 of the SPS Agreement, we do not have sufficient evidence on the record to allow us to carry out an examination as to whether India's AI measures in respect of pathological materials from birds are based on the recommendations of Chapter 5.8 of the Terrestrial Code.

7.226. In addition to pathological materials, S.O. 1663(E) also prohibits "biological products from birds" and exempts those destined for National Reference Laboratories. The Panel has not been able to discern the meaning of this term in the context of S.O. 1663(E). As mentioned in paragraph 7.222 above, Chapter 5.8 does not contain any reference to biological products. Accordingly, bearing in mind the absence of evidence before us, we conclude that there is no product-specific recommendation in Chapter 10.4 of the Terrestrial Code on biological products from birds. Furthermore, in the event that Chapter 5.8 of the Terrestrial Code could be considered as the relevant international standard in respect of biological products from birds for the purpose of Article 3 of the SPS Agreement, we do not have sufficient evidence on the record to determine whether India's AI measures in respect of biological products from birds are based on the recommendations of Chapter 5.8 of the Terrestrial Code.

7.227. In the light of the above, the Panel finds that there is no relevant international standard related to AI for live pigs. We further find that that there is no product-specific recommendation in Chapter 10.4 of the Terrestrial Code for "pathological material and biological products from birds", and that we do not have sufficient evidence on the record to determine whether India's AI measures in respect of these products are based on the recommendations of Chapter 5.8 of the Terrestrial Code. The immediate consequence of these findings is that the provisions of Article 3.1 and 3.2 of the SPS Agreement do not apply to India's AI measures in respect of these products, as there is no relevant standard on which those measures could be based or to which they could conform. We shall therefore examine India's NAI-based import prohibition regarding live pigs and "pathological material and biological products from birds" (except as provided in paragraph (2)(ii) of S.O. 1663(E)) under the United States' claims relating to the need for scientific justification for India's AI measures, in particular, under Articles 5.1, 5.2 and 5.6 of the SPS Agreement.

7.4.2.2.3 Product-specific recommendations in Chapter 10.4 of the Terrestrial Code

7.228. Having established the product coverage of the Terrestrial Code for the purpose of this dispute, namely eight out of the ten categories of products listed in S.O. 1663(E), we proceed to examine in detail each of the product-specific recommendations in Chapter 10.4 as they relate to each of the eight categories of products in S.O. 1663(E) that are covered by the standard.

7.229. We observe first that the product-specific recommendations for each of the relevant products are found in Articles 10.4.5 to 10.4.24 of the Terrestrial Code. In general, the content of these product-specific recommendations depends on the type of product concerned, as well as the disease status of the place of origin. In this respect, the recommendations may vary depending upon whether the importation takes place from a country, zone or compartment that is NAI-free or HPNAI-free. In some instances, the disease status of the place of origin is irrelevant (in which case the Terrestrial Code uses the language "regardless of the NAI status of the country of origin").

7.230. The table below reproduces each of the relevant product-specific recommendations contained in Chapter 10.4 of the Terrestrial Code on a product-by-product basis:

S.O. 1663(E), para. (1)(ii)(a): domestic and wild birds[518] (including poultry[519] and captive birds[520])
Article 10.4.5 **Recommendations for importation from a NAI-free country, zone or compartment** For live poultry (other than day-old poultry) Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the poultry showed no clinical sign of NAI on the day of shipment; 2) the poultry were kept in a NAI-free country, zone or compartment since they were hatched or for at least the past 21 days; 3) the poultry are transported in new or appropriately sanitized containers; 4) if the poultry have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.
Article 10.4.6 **Recommendations for the importation of live birds other than poultry** Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) on the day of shipment, the birds showed no clinical sign of infection with a virus which would be considered NAI in poultry; 2) the birds were kept in isolation approved by the Veterinary Services since they were hatched or for at least the 21 days prior to shipment and showed no clinical sign of infection with a virus which would be considered NAI in poultry during the isolation period; 3) a statistically valid sample of the birds, selected in accordance with the provisions of Article 10.4.29., was subjected to a diagnostic test within 14 days prior to shipment to demonstrate freedom from infection with a virus which would be considered NAI in poultry; 4) the birds are transported in new or appropriately sanitized containers; 5) if the birds have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.
S.O. 1663(E), para. (1)(ii)(b): day old chicks[521], ducks, turkey, and other newly hatched avian species
Article 10.4.7 **Recommendations for importation from a NAI-free country, zone or compartment** For day-old live poultry Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the poultry were kept in a NAI-free country, zone or compartment since they were hatched; 2) the poultry were derived from parent flocks which had been kept in a NAI-free country, zone or compartment for at least 21 days prior to and at the time of the collection of the eggs; 3) the poultry are transported in new or appropriately sanitized containers; 4) if the poultry or the parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.
Article 10.4.8 **Recommendations for importation from a HPNAI-free country, zone or compartment** For day-old live poultry Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the poultry were kept in a HPNAI-free country, zone or compartment since they were hatched; 2) the poultry were derived from parent flocks which had been kept in a NAI-free establishment for at least 21 days prior to and at the time of the collection of the eggs; 3) the poultry are transported in new or appropriately sanitized containers; 4) if the poultry or the parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.

[518] The Glossary of the Terrestrial Code defines the term "wild animal" as "an animal that has a phenotype unaffected by human selection and lives independent of direct human supervision or control".

[519] The Glossary of the Terrestrial Code defines the term "poultry" as "all domesticated birds, including backyard poultry, used for the production of meat or eggs for consumption, for the production of other commercial products, for restocking supplies of game, or for breeding these categories of birds, as well as fighting cocks used for any purpose. Birds that are kept in captivity for any reason other than those reasons referred to in the preceding paragraph, including those that are kept for shows, races, exhibitions, competitions or for breeding or selling these categories of birds as well as pet birds, are not considered to be poultry".

[520] The Glossary of the Terrestrial Code defines the term "captive wild animal" as "an animal that has a phenotype not significantly affected by human selection but that is captive or otherwise lives under direct human supervision or control, including zoo animals and pets".

[521] The Glossary of the Terrestrial Code defines the term "day-old birds" as "birds aged not more than 72 hours after hatching".

Article 10.4.9
Recommendations for the importation of day-old live birds other than poultry
Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:
1) on the day of shipment, the birds showed no clinical sign of infection with a virus which would be considered NAI in poultry;
2) the birds were hatched and kept in isolation approved by the Veterinary Services;
3) the parent flock birds were subjected to a diagnostic test at the time of the collection of the eggs to demonstrate freedom from infection with NAIV;
4) the birds are transported in new or appropriately sanitized containers;
5) if the birds or parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.

S.O. 1663(E), para. (1)(ii)(c): un-processed meat[522] and meat products[523] from avian species, including domesticated, wild birds and poultry

Article 10.4.19
Recommendations for importation from either a NAI or HPNAI-free country, zone or compartment
For fresh meat of poultry
Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the entire consignment of fresh meat comes from poultry:
1) which have been kept in a country, zone or compartment free from HPNAI since they were hatched or for at least the past 21 days;
2) which have been slaughtered in an approved abattoir in a country, zone or compartment free from HPNAI and have been subjected to ante- and post-mortem inspections in accordance with Chapter 6.2. and have been found free of any signs suggestive of NAI.

Article 10.4.20
Recommendations for the importation of meat products of poultry
Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:
1) the commodity is derived from fresh meat which meet the requirements of Article 10.4.19.; or
2) the commodity has been processed to ensure the destruction of NAI virus in accordance with Article 10.4.26.;
AND
3) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus.

S.O. 1663(E), para. (1)(ii)(d): hatching eggs[524]

Article 10.4.10
Recommendations for importation from a NAI-free country, zone or compartment
For hatching eggs of poultry
Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:
1) the eggs came from a NAI-free country, zone or compartment;
2) the eggs were derived from parent flocks which had been kept in a NAI-free country, zone or compartment for at least 21 days prior to and at the time of the collection of the eggs;
3) the eggs are transported in new or appropriately sanitized packaging materials;
4) if the parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.

Article 10.4.11
Recommendations for importation from a HPNAI-free country, zone or compartment
For hatching eggs of poultry
Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:
1) the eggs came from a HPNAI-free country, zone or compartment;
2) the eggs were derived from parent flocks which had been kept in a NAI-free establishment for at least 21 days prior to and at the time of the collection of the eggs;
3) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.);
4) the eggs are transported in new or appropriately sanitized packaging materials;
5) if the parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.

[522] The Glossary of the Terrestrial Code defines the term "meat" as "all edible parts of an animal". The term "fresh meat" is defined as "meat that has not been subjected to any treatment irreversibly modifying its organoleptic and physicochemical characteristics. This includes frozen meat, chilled meat, minced meat and mechanically recovered meat".
[523] The Glossary of the Terrestrial Code defines the term "meat products" as "meat that has been subjected to a treatment irreversibly modifying its organoleptic and physicochemical characteristics".
[524] The Glossary of the Terrestrial Code defines the term "hatching eggs" as "fertilised bird eggs, suitable for incubation and hatching".

Article 10.4.12 **Recommendations for the importation of hatching eggs from birds other than poultry** Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the parent flock birds were subjected to a diagnostic test seven days prior to and at the time of the collection of the eggs to demonstrate freedom from infection with NAIV; 2) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.); 3) the eggs are transported in new or appropriately sanitized packaging materials; 4) if the parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.
S.O. 1663(E), para. (1)(ii)(e): eggs and egg products (except specific pathogen free eggs)
Article 10.4.13 **Recommendations for importation from a NAI-free country, zone or compartment** For eggs for human consumption Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the eggs were produced and packed in a NAI-free country, zone or compartment; 2) the eggs are transported in new or appropriately sanitized packaging materials.
Article 10.4.14 **Recommendations for importation from a HPNAI-free country, zone or compartment** For eggs for human consumption Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the eggs were produced and packed in a HPNAI-free country, zone or compartment; 2) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.); 3) the eggs are transported in new or appropriately sanitized packaging materials.
Article 10.4.15 **Recommendations for importation of egg products of poultry** Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the commodity is derived from eggs which meet the requirements of Articles 10.4.13. or 10.4.14.; or 2) the commodity has been processed to ensure the destruction of NAI virus in accordance with Article 10.4.25.; AND 3) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus.
S.O. 1663(E), para. (1)(ii)(f): un-processed feathers
Article 10.4.22 **Recommendations for the importation of feathers and down of poultry** Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) these commodities originated from poultry as described in Article 10.4.19. and were processed in a NAI-free country, zone or compartment; or 2) these commodities have been processed to ensure the destruction of NAI virus (under study); AND 3) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus.
Article 10.4.23 **Recommendations for the importation of feathers and down of birds other than poultry** Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) these commodities have been processed to ensure the destruction of NAI virus (under study); and 2) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus.
Article 10.4.24 **Recommendations for the importation of feather meal and poultry meal** Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) these commodities were processed in a NAI-free country, zone or compartment from poultry which were kept in a NAI-free country, zone or compartment from the time they were hatched until the time of slaughter or for at least the 21 days preceding slaughter; or 2) these commodities have been processed either: a) with moist heat at a minimum temperature of 118ºC for minimum of 40 minutes; or b) with a continuous hydrolysing process under at least 3.79 bar of pressure with steam at a minimum temperature of 122ºC for a minimum of 15 minutes; or c) with an alternative rendering process that ensures that the internal temperature throughout the product reaches at least 74ºC; AND 3) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus.

S.O. 1663(E), para. (1)(ii)(i): products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use
Article 10.4.21 **Recommendations for the importation of products of poultry origin, other than feather meal and poultry meal, intended for use in animal feeding, or for agricultural or industrial use** Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) these commodities were processed in a NAI-free country, zone or compartment from poultry which were kept in a NAI-free country, zone or compartment from the time they were hatched until the time of slaughter or for at least the 21 days preceding slaughter; or 2) these commodities have been processed to ensure the destruction of NAI virus (under study); AND 3) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus.
S.O. 1663(E), para. (1)(ii)(j): semen of domestic and wild birds including poultry
Article 10.4.16 **Recommendations for importation from a NAI-free country, zone or compartment** For poultry semen Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the donor poultry: 1) showed no clinical sign of NAI on the day of semen collection; 2) were kept in a NAI-free country, zone or compartment for at least the 21 days prior to and at the time of semen collection.
Article 10.4.17 **Recommendations for the importation from a HPNAI-free country, zone or compartment** For poultry semen Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the donor poultry: 1) showed no clinical sign of HPNAI on the day of semen collection; 2) were kept in a HPNAI-free country, zone or compartment for at least the 21 days prior to and at the time of semen collection.
Article 10.4.18 **Recommendations for the importation of semen of birds other than poultry** Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the donor birds: 1) were kept in isolation approved by the Veterinary Services for at least the 21 days prior to semen collection; 2) showed no clinical sign of infection with a virus which would be considered NAI in poultry during the isolation period; 3) were tested within 14 days prior to semen collection and shown to be free of NAI infection.

7.4.2.2.4 How to read Chapter 10.4 of the Terrestrial Code

7.231. In this particular case, the parties have diametrically opposed understandings of how Chapter 10.4 of the Terrestrial Code should be read. There are two principal issues of contention, namely (i) whether Chapter 10.4 of the Terrestrial Code envisages the imposition of import prohibitions because of concerns relating to AI; and (ii) the interpretation of the references to zones and compartments in Chapter 10.4.

7.232. Both issues are of the utmost importance because the conclusions we reach in respect of them will guide us in our analysis of whether India's AI measures are based on the Terrestrial Code, and in particular Chapter 10.4. We examine each issue in turn.

7.4.2.2.4.1 Whether Chapter 10.4 of the Terrestrial Code envisages the imposition of import prohibitions because of concerns relating to AI

7.233. As stated above, the parties have opposite views on whether Chapter 10.4 of the Terrestrial Code envisages the imposition of import prohibitions because of concerns relating to AI. On the one hand, the United States is of the view that the text of Chapter 10.4 of the Terrestrial Code "illustrates that under the relevant international standard, import of products from countries reporting LPNAI should be allowed"[525]; in addition, the choice of a relevant recommendation from the Code must depend on the NAI status of an exporting country, zone or compartment.[526] On the other hand, India postulates that the recommendations in Chapter 10.4

[525] United States' opening statement at the first substantive meeting of the Panel, para. 6.
[526] United States' opening statement at the first substantive meeting of the Panel, paras. 5-7; United States' first written submission, paras. 55-61 and 128.

"are structured in a manner wherein each recommendation contains a 'condition of entry'"[527], thus allowing an importing country to choose whether to require NAI-freedom or HPNAI-freedom; and whether to extend such a requirement to an entire exporting country, or only to the zones or compartments from which imported products originate.[528] India also posits that the standard provided in Article 10.4.1.10 of the Terrestrial Code "stipulates that if a country notifies HPAI and LPAI in poultry, Member countries can impose an immediate ban on trade in poultry commodities depending on the condition of entry they have selected based on the level of protection they have deemed appropriate".[529]

7.234. The arguments of the parties appear to raise separate though related issues; first, whether Article 10.4.1.10 of the Terrestrial Code envisages, either explicitly or implicitly, the imposition of an import prohibition; and second, whether the product-specific recommendations in Chapter 10.4 of the Terrestrial Code envisage, either explicitly or implicitly, the imposition of import prohibitions. We thus proceed to address these two issues.

(i) Whether Article 10.4.1.10 of the Terrestrial Code envisages the imposition of an import prohibition

7.235. As mentioned, the parties express divergent views regarding the interpretation of Article 10.4.1.10 which reads as follows:

> 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.

7.236. The United States submits that "this provision is notable because it addresses a situation that should not arise". The United States explains that this provision provides that notification of HPAI and LPAI in birds other than poultry should not be a basis to impose bans. However, it maintains, Article 10.4.1.1 "does not require a country to notify anything other than LPNAI outbreaks in poultry".[530] As has been noted above, India puts forward an *a contrario* reading of this provision whereby countries can ban trade in poultry in the circumstances not explicitly covered by Article 10.4.1.10; i.e. in circumstances other than infection with the HPAI and LPAI virus in birds other than poultry, including wild birds.[531]

7.237. Following a question from the Panel, the OIE clarified that "[t]he intention of Article 10.4.1.10 was to discourage Member countries from imposing bans on trade in poultry".[532] The OIE also explained that the reasoning behind Article 10.4.1.10 was highlighted in the report of the March 2008 meeting of the Code Commission as follows:

> The Code Commission confirmed that the rationale for the current definition [of poultry] is to encourage reporting of HPAI in all species and, at the same time, to discourage Members from introducing trade measures in response to findings in wild birds and other birds that are not considered to be part of the commercial sector.
>
> The Code Commission agrees with the comments of Members that noted the potential importance of avian species kept in backyard flocks and for hobby purposes in the epidemiology of avian influenza. This is the reason for requiring reporting of HPAI in such species. However, findings in pet or wild birds (which are not defined as poultry according to the current definition) should not be the rationale for introducing trade bans on the commercial sector. If Members responded to such findings by imposing trade bans, the OIE considers that this would be a serious disincentive to transparency

[527] India's opening statement at the first substantive meeting of the Panel, para. 16.
[528] India's opening statement at the first substantive meeting of the Panel, paras. 16-18 and 25-30; India's first written submission, paras. 136-142.
[529] India's first written submission, para. 125.
[530] United States' first written submission, para. 51; United States' opening statement at the first substantive meeting of the Panel, paras. 11 and 13; United States' second written submission, para. 21.
[531] India's first written submission, para. 131; India's opening statement at the first substantive meeting of the Panel, paras. 20, 25 and 30; India's response to Panel question No. 29(b); India's second written submission, para. 53.
[532] OIE's response to Panel question No. 10(a).

> in reporting. It is important to encourage reporting of infection in all avian species and the Code Commission considers that the best way to do this is to maintain the current definition of poultry.[533]

7.238. The explanations provided by the OIE resonate with the argument of the United States that "[w]here the [Terrestrial] Code recommends prohibitions, it explicitly so provides".[534] We recall that, in response to a question from the Panel, the OIE agreed with this statement and noted that indeed "any restrictions recommended would be explicitly provided in the Terrestrial Code chapters, including in Chapter 10.4".[535]

7.239. Accordingly, on the basis of the wording of Article 10.4.1.10 as well as the explanations provided by the OIE, we find no basis for the *a contrario* interpretation of Article 10.4.1.10 advocated by India. We therefore conclude that Article 10.4.1.10 of the Terrestrial Code does not envisage the imposition of an import prohibition with respect to poultry products.

(ii) Whether the product-specific recommendations in Chapter 10.4 of the Terrestrial Code envisage the imposition of import prohibitions

7.240. We now proceed to examine whether the product-specific recommendations in Chapter 10.4 of the Terrestrial Code envisage, either explicitly or implicitly, the imposition of import prohibitions. As before, the parties have divergent views. On the one hand, the United States submits that the product-specific recommendations provided in Chapter 10.4 of the Terrestrial Code illustrate that the importation of products from countries reporting LPNAI should be allowed; in addition, the choice of a relevant recommendation from the Terrestrial Code must depend on the NAI status of an exporting country, zone or compartment.[536] India, on the other hand, is of the view that each product-specific recommendation in Chapter 10.4 contains a "condition of entry", thus allowing an importing country to choose whether to require NAI-freedom or HPNAI-freedom.[537]

7.241. To understand the positions of the parties, we examine two concrete examples of recommendations in Chapter 10.4 of the Terrestrial Code and the respective manner in which the parties understand them. The text of the relevant recommendations is included in the table in paragraph 7.230 above.

7.242. First, Chapter 10.4 contains three provisions that include recommendations concerning the importation of eggs for human consumption. These vary according to the NAI status of the country, region or compartment of origin, namely: imports from a NAI-free country, zone or compartment (Article 10.4.13); a HPNAI-free country, zone or compartment (Article 10.4.14); and recommendations regardless of the NAI status of the country of origin (Article 10.4.15).[538] We note that the wording of Articles 10.4.13 and 10.4.14 is quite similar, except for the references to NAI and HPNAI, and the presence of the additional conditions in Article 10.4.14 (that is, "the eggs have had their surfaces sanitized").

7.243. The United States interprets these recommendations as meaning that eggs for human consumption can be imported from either an HPNAI or NAI-free country, and "[t]he Code simply requires a veterinary certificate, for both NAI and HPNAI-free territories, that certain control

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[533] OIE's response to Panel question No. 10(a) (quoting the Report of the meeting of the OIE Terrestrial Animal Health Standards Commission, 76 SG/12/CS1 B, OIE, Paris, 10-14 March 2008).

[534] United States' opening statement at the first substantive meeting of the Panel, para. 13. As an example, the United States refers to Article 10.1.2 of the Terrestrial Code as providing the recommendations with respect to avian chlamydiosis, which reads as follows:

> *Veterinary Authorities* of countries free from avian chlamydiosis may prohibit importation or transit through their territory, from countries considered infected with avian chlamydiosis, of birds of the *Psittacidae* family.

[535] OIE's response to Panel question No. 16.

[536] United States' opening statement at the first substantive meeting of the Panel, paras. 5-7; United States' first written submission, paras. 55-61 and 128.

[537] India's opening statement at the first substantive meeting of the Panel, paras. 16-18, 25-30; and India's first written submission, paras. 136-142.

[538] The text of Articles 10.4.13 to 10.4.15 of the Terrestrial Code is provided in the table in para. 7.230 above.

measures were in fact applied".[539] According to the United States, "[t]hese recommendations are a clear example of the scientific evidence being applied rationally to ensure safety and permit trade".[540] In its view, LPAI viruses do not transmit to the inside of poultry eggs, and therefore there is no need to prohibit these products from a territory that only has LPAI. Instead, it argues, the appropriate precaution is to ensure sanitization of the surface of eggs because that may be the only potential vehicle that might have any virus on it.[541]

7.244. India disagrees with the United States' interpretation and argues that both Articles 10.4.13 and 10.4.14 specify "conditions of entry" for the relevant products. According to India, "[w]hile the condition of entry for eggs under Article 10.4.13 is 'NAI-free country, zone or compartment', the condition of entry for eggs under Article 10.4.14 is '[HP]NAI-free country, zone or compartment'".[542] Therefore, in India's view, "a country may condition the entry of eggs for human consumption either by importing from a NAI-free country, zone or compartment or from a HPNAI-free country, zone or compartment, according to the level of protection it deems appropriate".[543] Furthermore, India explains that clause (1) of Article 10.4.15 provides that egg products be derived from eggs which meet the requirements of Articles 10.4.13 or 10.4.14. Accordingly, "in the final analysis an egg product should be derived from an egg which itself should fulfil the condition of entry specified in Article 10.4.13 or Article 10.4.14".[544]

7.245. A second example refers to the two provisions in Chapter 10.4 including recommendations with respect to the importation of fresh meat of poultry. As was the case with the eggs for human consumption, the recommendations depend on the NAI status of the country, zone or compartment of origin, i.e. a NAI or HPNAI-free country, zone or compartment (Article 10.4.19) while other recommendations apply regardless of the NAI status of the country of origin (Article 10.4.20).[545]

7.246. The United States submits with regard to Article 10.4.19 that "[a]s LPAI viruses do not replicate to poultry meat, the recommendation rightly focuses on ensuring that the source bird has not been in a HPNAI territory or at least outside it for the relevant incubation period (21 days)". According to the United States, "[i]f so, and the bird is slaughtered appropriately with the proper inspection, then a certificate attesting as much is sufficient to allow trade".[546] Furthermore, the United States notes that with respect to poultry meat and meat products, Articles 10.4.19 and 10.4.20 respectively provide "the exact same recommendation regardless of whether the territory is classified as NAI or HPNAI-free".[547] Accordingly, the Unites States observes that it "fails to see how even India can claim that the [Terrestrial] Code recommends disparate treatment – let alone a ban – or holds out NAI-free as achieving a higher level of protection".[548] Finally, the United States asserts that both Articles 10.4.19 and 10.4.3 of the Terrestrial Code explicitly indicate that in case of LPNAI infections, poultry meat may be kept for slaughter and consumption.[549]

7.247. India, in contrast, asserts that Article 10.4.19 "suggests, fresh meat of poultry can be imported from a NAI-free country, zone or compartment or from a HPNAI-free country, zone or compartment according to the level of protection a country deems appropriate".[550] Based on its

[539] United States' first written submission, para. 57.
[540] United States' first written submission, para. 58.
[541] United States' first written submission, para. 58; United States' response to Panel question No. 7.
[542] India's first written submission, para. 119(A).
[543] India's first written submission, para. 139. India's opening statement at the first substantive meeting of the Panel, paras. 17-18; India's response to Panel question No. 29(b); and India's second written submission, para. 35.
[544] India's first written submission, para. 139.
[545] The text of Articles 10.4.19 and 10.4.20 of the Terrestrial Code is provided in the table in para. 7.230 above.
[546] United States' first written submission, para. 59.
[547] United States' response to Panel question No. 7.
[548] United States' response to Panel question No. 7; United States' second written submission, para. 20.
[549] United States' response to Panel question No. 38. We note that Article 10.4.3.2 of the Terrestrial Code provides that "[i]n the case of LPNAI infections, poultry may be kept for slaughter for human consumption subject to conditions specified in Article 10.4.19".
[550] India's first written submission, para. 140.

determined ALOP, India has chosen to require country freedom from NAI (both HPNAI and LPNAI), which is reflected in S.O. 1663(E).[551]

7.248. Both examples distinctly illustrate the parties' divergent interpretations of the product-specific recommendations in Chapter 10.4. In essence, while the United States interprets the recommendations as providing for the conditions for safe trade according to the NAI status of the exporting country, zone or compartment, India interprets the reference to that status as a "condition of entry" which it is allowed to choose. Thus, if it chooses to impose NAI country freedom as a "condition of entry", the other recommendations applicable, for instance, to a HPNAI-free country (region or compartment) or "regardless of the NAI status" of the country, would not apply to India.

7.249. Given these opposing understandings, the Panel asked the OIE for guidance on how its own standard must be interpreted. The OIE explained that Chapter 10.4 provides risk mitigation measures that can be relied upon to prevent the introduction of AI via the importation of commodities from countries not free from LPNAI.[552] According to the OIE, recommendations in Chapter 10.4 provide that "even if an exporting country is not free of [LPNAI], importation can take place from *country, zone or compartment* that is free from infection with [HPAI]".[553] Particularly, the OIE explained that when an exporting country reports LPNAI in poultry, it cannot be considered as a country that is free from NAI. It may, however, be considered as a country that is free from HPNAI. Furthermore, the OIE stressed that "[t]he Terrestrial Code recommends measures for the continuation of trade in poultry products notwithstanding a finding of infection with a[n LPAI] virus".[554] The OIE explained that there are several Articles in Chapter 10.4 dealing with trade from countries that are free from HPNAI (but not free from NAI), including Articles 10.4.8 (day-old live poultry), 10.4.11 (poultry hatching eggs), 10.4.14 (eggs for human consumption) and 10.4.17 (poultry semen).[555]

7.250. The OIE pointed out that, in the case of fresh poultry meat, Article 10.4.19 contains the same recommendations for importation from a NAI-free country, zone or compartment, as from an HPNAI-free country, zone or compartment. According to the OIE, the rationale for these provisions is that when chickens are infected with an HPNAI virus, because of the systemic nature of the infection, the virus can be found in virtually all parts of the body, whereas infection with LPNAI results in virus presence only during the acute phase of infection and limited to the respiratory and alimentary tracts with no systemic involvement. Thus, fresh meat should originate from an HPNAI-free country, zone or compartment, but can originate from an LPNAI infected one, as long as derived from animals inspected and showing no signs of disease. The requirement for ante- and post-mortem inspection in an approved abattoir is intended to detect birds in the acute infectious phase – hence the requirement for freedom from any signs suggestive of AI. As advised by the OIE, "the Terrestrial Code establishes measures that are proportional to risk, with the objective of facilitating safe trade and avoiding unjustifiable trade barriers".[556]

7.251. Hence, it appears to us that the OIE agrees with the approach to the interpretation of the product-specific recommendations in Chapter 10.4 of the Terrestrial Code advocated by the United States. We recall that the OIE agreed with the statement of the United States that where the Terrestrial Code recommends prohibitions, it explicitly so provides.[557] Indeed, we do not find any recommendations for import prohibitions in Chapter 10.4 of the Terrestrial Code. We have examined the text of each of the product-specific recommendations in Chapter 10.4 outlined in the table in paragraph 7.230 above and we find no basis for the interpretation of the product-specific recommendations advocated by India.

7.252. We have found a number of product-specific recommendations in Chapter 10.4 that envisage allowing the importation of relevant poultry products from countries reporting LPNAI or even regardless of the countries' NAI status, provided that appropriate risk mitigation conditions

[551] India's first written submission, para. 140; India's opening statement at the first substantive meeting of the Panel, para. 30; India's response to Panel question No. 29(b); India's second written submission, para. 35.
[552] OIE's response to Panel question No. 12.
[553] OIE's response to Panel question No. 17(a). (emphasis original)
[554] OIE's response to Panel question No. 14(b).
[555] OIE's response to Panel question No. 11(c).
[556] OIE's response to Panel question No. 11(c).
[557] OIE's response to Panel question No. 16.

are fulfilled. In particular, Articles 10.4.8 (day-old live poultry), 10.4.11 (hatching eggs of poultry), 10.4.14 (eggs for human consumption), 10.4.17 (poultry semen) and 10.4.19 (fresh meat of poultry) provide for the risk mitigation conditions necessary for the importation of the products concerned from a HPNAI-free country, zone or compartment, which by definition might not be LPNAI-free. Articles 10.4.6 (live birds other than poultry), 10.4.9 (day-old live birds other than poultry), 10.4.12 (hatching eggs from birds other than poultry), 10.4.15 (egg products of poultry), 10.4.18 (semen of birds other than poultry), 10.4.20 (meat products of poultry), 10.4.21 (products of poultry origin, other than feather meal and poultry meal, intended for use in animal feeding, or for agricultural or industrial use), 10.4.22 (feathers and down of poultry), 10.4.23 (feathers and down of birds other than poultry) and 10.4.24 (feather meal and poultry meal) contain the risk mitigation conditions for the importation of the products concerned regardless of the NAI status of the country of origin.[558]

7.253. On the basis of the foregoing, we conclude that the product-specific recommendations in Chapter 10.4 of the Terrestrial do not envisage, either explicitly or implicitly, the imposition of import prohibitions with respect to poultry products.

7.4.2.2.4.2 The interpretation of the references to zones and compartments in Chapter 10.4 of the Terrestrial Code

7.254. Another issue of contention between the parties that touches upon the interpretation of Chapter 10.4 is whether it envisages that countries can choose whether to import only from NAI or HPNAI-free countries or also from zones and compartments. On the one hand, the United States argues that the OIE encourages countries to consider principles such as regionalization, i.e. limiting the territory to which a measure need be applied.[559] According to the United States, India's country-wide application of its AI-based import ban is not based on the Terrestrial Code recommendations, which provide for the application of AI-related trade restrictions at the zone or compartment level when appropriate surveillance, control, and biosecurity measures are in place.[560] India, on the other hand, is of the view that the recommendations in Chapter 10.4 "are structured in a manner wherein each recommendation contains a 'condition of entry'"[561], thus allowing an importing country to choose whether to require NAI-freedom or HPNAI-freedom, and whether to extend such a requirement to an entire exporting country, or only to its zones or compartments.[562]

7.255. We proceed to examine Chapter 10.4 on its face to determine whether it envisages that countries can choose whether to import only from NAI or HPNAI-free countries or also from zones and compartments. We note that the text of Chapter 10.4 speaks often of "zones"[563] and "compartments".[564] We also note that the parties have argued about "regionalization" in connection with these terms. In this context, Article 6 of the SPS Agreement, which we examine in section 7.9 below, refers to "Adaptation to Regional Conditions". The OIE clarified that, for the purposes of the Terrestrial Code, "zoning" and "regionalisation" have the same meaning and explained that Chapters 4.3 and 4.4 of the Terrestrial Code set out the general principles of "zoning" and "compartmentalisation".[565]

7.256. Examining the various provisions in Chapter 10.4 on their face, we observe that Articles 10.4.2 to 10.4.4 of the Terrestrial Code recognize in general terms the possibility of

[558] The text of the relevant Articles of Chapter 10.4 of the Terrestrial Code is provided in the table in para. 7.230 above.

[559] United States' first written submission, paras. 12 and 49.

[560] United States' first written submission, para. 156.

[561] India's opening statement at the first substantive meeting of the Panel, para. 16.

[562] India's opening statement at the first substantive meeting of the Panel, paras. 16-18 and 25-30; India's first written submission, paras. 136-142.

[563] The Glossary of the Terrestrial Code defines the term "zone/region" as "a clearly defined part of a territory containing an animal subpopulation with a distinct health status with respect to a specific disease for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade".

[564] The Glossary of the Terrestrial Code defines the term "compartment" as "an animal subpopulation contained in one or more establishments under a common biosecurity management system with a distinct health status with respect to a specific disease or specific diseases for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade".

[565] OIE's response to Panel question No. 18(a).

differentiating the NAI status of a country, zone or compartment based on certain criteria. These criteria are provided for in Article 10.4.2, which reads as follows:

> **Determination of the NAI status of a country, zone or compartment**
>
> The NAI status of a country, a zone or a compartment can be determined on the basis of the following criteria:
>
> 1) NAI is notifiable in the whole country, an on-going NAI awareness programme is in place, and all notified suspect occurrences of NAI are subjected to field and, where applicable, laboratory investigations;
>
> 2) appropriate surveillance is in place to demonstrate the presence of infection in the absence of clinical signs in poultry, and the risk posed by birds other than poultry; this may be achieved through a NAI surveillance programme in accordance with Articles 10.4.27. to 10.4.33.;
>
> 3) consideration of all epidemiological factors for NAI occurrence and their historical perspective.

7.257. Articles 10.4.3 and 10.4.4 further reflect this possibility by providing the conditions that must be met for a country, zone or compartment to be considered either "NAI-free" and "HPNAI-free", respectively:

> **Article 10.4.3**
>
> **NAI-free country, zone or compartment**
>
> A country, zone or compartment may be considered free from NAI when it has been shown that neither HPNAI nor LPNAI infection in poultry has been present in the country, zone or compartment for the past 12 months, based on surveillance in accordance with Articles 10.4.27. to 10.4.33.
>
> If infection has occurred in poultry in a previously free country, zone or compartment, NAI-free status can be regained:
>
> 1) In the case of HPNAI infections, three months after a stamping-out policy (including disinfection of all affected establishments) is applied, providing that surveillance in accordance with Articles 10.4.27. to 10.4.33. has been carried out during that three-month period.
>
> 2) In the case of LPNAI infections, poultry may be kept for slaughter for human consumption subject to conditions specified in Article 10.4.19. or a stamping-out policy may be applied; in either case, three months after the disinfection of all affected establishments, providing that surveillance in accordance with Articles 10.4.27. to 10.4.33. has been carried out during that three-month period.

> **Article 10.4.4**
>
> **HPNAI-free country, zone or compartment**
>
> A country, zone or compartment may be considered free from HPNAI when:
>
> 1) it has been shown that HPNAI infection in poultry has not been present in the country, zone or compartment for the past 12 months, although its LPNAI status may be unknown; or
>
> 2) when, based on surveillance in accordance with Articles 10.4.27. to 10.4.33., it does not meet the criteria for freedom from NAI but any NAI virus detected has not been identified as HPNAI virus.

> The surveillance may need to be adapted to parts of the country or existing zones or compartments depending on historical or geographical factors, industry structure, population data, or proximity to recent outbreaks.
>
> If infection has occurred in poultry in a previously free country, zone or compartment, HPNAI-free status can be regained three months after a stamping-out policy (including disinfection of all affected establishments) is applied, providing that surveillance in accordance with Articles 10.4.27. to 10.4.33. has been carried out during that three-month period.

7.258. In addition to these general provisions, we also observe that Chapter 10.4 includes numerous product-specific recommendations foreseeing the measures to be applied by importing countries depending on the NAI status of the country, zone or compartment from which the products originate. For instance, Articles 10.4.5 (live poultry (other than day-old poultry)), 10.4.7 (day-old live poultry), 10.4.10 (hatching eggs of poultry), 10.4.13 (eggs for human consumption), 10.4.16 (poultry semen) and 10.4.19 (fresh meat of poultry) provide that the importation of the products concerned may take place not only from a NAI-free country, but also from a NAI-free zone or compartment. In addition, Articles 10.4.8 (day-old live poultry), 10.4.11 (hatching eggs of poultry), 10.4.14 (eggs for human consumption), 10.4.17 (poultry semen) and 10.4.19 (fresh meat of poultry) provide that the importation of the products concerned may take place not only from a HPNAI-free country, but also from a HPNAI-free zone or compartment, which would mean a zone or compartment which is not necessarily free from LPNAI.[566]

7.259. In our view, the text of Chapter 10.4 indicates that the recommendations contained therein are not only intended for country-wide purposes; rather, they are intended to also apply to zones and compartments.

7.260. As with other matters pertaining to the interpretation of the Terrestrial Code, we consulted the OIE, which explained that "[z]oning and compartmentalisation are concepts promoted by the OIE, both to prevent and control diseases and to allow safe trade from countries not free".[567] The OIE clarified that these concepts "are in general applicable to all listed diseases"[568], which means that they also apply in the case of NAI. The OIE further explained how the concepts of zoning and compartmentalization work in connection with NAI as follows:

> In the case of AI, where the entry of the disease agent into a country or zone cannot be prevented with complete efficiency, due to the role of wild birds in disseminating infection, compartmentalisation based on biosecurity can be applied as a trade facilitating measure. The aim is to seek recognition between trading partners that the measures applied to protect the compartment are sufficiently robust, so that even if avian influenza were to occur in the country, the sub population within the compartment (which should be approved before any outbreak) would remain free, and therefore eligible for trade based on measures that apply to a population that is free of infection.[569]

7.261. Having been informed of the parties' positions, the OIE affirmed that the requirements of an importing country should take into consideration the zoning and compartmentalization principles applied according to the relevant chapters in the Terrestrial Code. Nonetheless, if the affected country, i.e. the exporting country, does not apply zoning to reduce the size of the affected population, then the measures recommended in the Code for a particular product should be applied for the entire country.[570]

7.262. It appears to us that the application by an importing country of the product-specific recommendations to zones or compartments presupposes that the exporting country has established such zones or compartments within its territory according to the Terrestrial Code. To this end, if an exporting country establishes zones or compartments, Chapter 10.4 envisages that

[566] The text of the relevant Articles of Chapter 10.4 of the Terrestrial Code is provided in the table in para. 7.230 above.
[567] OIE's response to Panel question No. 2.
[568] OIE's response to Panel question No. 14(b).
[569] OIE's response to Panel question No. 2.
[570] OIE's response to Panel question No. 19(b).

the importing country allow the importation from those zones and compartments subject to the product-specific recommendations contained therein, which vary depending on the NAI status of that zone or compartment. We understand this to mean that Chapter 10.4 of the Terrestrial Code envisages that importing countries, when adopting and applying their AI measures, should at least recognize that even if an exporting country may not be entirely NAI or HPNAI-free, it may have zones or compartments that are NAI or HPNAI-free.

7.263. On the basis of the foregoing, we conclude that the Terrestrial Code envisages that AI measures allow for the possibility of importing from NAI or HPNAI-free zones and compartments; and not only from NAI or HPNAI-free countries.

7.4.2.2.5 Whether India's AI measures are based on Chapter 10.4 of the Terrestrial Code

7.264. We now examine whether India's AI measures are "based on" the Terrestrial Code, and, in particular, Chapter 10.4 thereof.

7.265. As described in section 7.4.2.2 above, the Appellate Body in *EC – Hormones* explained that, to be "based on" an international standard, a measure "may adopt some, not necessarily all, of the elements of the international standard".[571] The Appellate Body also referred to the ordinary meaning of the term "based on" in Article 3.1 of the SPS Agreement and observed that "[a] thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter[572]".[573] The Appellate Body however did not expound further as to which and how many elements of an international standard must be adopted for an SPS measure to be considered to be "based on" the standard within the meaning of Article 3.1 of the SPS Agreement.

7.266. We recall that, in *EC – Sardines*, the Appellate Body, when interpreting the obligation in Article 2.4 of the TBT Agreement to use international standards "as a basis" for technical regulations[574], considered its approach to the interpretation of the term "based on" in the context of Article 3.1 of the SPS Agreement as relevant for the interpretation of "as a basis" in Article 2.4.[575] We think that the reverse approach is also viable. Hence, we shall guide ourselves by the Appellate Body's findings in *EC – Sardines*, where appropriate.

7.267. We note that, in *EC – Sardines*, after citing several dictionary definitions, the Appellate Body highlighted the following similar terms in clarifying the ordinary meaning of the term "basis": "principal constituent", "fundamental principle", "main constituent", and "determining principle".[576] The Appellate Body then concluded that "there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other".[577]

7.268. The Appellate Body further observed:

> We see no need here to define in general the nature of the relationship that must exist for an international standard to serve "as a basis for" a technical regulation. Here we need only examine this measure to determine if it fulfils this obligation. In our view, it can certainly be said—at a minimum—that something cannot be considered a "basis" for something else if the two are *contradictory*. Therefore, under Article 2.4, if the technical regulation and the international standard *contradict* each other, it cannot

[571] Appellate Body Report, *EC – Hormones*, para. 171.
[572] (footnote original) L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 187.
[573] Appellate Body Report, *EC – Hormones*, para. 163.
[574] Appellate Body Report, *EC – Sardines*, paras. 242-244.
[575] The Appellate Body explained that its "approach in *EC – Hormones* is also relevant for the interpretation of Article 2.4 of the *TBT Agreement*". Appellate Body Report, *EC – Sardines*, para. 242. We also note, nevertheless, that the Appellate Body did not consider it necessary to decide in that case whether the term "as a basis", in the context of Article 2.4 of the TBT Agreement, has the same meaning as the term "based on", in the context of Article 3.1 of the SPS Agreement. Appellate Body Report, *EC – Sardines*, footnote 169.
[576] Appellate Body Report, *EC – Sardines*, paras. 243-245.
[577] Appellate Body Report, *EC – Sardines*, para. 245.

> properly be concluded that the international standard has been used "as a basis for" the technical regulation.[578]

7.269. The Appellate Body's reasoning is useful for our interpretation of the term "based on" in Article 3.1 of the SPS Agreement. Extrapolating from this reasoning for our purposes in this dispute, it seems to us equally viable to say that where an SPS measure and the relevant international standard contradict each other, it cannot properly be concluded that the SPS measure is "based on" that international standard.

7.270. We have found that India's interpretative approach, whereby Chapter 10.4 would allow an importing country to choose as a "condition of entry" the NAI-free status of the exporting country and apply that condition only on a country-wide basis, runs contrary to Chapter 10.4 of the Terrestrial Code. Specifically, in sections 7.4.2.2.4.1 and 7.4.2.2.4.2 above, we found that Chapter 10.4 of the Terrestrial Code does not envisage the imposition of import prohibitions with respect to poultry products, and that it does envisage that AI measures allow for the possibility of importing from NAI or HPNAI-free zones and compartments; and not only from NAI or HPNAI-free countries. As explained in paragraphs 7.252 and 7.258 above, a number of product-specific recommendations in Chapter 10.4 envisage the importation of relevant poultry products from countries, zones or compartments reporting LPNAI or even regardless of the country NAI status, provided that appropriate risk mitigation conditions are fulfilled.

7.271. We recall that India's AI measures are those "that prohibit the importation of certain agricultural products from countries reporting NAI" and that they are maintained through the Livestock Act and S.O. 1663(E). In particular, S.O. 1663(E) prohibits the importation of the relevant products from countries reporting NAI, thus not allowing importation from NAI or HPNAI-free zones or compartments, in contradiction with the product-specific recommendations of Chapter 10.4 of the Terrestrial Code. Also in contradiction with Chapter 10.4, S.O. 1663(E) prohibits the importation of the relevant products from non-NAI-free countries, zones or compartments. We thus agree with the United States that India's AI measures amount to a "fundamental departure" from the Terrestrial Code.[579]

7.272. Accordingly, because India's AI measures and Chapter 10.4 of the Terrestrial Code contradict each other, it cannot properly be concluded that India's AI measures are "based on" the relevant international standard.

7.273. On the basis of the foregoing, we conclude that India's AI measures are not "based on" the relevant international standard, the Terrestrial Code, and, in particular, Chapter 10.4 thereof, within the meaning of Article 3.1 of the SPS Agreement.

7.4.2.2.6 Conclusion on the United States' claim pursuant to Article 3.1 of the SPS Agreement

7.274. Having concluded that India's AI measures are not "based on" the relevant international standard, the Terrestrial Code, and, in particular, Chapter 10.4 thereof, the Panel finds that India's AI measures are inconsistent with Article 3.1 of the SPS Agreement.

7.4.2.3 Whether India's AI measures "conform to" the Terrestrial Code pursuant to Article 3.2 of the SPS Agreement

7.275. Having found that India's AI measures are not "based on" the Terrestrial Code and, in particular, Chapter 10.4 thereof, within the meaning of Article 3.1 of the SPS Agreement, and in line with our reasoning in paragraph 7.202 above, we conclude that India's AI measures also do not "conform to" the Terrestrial Code, and, in particular, Chapter 10.4 thereof, within the meaning of Article 3.2 of the SPS Agreement. India therefore is not entitled to benefit from the presumption of consistency of its AI measures with the other relevant provisions of the SPS Agreement and of the GATT 1994.

[578] Appellate Body Report, *EC – Sardines*, para. 248. (emphasis original)
[579] United States' second written submission, para. 10.

7.5 Whether India's AI measures are inconsistent with Articles 5.1, 5.2 and 2.2 of the SPS Agreement

7.5.1 Introduction

7.276. The United States claims that, by failing to undertake a risk assessment, India has breached Articles 5.1 and 5.2 of the SPS Agreement.[580] The United States further claims that the failure to conduct a risk assessment resulted in a breach of Article 2.2 of the SPS Agreement.[581]

7.277. Before commencing the legal analysis of these provisions, we note India's assertion that "[t]he United States claims pursuant to Article[s] 2.2, 5.1 and 5.2 are limited to fresh meat of poultry and eggs".[582] According to India, the United States has "not adduced arguments or evidence concerning India's measure with respect to pigs in its claim under Article 2.2, 5.1 and 5.2".[583]

7.278. We recall our preliminary ruling of 22 May 2013, which, as explained in paragraph 7.4 above, forms an integral part of the present findings, to the effect that the ten categories of products listed in S.O. 1663(E) and the United States' panel request fall within the scope of this dispute.[584] In line with those findings, we are not persuaded by India's submission that the United States' claims under Articles 5.1, 5.2 and 2.2 of the SPS Agreement pertain only to fresh meat of poultry and eggs.

7.279. In addition, we recall our findings in sections 7.4.2.2.5 and 7.4.2.2.6 above that India's AI measures are not based on the Terrestrial Code and that, as explained in section 7.4.2.3 above, they do not conform to the Terrestrial Code. Accordingly, India cannot rely on the alleged conformity of its AI's measures to the Terrestrial Code in order to justify a presumption of consistency of those measures with the remainder of the SPS Agreement, including Articles 2.2, 5.1 and 5.2. Furthermore, as found in section 7.4.2.2.2 above, such a defence would not apply in respect of live pigs as these are not covered by Chapter 10.4 of the Terrestrial Code and, to our knowledge, there is no other relevant international standard for AI applicable to live pigs. We also refer to our findings in section 7.4.2.2.2 above that there is no product-specific recommendation in Chapter 10.4 of the Terrestrial Code for "pathological material and biological products from birds", and that we do not have sufficient evidence on record to determine whether India's AI measures in respect of these products are based on the recommendations of Chapter 5.8 of the Terrestrial Code.

7.280. With this in mind, we proceed to examine the United States' claims under Articles 5.1, 5.2 and 2.2 of the SPS Agreement. We begin by considering the relationship between these provisions.

7.5.2 Relationship between Articles 5.1, 5.2 and 2.2 of the SPS Agreement

7.281. Articles 2.2, 5.1 and 5.2 of the SPS Agreement deal with the scientific foundation of SPS measures[585] and are intimately related. While Articles 5.1 and 5.2 concern risk assessments, Article 2.2 refers to scientific principles and sufficient scientific evidence. Prior panels have found that Articles 5.1 and 5.2 of the SPS Agreement directly inform each other because Article 5.2 sheds light on the elements that are of relevance in the assessment of risks as foreseen in Article 5.1.[586] Furthermore, the Appellate Body has explained that Article 5.1 constitutes "a specific application of the basic obligations contained in Article 2.2" of the SPS Agreement[587], and that Article 2.2 informs Article 5.1 because "the elements that define the basic obligation set out in

[580] United States' request for the establishment of a panel, p. 2; United States' first written submission, para. 17.
[581] United States' first written submission, para. 124. The United States further avers that India may not invoke Article 5.7 of the SPS Agreement in order to avoid its obligations under Articles 5.1 and 5.2 (United States' first written submission, para. 125). As India has not presented a defence under Article 5.7, the Panel finds it unnecessary to make any determinations in respect of this provision.
[582] India's response to Panel question No. 60.
[583] India's response to Panel question No. 60.
[584] Preliminary ruling of 22 May 2013, paras. 3.27-3.30, 3.37, 3.92-3.93, 3.140.
[585] Panel Report, *US – Poultry (China)*, para. 7.167.
[586] Panel Reports, *Japan – Apples*, para. 8.230; and *US – Poultry (China)*, para. 7.172.
[587] Appellate Body Reports, *EC – Hormones*, para. 180; and *Australia – Apples*, para. 209.

Article 2.2 impart meaning to Article 5.1".[588] The Appellate Body advises that "Articles 2.2 and 5.1 should constantly be read together".[589]

7.282. The relationship between these three provisions has led panels and the Appellate Body to conclude that, when an SPS measure is not based on a risk assessment conducted according to the requirements in Article 5.1 and 5.2, "this measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence".[590] In practical terms, this means that a violation of Articles 5.1 and 5.2 entails a violation of the more general Article 2.2 of the SPS Agreement.[591] Nonetheless, the opposite is not always the case due to the broader scope of Article 2.2; indeed, not all instances of violation of Article 2.2 entail a violation of Articles 5.1 and 5.2.[592]

7.283. Bearing in mind the relationship between these provisions and in line with the approach followed by prior panels and the Appellate Body, we will first examine the United States' claims under Articles 5.1 and 5.2, before proceeding to the broader claim under Article 2.2 of the SPS Agreement.

7.5.3 Whether India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement

7.5.3.1 Arguments of the parties

7.5.3.1.1 United States

7.284. According to the United States, the relevant international standard, the Terrestrial Code, contains specific science-based recommendations for addressing the risks posed by AI. Since India's measures do not conform to the international standard, India had an obligation to undertake a risk assessment and base its measures on that risk assessment, which it has not done. Accordingly, the United States contends, India, "by failing to undertake a risk assessment, has breached several WTO obligations, including Article 5.1 of the SPS Agreement".[593]

7.285. The United States submits that during the first substantive meeting, India sought to debate the science of AI transmission and to discuss the risks associated with AI. In the United States' view, while the science it has submitted refutes India's contentions, the more important point is that these scientific questions are not relevant in the present dispute. For the United States, what is relevant under the SPS Agreement is that India's measures are not based on the Terrestrial Code, and that India has not conducted a risk assessment.[594] For the United States "[f]undamentally, a risk assessment is not an exercise to gather evidence to fit a pre-ordained conclusion, but rather an impartial, scientific exercise to determine whether a measure should be adopted to protect against a particular risk".[595]

7.286. The United States contends that Article 5.1 requires that an appropriate risk assessment "tak[e] into account risk assessment techniques developed by the relevant international organizations".[596] The OIE has promulgated standards regarding risk assessment both in the Terrestrial Code (Chapter 2.1) and in its Handbook on Import Risk Analysis. Accordingly, for the United States, a proper risk assessment for AI under the SPS Agreement would, at a minimum, consider and address the OIE's risk assessment techniques.[597]

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[588] Appellate Body Report, *EC – Hormones*, para. 180.
[589] Appellate Body Reports, *EC – Hormones*, para. 180; and *Australia – Apples*, para. 209.
[590] Panel Report, *Australia – Salmon*, para. 8.52; Appellate Body Report, *Australia – Salmon*, para. 137.
[591] Appellate Body Report, *Australia – Salmon*, paras. 137-138; Panel Reports, *Australia – Salmon*, para. 8.52; *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.85 and 7.161; *EC – Approval and Marketing of Biotech Products*, paras. 7.3396 and 7.3399; *US – Poultry (China)*, paras. 7.168 and 7.203–7.204; and *Australia – Apples*, paras. 7.212 and 7.905.
[592] Appellate Body Report, *Australia – Salmon*, paras. 137-138; Panel Reports, *Australia – Salmon*, para. 8.52; *US – Poultry (China)*, para. 7.168; and *Australia – Apples*, para. 7.212.
[593] United States' first written submission, para. 17.
[594] United States' closing statement at the first meeting of the Panel, para. 4.
[595] United States' first written submission, para. 110.
[596] United States' first written submission, para. 111.
[597] United States' first written submission, para. 111.

7.287. The United States avers that India, in its most recent notification to the WTO, explained why it enacted its measures: (i) "to ensure food safety and protect domestic and wild birds from AI (both HPNAI and LPNAI)"; and (ii) "urgent action has been taken to prevent the ingress of this virus to protect human health as well as health of poultry in India".[598] Since "India has stated that its measures were adopted to address risks associated with both diseases and food safety, the SPS Agreement obliges India to base its measures on both types of risk assessment – a Pest Risk Assessment and a Food Safety Risk Assessment".[599] Despite this, the United States alleges, India lacks a risk assessment on which it bases its measures and "India's measures are not based on a risk assessment in contravention of Article 5.1".[600] The United States adds that without a risk assessment, India could not have taken into account the factors noted in Article 5.2, thereby breaching that provision as well.[601]

7.288. The United States recalls that at the June 2010 SPS Committee meeting, India asserted that "India conducted a detailed risk analysis for the importation of animal and animal products, by a committee of experts, based on the existing global situation of AI, available scientific literature and the OIE standards".[602] At the October 2010 SPS Committee Meeting, India provided a document to the United States and the European Union entitled "India's Risk Assessment on Avian Influenza for imposing ban on import of poultry and poultry products from Avian Influenza positive countries" (Summary Document).[603] The summary report of the meeting indicates that "India had provided its risk assessment on [AI] directly to the United States, and was willing to share it with other Members upon request".[604]

7.289. According to the United States, at an SPS Committee meeting following the one held in October 2010, the United States and other Members criticized the Summary Document as inconsistent with the appropriate standards for a risk assessment. The United States explains that India noted at the time that what it had provided "was not the final risk assessment document, which would take some time".[605] In September 2011, the United States requested the OIE to review the document provided by India. A review was conducted that noted, *inter alia*, that the document "is unstructured and repetitive", "[i]ts reasoning is unclear and it is poorly supported by reference to scientific literature", and that "India's risk assessment fails to evaluate the likelihood of the risks arising".[606]

7.290. The United States elaborates that at a subsequent SPS Committee meeting, it asked that the OIE be given the floor in order to summarize its findings on India's document. According to the United States, India objected and noted that "[i]n October 2010, India had provided a summary report on an informal basis to the European Union and the United States". India further "clarified that the document had also been provided to the OIE on an informal basis, and that it was a summary document, not a full risk assessment".[607]

7.291. The United States submits that "India's position regarding this document has changed in the past", and "India's more recent pronouncements are that the Summary Document is in fact not intended to serve as its risk assessment".[608] The United States adds that it addresses the Summary Document "[i]n the interest of completeness". However, in the event that India asserts in this proceeding that the document qualifies as a risk assessment, the United States contends that the Summary Document fails to satisfy the requirements of the SPS Agreement.[609]

7.292. In its second written submission, the United States posits that India's only response to the United States' claims involving the absence of a risk assessment is that the "non-existence of a risk assessment is of no consequence when India's measure is in conformity with the [Terrestrial]

[598] United States' first written submission, para. 112.
[599] United States' first written submission, para. 112.
[600] United States' first written submission, para. 113.
[601] United States' first written submission, para. 113.
[602] United States' first written submission, para. 80 (referring to [G/SPS/R/58, para. 40]).
[603] United States' first written submission, para. 81 (referring to Exhibit US-110).
[604] United States' first written submission, para. 81 (referring to G/SPS/R/61, para. 27).
[605] United States' first written submission, para. 82 (referring to G/SPS/R/63, paras. 64-67).
[606] United States' first written submission, para. 83.
[607] United States' first written submission, para. 84 (referring to G/SPS/R/64, para. 85).
[608] United States' first written submission, para. 114.
[609] United States' first written submission, paras. 114-123; and United States' second written submission, para. 35.

Code".[610] However, the United States considers that it has demonstrated that India's measures neither "conform to" nor are "based on" the Terrestrial Code. Accordingly, if the Panel finds that India's measures are not in conformity with the Terrestrial Code, then the United States requests the Panel to find that India's measures are in breach of India's obligations under Articles 5.1, 5.2, and 2.2 of the SPS Agreement.[611]

7.293. In addition, the United States contends that both the Panel and the United States "pursued every possible avenue for obtaining information from India on any other document that might serve as a risk assessment". Specifically, (i) requests have been made to India in the SPS Committee meetings[612]; (ii) the United States requested in January 2012 pursuant to Article 5.8 that India indicate if its measures were based on a risk assessment and if so, to provide a copy[613]; (iii) the Panel sought clarification from India at the first substantive meeting; and (iv) the Panel requested India in question No. 31 to confirm whether India's AI measures are based on a risk assessment, and if so, to provide it to the Panel. According to the United States, despite all of these inquiries, India never identified any risk assessment.[614]

7.5.3.1.2 India

7.294. India's position is that "SPS measures which imbibe the relevant international standards" would be deemed to be based on scientific principles and sufficient scientific evidence, such that further justification for adoption of the international standard by a Member is neither required nor necessary. India is therefore "surprised" that "despite this understanding, the United States seeks from India a risk assessment as a further justification that its measure is based on science".[615]

7.295. India states that "it was always [its] understanding that having adopted an OIE recommendation, it was not required to further conduct a risk assessment".[616] India elaborates that "[i]t is evident that when a Member bases its SPS measures on an international standard it is not required to further conduct a risk assessment under Article 5.1 of the SPS Agreement as the international standard itself fulfils the requirement of being based on scientific principles and not being maintained without sufficient scientific evidence".[617] In India's view, the "non-existence of a risk assessment is of no consequence when India's measure is in conformity with the [Terrestrial] Code".[618] India asserts that the United States' argument concerning the inconsistency of India's measures with Articles 5.1 and 5.2 "misrepresents the correct position concerning the requirement of conducting a risk assessment".[619]

7.296. India explains that "where there are international standards, the WTO members should preferably base their domestic sanitary measure on such international standards, *in casu*, the [Terrestrial] Code". However, when there are no international standards or if the domestic sanitary measure adopts a higher level of protection, then the WTO Member in question is required to justify its domestic sanitary measure through a risk assessment. For India, in the light of the above, it is clear that it is not required to conduct a risk assessment, "as it[s] measures for eggs and fresh meat of poultry under S.O. 1663(E) conform with the [Terrestrial] Code".[620]

7.297. Moreover, India asserts that the scientific evidence it submitted to justify an import suspension on fresh meat of poultry and eggs from LPNAI countries clearly establishes the risk in trade from these commodities and "fulfils the requirement of not maintaining its measure without sufficient scientific evidence under Article 2.2 and India is under no obligation to conduct a

[610] United States' second written submission, para. 34 (citing India's opening statement at the first meeting of the Panel, para. 4).
[611] United States' second written submission, para. 34.
[612] United States' second written submission, para. 35 (referring to United States first written submission, para. 80).
[613] United States' second written submission, para. 35 (referring to Exhibit US-4).
[614] United States' second written submission, para. 35.
[615] India's first written submission, paras. 2-3.
[616] India's first written submission, para. 7.
[617] India's first written submission, paras. 165; and India's response to Panel question No. 60.
[618] India's opening statement at the first meeting of the Panel, para. 4.
[619] India's first written submission, para. 184.
[620] India's response to Panel question No. 31.

separate risk assessment in this instance". Therefore, according to India, the "United States' claim under Article[s] 5.1 and 5.2 should be dismissed".[621]

7.298. With respect to the Summary Document referred to by the United States, India acknowledges that in October 2010, pursuant to bilateral talks between the two countries, India informally provided a document that contained a brief summary of scientific material which India believed formed the basis of the OIE recommendation and hence also the justification behind India's measure. India mentioned in the Summary Document the specific OIE recommendation which it believed was applicable in the instant case. India stresses that "[t]his document was provided informally and in good faith only to the United States and the European Communities and India categorically stated that this was not India's risk assessment and should not be treated as one".[622]

7.299. India asserts that "[i]n breach of the trust reposed by India in the United States, it together with the European Union specifically sought an opinion from the OIE whether the document qualified as a risk assessment". India avers that it "had not sought OIE's opinion on the matter and shared the document with the OIE only for information purposes".[623] In India's view, "[t]he OIE does not have a separate mandate to assess, judge or comment on the existence or content of a Member's risk assessment". Nonetheless, "in disregard of its mandate and overstepping its position as an observer at SPS Committee meetings, the OIE took to the floor and proceeded to opine on the document stating that it was severely deficient in many aspects".[624]

7.300. India acknowledges that the OIE in its "critical review" of India's Summary Document stated that the document "does not conform to the OIE's definition of a risk assessment" and also "accuses India of plagiarism for allegedly quoting from a New Zealand risk assessment without mentioning the source".[625] India contends that it had not relied on the New Zealand risk assessment and the OIE reviewer failed to notice that the scientific authorities behind the facts mentioned in India's Summary Document were listed in the end notes.[626]

7.301. According to India, the OIE reviewer "further failed to note that the New Zealand risk assessment which was conducted in 1999 (when the concept of LPNAI occurrences in poultry was not yet recognized by the OIE) was outdated compared to a far more recent risk assessment conducted by Australia in 2008". India then posits that "[t]he Australian risk assessment categorically concludes that fresh meat of poultry from countries such as USA which notified LPNAI should not be imported".[627]

7.5.3.2 Analysis by the Panel

7.5.3.2.1 Introduction

7.302. The issue before the Panel is whether India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement. In particular, the United States claims that India did not undertake a risk assessment and failed to ensure that its AI measures are based on a risk assessment in violation of Article 5.1 of the SPS Agreement.[628] The United States further claims that without a risk assessment, India could not have taken into account available scientific evidence and the other factors noted in Article 5.2, thereby breaching that provision as well.[629]

7.303. India responds that its measures conform to the Terrestrial Code and therefore the "non-existence of a risk assessment is of no consequence when India's measure is in conformity with the [Terrestrial] Code".[630]

[621] India's first written submission, para. 186.
[622] India's first written submission, para. 7.
[623] India's first written submission, para. 8.
[624] India's first written submission, para. 8.
[625] India's first written submission, para. 9.
[626] India's first written submission, para. 9.
[627] India's first written submission, para. 9.
[628] United States' first written submission, paras. 17 and 113.
[629] United States' first written submission, para. 113.
[630] India's opening statement at the first meeting of the Panel, para. 4.

7.304. As explained in paragraph 7.279 above, we have found that India's AI measures are not based on, and therefore do not conform to, the Terrestrial Code, and, in particular, Chapter 10.4 thereof. Accordingly, India cannot rely on the alleged conformity of its AI's measures to the Terrestrial Code in order to justify a presumption of consistency of those measures with the remainder of the SPS Agreement, including Articles 2.2, 5.1 and 5.2.

7.305. We now proceed to examine the legal provisions at issue to ascertain the applicable legal test.

7.5.3.2.2 The legal provisions at issue

7.306. The first two paragraphs of Article 5 of the SPS Agreement read as follows:

> 1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.
>
> 2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

7.307. We concur with the approach adopted by the panel in *US – Poultry (China)* and thus consider that an analysis under Article 5.1 of the SPS Agreement consists of answering two fundamental questions: first, whether India has a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations and the elements listed in Article 5.2; and second, if that is the case, whether India's AI measures are based on that risk assessment.[631]

7.308. In *Australia – Apples*, the Appellate Body observed that Article 5.2 requires a risk assessor to take into account the available scientific evidence, together with other factors. The Appellate Body explained that whether a risk assessor has taken into account the available scientific evidence in accordance with Article 5.2 of the SPS Agreement and whether its risk assessment is a proper risk assessment within the meaning of Article 5.1 and Annex A(4) "must be determined by assessing the relationship between the conclusions of the risk assessor and the relevant available scientific evidence".[632]

7.5.3.2.3 Whether India has a risk assessment pursuant to Article 5.1 of the SPS Agreement

7.309. The first question we must answer under our analysis of the United States' claim pursuant to Article 5.1 is whether India has a risk assessment. As noted above, the United States claims that India lacks a risk assessment on which to base its measures[633], while India responds that because its measures conform to the Terrestrial Code, "the non-existence of a risk assessment is of no consequence".[634]

7.310. In order to establish whether India has a risk assessment, we commence by looking at the definition of "risk assessment" in Annex A(4) of the SPS Agreement, which reads:

> *Risk assessment* – The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated

[631] Panel Report, *US – Poultry (China)*, para. 7.173. We note that a similar approach was adopted by the panel in *EC – Approval and Marketing of Biotech Products*. Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.3019.

[632] Appellate Body Report, *Australia – Apples*, para. 208.

[633] United States' first written submission, para. 113.

[634] India's opening statement at the first meeting of the Panel, para. 4; India's first written submission, para. 185.

> potential biological and economic consequences; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

7.311. In reference to the above definition, the Appellate Body has described the term "risk assessment" as "a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions".[635]

7.312. We need to establish whether India has a risk assessment that falls within the definition provided in Annex A(4) of the SPS Agreement. Further to the United States' contention that India has not undertaken a risk assessment, and since India had not come forward with one, the Panel asked India to clarify whether it has a risk assessment for its AI measures and, if so, to provide it to the Panel.[636] India did not do so, responding that it was "not required to conduct a risk assessment for measures which conform to the international standards".[637]

7.313. We note that India argued that "[t]he Australian risk assessment categorically concludes that fresh meat of poultry from countries such as USA which notified LPNAI should not be imported".[638] Nevertheless, leaving aside Australia's submission to this Panel, which did not concur with India's assertion[639], India did not contend before us that its AI measures are based on Australia's risk assessment.

7.314. The United States draws the Panel's attention to the Summary Document[640] which India provided at the WTO SPS Committee meeting in October 2010, and maintains that it does not constitute a risk assessment within the meaning of Articles 5.1, 5.2 and Annex A(4) of the SPS Agreement.[641] India acknowledges that in October 2010, pursuant to bilateral talks between the two countries, India informally provided a document that contained a brief summary of scientific material which India believed formed the basis of the OIE recommendation and hence also the justification behind India's measure. Nevertheless, India submits that the Summary Documents is not India's risk assessment.[642]

7.315. Having found that India's AI measures are not based on, and therefore do not conform to, the Terrestrial Code and, in particular Chapter 10.4 thereof, such that a risk assessment is required in this case, and having considered the submissions of the parties on the existence of a risk assessment, we turn to our own examination of whether India has a risk assessment that meets the definition provided in Annex A(4) of the SPS Agreement.

7.316. It seems to us that the only document before us that could constitute such an assessment is the Summary Document. We observe that, although this Summary Document is entitled "India's Risk Assessment on Avian Influenza for imposing ban on import of poultry and poultry products from Avian Influenza positive countries", India submits that "[t]his document was provided informally and in good faith only to the United States and the European Communities" and that "this was not India's risk assessment and should not be treated as one".[643] We accept India's assertion that it did not intend for it to serve as a risk assessment. We also note that, as India asserts, the document is but a "brief summary of scientific material". In the light of these assessments and descriptions of the Summary Document, we are not satisfied that it meets the definition set out in Annex A(4), nor that it meets the Appellate Body's description of "a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions".

7.317. On the basis of the evidence and argument before us, the Panel concludes that India does not have a risk assessment within the meaning of Annex A(4) and as required by Article 5.1 of the SPS Agreement in respect of its AI measures.

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[635] Appellate Body Report, *Australia – Apples*, para. 207 (quoting Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 527; and *EC – Hormones*, para. 187).
[636] Panel question Nos. 31 and 59.
[637] India's response to Panel question Nos. 31 and 59.
[638] India's first written submission, para. 9.
[639] Australia's third-party written submission, para. 15.
[640] As defined in para. 7.288 above.
[641] United States' first written submission, paras. 81-84 and 114-123.
[642] India's first written submission, para. 7; India's second written submission, para. 85.
[643] India's first written submission, para. 7; India's second written submission, para. 85.

7.5.3.2.4 Conclusion on the United States' claims under Articles 5.1 and 5.2 of the SPS Agreement

7.318. In the absence of a risk assessment, we do not find it necessary to continue our analysis under Article 5.1 of the SPS Agreement. We therefore find that India's AI measures are inconsistent with Article 5.1 of the SPS Agreement because they are not based on a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations.

7.319. Having concluded that India's AI measures are not based on a risk assessment, it is not possible to examine whether India could have taken into account in the assessment of risks the factors set out in Article 5.2 of the SPS Agreement. The Panel also finds that, in the absence of a risk assessment, India's AI measures are inconsistent with Article 5.2 of the SPS Agreement because they are not based on a risk assessment that takes into account the factors set forth in Article 5.2.

7.5.4 Whether India's AI measures are inconsistent with Article 2.2 of the SPS Agreement

7.5.4.1 Arguments of the parties

7.5.4.1.1 United States

7.320. The United States claims that India's AI measures are inconsistent with Article 2.2 because they are not applied only to the extent necessary to protect human or animal life or health, are not based upon scientific principles, and are maintained without sufficient scientific evidence.[644]

7.321. The United States submits that Article 2.2 sets forth fundamental obligations applicable to all SPS measures, including that measures be based on scientific principles and sufficient scientific evidence. In the United States' view, Articles 5.1 and 5.2 serve as a specific application of these basic principles by requiring Members to undertake a risk assessment. Citing the Appellate Body, the United States points out that the relationship between these provisions "is that a proper risk assessment is a constituent component of ensuring measures are based on scientific principles and not maintained without sufficient scientific evidence".[645]

7.322. The United States proceeds to argue that because of this relationship, a finding that Articles 5.1 or 5.2 has been breached means that a violation of Article 2.2 has occurred as well. According to the United States, in the absence of any risk assessment, and thus, in the absence of sufficient scientific evidence supporting India's measures, India is also in breach of Article 2.2. The United States submits in addition that India's imposition of a ban on the identified avian products is not maintained with sufficient scientific evidence because there is no scientific evidence that these products may not be safely traded under any circumstances. The United States holds the view that the scientific evidence establishes that the LPAI virus is not present in poultry meat or inside eggs and LPAI cannot be transmitted through these products.[646]

7.323. The United States asserts that "India's measures are maintained without scientific evidence because the measures impose import prohibitions on products that scientific evidence indicates can be safely imported with the proper precautions, specifically products from countries reporting only LPNAI".[647] The United States refers to the findings of the panel in *Japan – Apples* to point out that the critical question is whether there is an adequate relationship between India's import prohibitions on account of LPNAI and the relevant scientific evidence.[648] After reviewing the

[644] United States' request for the establishment of a panel, p. 2.
[645] United States' first written submission, para. 124 (referring to Appellate Body Report, *Australia – Salmon*, paras. 137 and 138).
[646] United States' first written submission, para. 124.
[647] United States' second written submission, para. 36.
[648] United States' second written submission, para. 37 (citing Panel Report, *Japan – Apples*, para. 8.102).

evidence provided by India, the United States concludes that "[i]n short, India cannot show that its measures have *any* relationship to the scientific evidence, let alone an adequate one".[649]

7.5.4.1.2 India

7.324. India believes the United States "failed in its burden to present a prima facie case" of violation of Article 2.2 of the SPS Agreement.[650] According to India, in any event, its measures are in conformity with Article 2.2 of the SPS Agreement.[651] India bases its argument on three different grounds: (i) India's measures conform to or are based on international standards, which fulfils the requirement of being based on scientific principles and not maintained without sufficient scientific evidence; (ii) other countries maintain similar import restrictions upon occurrence of NAI, proving that the risk is well founded; and (iii) existing scientific literature supports measures maintained by India.[652]

7.325. On the first ground, India contends that it submitted detailed arguments on why its measures are in conformity with the Terrestrial Code. In India's view, if the Panel finds this to be the case, India's measures will be presumed to be consistent with the SPS Agreement, including Articles 2 and 5.[653]

7.326. Regarding the second ground, India asserts that import bans upon an occurrence of LPNAI are being implemented by several countries. For India "[t]his clearly establishes that several OIE and WTO Members perceive a real risk in trade of fresh meat of poultry and eggs from countries reporting LPNAI".[654] India argues that since the Terrestrial Code permits importing countries to seek country-wide freedom from the exporting country, importing countries are well within their rights to impose bans on these commodities from exporting countries upon a notification of LPNAI. India further explains that it imposes a temporary import prohibition which is lifted once the exporting country declares freedom; and "[e]xceptions to the country-wide ban are implemented if the exporting country proves it[s] [biosecurity] to the importing country and a formal agreement in this regard is reached between both countries as recommended by the [Terrestrial] Code". According to India, "Member State implementation of the [Terrestrial] Code reinforces India's claim that the OIE permits the imposition of temporary import suspensions on a country-wide basis from countries reporting LPNAI because of a risk perceived in trade in such commodities".[655]

7.327. Finally, with respect to the third ground, India relies on several scientific reports to support its argument that those scientific reports clearly outline the risk of trade in unprocessed meat and eggs from LPAI reporting countries. India asserts that its measures "seek to address a risk of transmission of a disease not currently present in India by temporarily suspending imports of these products from LPNAI countries".[656] According to India, its measures are based on scientific principles and are not maintained without sufficient scientific evidence.[657]

7.5.4.2 Analysis by the Panel

7.5.4.2.1 Introduction

7.328. The issue before the Panel is whether India's AI measures are based on scientific principles and are not maintained without sufficient scientific evidence as required by Article 2.2 of the SPS Agreement. The United States claims that a finding that Article 5.1 or 5.2 has been breached also means a violation of Article 2.2 of the SPS Agreement.[658] India disagrees and asserts that its AI measures are in conformity with Article 2.2 of the SPS Agreement.[659]

[649] United States' second written submission, para. 48. (emphasis original)
[650] India's first written submission, para. 158.
[651] India's first written submission, para. 159.
[652] India's first written submission, para. 161.
[653] India's first written submission, para. 166.
[654] India's first written submission, para. 174.
[655] India's first written submission, para. 174.
[656] India's first written submission, para. 182.
[657] India's first written submission, para. 182.
[658] United States' first written submission, para. 124.
[659] India's first written submission, paras. 161-162.

7.329. We commence our analysis by examining the legal provision at issue.

7.5.4.2.2 The legal provision at issue

7.330. Article 2.2 of the SPS Agreement reads as follows:

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

7.331. Article 2.2 requires *inter alia* that SPS measures be based on scientific principles and not be maintained without sufficient scientific evidence. As explained in paragraph 7.282 above, where an SPS measure is not based on a risk assessment as required by Articles 5.1 and 5.2 of the SPS Agreement, this measure is presumed not to be based on scientific principles and to be maintained without sufficient scientific evidence, in contravention of Article 2.2 of the SPS Agreement.[660]

7.5.4.2.3 Conclusion on the United States' claim pursuant to Article 2.2 of the SPS Agreement

7.332. Having found in paragraphs 7.318 and 7.319 above that India's AI measures are not based on a risk assessment and are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement, we further find that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement, because they are not based on scientific principles and are maintained without sufficient scientific evidence.

7.5.5 Conclusion on the United States' claims pursuant to Articles 5.1, 5.2 and 2.2 of the SPS Agreement

7.333. The Panel finds that, in the absence of a risk assessment, India's AI measures are inconsistent with Article 5.1 of the SPS Agreement because they are not based on a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations. The Panel further finds that India's AI measures are inconsistent with Article 5.2 of the SPS Agreement because they are not based on a risk assessment that takes into account the factors set forth in Article 5.2.

7.334. In the light of our findings of inconsistency with Articles 5.1 and 5.2 of the SPS Agreement, the Panel also finds that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement, because they are not based on scientific principles and are maintained without sufficient scientific evidence.

7.6 Whether India's AI measures are inconsistent with Articles 2.3 and 5.5 of the SPS Agreement

7.6.1 Introduction

7.335. The Panel will now consider whether India's AI measures are inconsistent with Articles 2.3[661] and 5.5 of the SPS Agreement.

7.336. At the outset, the Panel observes that while, in its panel request, the United States articulates its claims under Articles 2.3 and 5.5 as distinct and separate claims[662], in its

[660] Appellate Body Report, *Australia – Salmon*, para. 138; Panel Reports, *Australia – Salmon*, para. 8.52; *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.85 and 7.161; *EC – Approval and Marketing of Biotech Products*, paras. 7.3396 and 7.3399; *US – Poultry (China)*, paras. 7.168 and 7.203–7.204; and *Australia – Apples*, paras. 7.212 and 7.905.

[661] We recall that the Panel has already determined in section 7.1.2.4.3 above that the United States' description in its panel request of its claim under Article 2.3 of the SPS Agreement meets the requirements of Article 6.2 of the DSU. Accordingly, the Panel has declined India's request that the United States' claim under Article 2.3 of the SPS Agreement be set aside on the basis that it is outside the jurisdiction of this Panel.

[662] United States' request for the establishment of a panel, paras. 2 and 6.

submissions, the United States elaborates on those claims collectively; that is, the United States argues that India's AI measures are inconsistent with Article 2.3, before arguing its "alternative"[663] claim under Article 5.5. Specifically, the United States first addresses the claim under Article 2.3, arguing that India breaches the obligations in both the first and second sentences of Article 2.3.[664] Thereafter, the United States contends that "to the extent that transmission of avian influenza through domestically-produced products and through foreign products are viewed as distinct situations, then India has breached Article 5.5 of the SPS Agreement".[665] According to the United States, that breach of Article 5.5 would result in a consequential breach of Article 2.3.[666] Nevertheless, the United States asserts, first and foremost, that "India's measures are more properly analysed under Article 2.3 than under Article 5.5".[667]

7.337. Before we proceed to examine each of the United States' claims, we must therefore first determine the relationship between these two provisions and decide the order of our analysis of the United States' claims under Articles 2.3 and 5.5 of the SPS Agreement.

7.6.2 Relationship between Articles 2.3 and 5.5 of the SPS Agreement

7.338. Article 2.3 obliges Members to ensure that their SPS 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. Article 2.3 also prohibits Members from applying their SPS measures in a manner which would constitute a disguised restriction on international trade. Article 5.5 in relevant part requires Members to avoid arbitrary or unjustifiable distinctions in the levels of protection they consider to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

7.339. There is a notable similarity in the language of the two provisions, with certain words or modified versions thereof appearing in both provisions, such as "discriminate", "arbitrary or unjustifiable", and "disguised restriction on international trade". In the light of these similarities, the Appellate Body has remarked that "[w]hen read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3".[668] In *Australia – Salmon*, the Appellate Body elaborated on the relationship between Articles 2.3 and 5.5 and considered that a finding of violation of Article 5.5 necessarily implies a violation of Article 2.3:

> We recall that the third – and decisive – element of Article 5.5 … requires a finding that the SPS measure which embodies arbitrary or unjustifiable restrictions in levels of protection results in "discrimination or a disguised restriction on international trade". Therefore, a finding of violation of Article 5.5 will necessarily imply a violation of Article 2.3, first sentence, or Article 2.3, second sentence. Discrimination "between Members, including their own territory and that of others Members" within the meaning of Article 2.3, first sentence, can be established by following the complex and indirect route worked out and elaborated by Article 5.5. However, it is clear that this route is not the only route leading to a finding that an SPS measure constitutes arbitrary or unjustifiable discrimination according to Article 2.3, first sentence. Arbitrary or unjustifiable discrimination in the sense of Article 2.3, first sentence, can be found to exist without any examination under Article 5.5.[669]

7.340. On the basis of this relationship, panels faced with two claims under Articles 2.3 and 5.5 have typically adopted the approach of examining the claim under Article 5.5 before turning to the claim under Article 2.3. Indeed, in some recent disputes in which a claim under Article 2.3 was

[663] United States' first written submission, Section VIII.H.
[664] United States' first written submission, paras. 160-184.
[665] United States' first written submission, para. 186; and United States' response to Panel question No. 33.
[666] United States' first written submission, paras. 185-189.
[667] United States' response to Panel question No. 33.
[668] Appellate Body Report, *EC – Hormones*, para. 212.
[669] Appellate Body Report, *Australia – Salmon*, para. 252; Panel Report, *US – Poultry (China)*, para. 7.318.

made, it was argued, not as an independent claim, but rather as a consequential breach of the alleged breach in Article 5.5.[670]

7.341. The United States has not presented its claim in this order. As described in paragraph 7.336 above, the United States has ordered its analysis such that its primary claim is under Article 2.3 of the SPS Agreement and, in the "alternative"[671], under Article 5.5 of the SPS Agreement. The United States elaborates that India's measures are "properly analysed" under Article 2.3 of the SPS Agreement.[672] However, the United States also argues that a finding by the Panel that transmission of AI in imported products and transmission of AI in domestic products amount to "different situations" for the purpose of Article 5.5 should lead the Panel to find that India's measures are inconsistent with Article 5.5 of the SPS Agreement because India maintains arbitrary or unjustifiable distinctions in the levels of protection that it considers appropriate for imported and domestic agricultural products with respect to AI risks.[673] The United States also argues that this should lead to a consequential finding that India's measures are inconsistent with Article 2.3 of the SPS Agreement.[674]

7.342. India argues that, in the event that its measures are found to be inconsistent with Article 3 of the SPS Agreement, then the Panel should address the United States' claims under Articles 2.2 and 2.3 before addressing the United States' various claims under Article 5 (including under Article 5.5).[675] India therefore does not contest the United States' request that we consider the latter's claim under Article 2.3 before Article 5.5.

7.343. Although the United States argues that this claim is most appropriately considered under Article 2.3 of the SPS Agreement, the Panel recalls that, according to the Appellate Body, a panel may depart from the sequential order suggested by the complaining party when this is required in the light of the correct interpretation or application of the legal provisions at issue.[676] Therefore, we are not bound by the sequence proposed by the United States.

7.344. We note that Article 2.3 is of a more general character than Article 5.5. A violation of Article 2.3 will not necessarily imply a violation of Article 5.5[677], and arbitrary or unjustifiable discrimination in the sense of Article 2.3, first sentence, can be found to exist without any examination under Article 5.5.[678] On this basis, we are of the view that it is not necessary that a complaining Member pursue its claim via Article 5.5 and, subsequently, Article 2.3 of the SPS Agreement, in order to substantiate a claim of arbitrary or unjustifiable discrimination under the SPS Agreement. Therefore, we also consider that the correct interpretation or application of Articles 2.3 and 5.5 of the SPS Agreement does not require that we depart from the order of analysis suggested by the United States and not contested by India.

7.345. In addition, and as we have observed in paragraph 7.341 above, the United States has not presented its claim under Article 2.3 as a consequence of an inconsistency with Article 5.5. Indeed, the United States' primary claim is *independent* of any allegation that India's AI measures are inconsistent with Article 5.5. Moreover, India has responded to the United States' arguments in this same order. Given that it is not necessary for a complaining Member to pursue its claim via Article 5.5 and, subsequently, Article 2.3, we think it logical that our analysis reflects the manner in which the parties have presented their arguments.

7.346. Furthermore, given the manner in which the United States has presented its arguments, we are concerned that our adoption of an alternative order of analysis may limit the Appellate Body's ability to review our decision, if it is requested to do so. Specifically, if we commence with Article 5.5, and find that India's AI measures are inconsistent with that provision

[670] Panel Reports, *Australia – Salmon (Article 21.5 - Canada)*, paras. 7.112-7.114; *EC – Approval and Marketing of Biotech Products*, paras. 7.1446-7.1448, 7.1765-7.1766 and 7.3405-7.3406; *US – Poultry (China)*, paras. 7.318-7.319; and *Australia – Apples*, para. 7.1095.
[671] United States' first written submission, Section VIII.H.
[672] United States' response to Panel question No. 33.
[673] United States' response to Panel question No. 33.
[674] United States' first written submission, para. 186.
[675] India's first written submission, para. 111.
[676] Appellate Body Report, *US – Zeroing (Article 21.5 – EC)*, para. 277.
[677] Panel Report, *Australia – Salmon*, para. 8.109.
[678] Appellate Body Report, *Australia – Salmon*, para. 252; Panel Report, *US – Poultry (China)*, para. 7.318.

and also, as a consequence, with Article 2.3, we will not assess the factual and legal arguments made by the United States in relation to whether India's AI measures breach Article 2.3 independently of any inconsistency with Article 5.5. Failure to do so would mean that there would not be sufficient factual findings on the record for the Appellate Body to complete our analysis (if it were asked to do so).[679]

7.347. In the light of the above, we will adopt the order of analysis suggested by the United States and commence by considering the United States' claim that India's AI measures result in arbitrary or unjustifiable discrimination inconsistent with Article 2.3 of the SPS Agreement. If we find that India's AI measures do violate Article 2.3, we will consider the United States' alternative, separate claim that India's AI measures are inconsistent with Article 5.5 of the SPS Agreement.

7.6.3 Whether India's AI measures are inconsistent with Article 2.3 of the SPS Agreement

7.6.3.1 Arguments of the parties

7.6.3.1.1 The United States

7.348. The United States argues that India's AI measures are inconsistent with Article 2.3 of the SPS Agreement and, in the alternative, Article 5.5 of the SPS Agreement, to the extent that India can be said to be maintaining different ALOPs. It is the view of the United States that "when it comes to regulating its trade in its own products on account of AI, India takes a diametrically different approach from that which it applies to imported products".[680] India's measures therefore serve, not as a buffer against AI, but as a means of arbitrarily or unjustifiably discriminating against imported products and applying a disguised restriction on trade. In so doing, India breaches Article 2.3 of the SPS Agreement.[681]

7.349. The United States believes that Article 2.3 and Article 5.5 provide two different conceptual frameworks through which India's discriminatory practices could be analysed. The United States believes that it is most appropriate to view India as having enacted measures that discriminate between India and other Members in responding to the risk of transmission of NAI in the products covered by S.O. 1663(E), and accordingly to view India as having breached Article 2.3, first sentence. Likewise, the United States believes that it is more appropriate to consider India as having one ALOP for LPNAI (reflected in its domestic surveillance and control measures), than distinct ALOPs with respect to transmission of LPNAI through foreign and domestic products.[682]

7.350. With regard to Article 2.3 itself, the United States argues that Article 2.3, first sentence, prohibits SPS measures that arbitrarily and unjustifiably discriminate between Members, whether between two different exporting Members that ship the same product to the Member imposing the measure, or between the Member imposing the measure and another Member. The United States relies on the panel's finding in *Australia – Salmon (Article 21.5 – Canada)* to argue that a breach of Article 2.3, first sentence, exists if:

a. the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;

b. the discrimination is arbitrary or unjustifiable; and

[679] We note that "[i]t is well settled that the Appellate Body will be in a position to complete the legal analysis if it has before it sufficient factual findings of the panel or undisputed facts on the panel record". Appellate Body Report, *EC – Selected Customs Matters*, para. 278 (citing Appellate Body Reports, *US – Hot-Rolled Steel*, para. 235; *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 98; and *US – Section 211 Appropriations Act*, para. 343).

[680] United States' first written submission, para. 160.

[681] United States' first written submission, para. 160.

[682] United States' response to Panel question No. 33.

c. identical or similar conditions prevail in the territory of the Members compared.[683]

7.351. The United States alleges that India arbitrarily and unjustifiably discriminates against imported products in the treatment of those products following an AI outbreak somewhere in the exporting country. In so doing, India breaches Article 2.3, first sentence.[684]

7.352. The United States argues that India maintains two different "forms"[685] of discrimination that are inconsistent with Article 2.3, first sentence. First, the United States argues that under S.O. 1663(E), if there is an NAI outbreak anywhere in the exporting country, the covered product is not permitted to be imported into India. By contrast, under India's domestic AI-control regime, domestic products may still be sold in India following an NAI outbreak within India, so long as the product originates outside a zone within 10 km of NAI detection.[686]

7.353. The United States argues that India's NAP calls for detections of AI in India to result in no restrictions or conditions of the movement of products originating outside the 10 km area surrounding the detection. By contrast, India's measures treat imported products differently and less favourably. The import ban is imposed on products from anywhere in a country where there has been even a single detection of AI. India offers no justification for this disparate treatment of imported products and therefore India's measures arbitrarily or unjustifiably discriminate against imported products.[687] India therefore applies one set of rules to domestic products and another less favourable set for identical imported products. The United States contends that this difference in treatment has no SPS justification. In sum, India's measures breach Article 2.3 of the SPS Agreement by arbitrarily or unjustifiably discriminating against imported products.[688]

7.354. The United States asserts that India's measures also arbitrarily and unjustifiably discriminate against imported products with respect to HPAI. It makes no sense for India to say that, whereas it will allow trade of domestic products from areas only 10.1 kilometres 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 there.[689]

7.355. Further, the United States regards as incorrect India's claim that the United States is arguing that India should be required to cull its entire poultry flock in response to an NAI outbreak.[690] The United States clarifies that it is seeking changes in the measures that India applies to imported products – the products at issue in this dispute – not the measures that India applies to domestic products. Rather than suggesting that India should cull its poultry flocks, the United States has explained that the SPS Agreement requires India to apply AI measures with respect to imported products on a similar basis as for domestic products. In particular, India should not apply bans on trade in products following LPNAI detections; and following HPNAI outbreaks, India should restrict trade in products only if those products are from affected zones or compartments – just as India applies its measures for containment of AI outbreaks in domestic flocks only to products from small and defined areas.[691]

7.356. The United States nonetheless notes that India's remarks regarding culling India's domestic poultry flock are telling, as they reveal that India appears to view culling this poultry flock in response to an NAI outbreak as the domestic equivalent of the measures (complete import

[683] United States' first written submission, para. 164.
[684] United States' first written submission, para. 166.
[685] United States' first written submission, Sections VIII.G(2)(a) and VIII.G(2)(b).
[686] United States' first written submission, paras. 167-170; United States' second written submission, para. 82.
[687] United States' first written submission, para. 171.
[688] United States' first written submission, para. 173.
[689] United States' opening statement at the first meeting of the Panel, para. 21.
[690] United States' response to Panel question No. 34 (referring to India's first written submission, para. 209).
[691] United States' response to Panel question No. 34.

bans) that it has imposed with respect to imported products following NAI detections in their country of origin.[692]

7.357. According to the United States, India's differential treatment of imported products and domestic products is not a function of any differences in conditions prevailing in India and other countries, or in countries' measures or procedures for control of AI.[693]

7.358. The second form of discrimination alleged by the United States relates to the imposition of bans on imported products on account of LPNAI. According to the United States, India's measures unjustifiably discriminate against imported products by banning them from India following detections of LPAI in the exporting country, while India does not even maintain surveillance requirements that would result in detection of LPNAI cases occurring in India's domestic poultry flocks.[694]

7.359. The United States notes that India has never notified LPNAI to the OIE, and that India represents that it has never had the disease. Citing its own veterinary experts, the United States argues that this is implausible, and that in fact India does not require use of surveillance procedures that would effectively detect LPNAI.[695] India's contrasting LPNAI-based import ban thus constitutes unjustifiable discrimination in breach of Article 2.3 of the SPS Agreement. The United States elaborates that according to India's surveillance regime, sampling only "may" be conducted on flocks, and that virological testing should occur "where possible", though it is not required.[696] Instead, the principal frontline method of detecting AI appears to be visual observation; however, LPAI (including LPNAI) is typically asymptomatic or causes only mild respiratory disease or decreased egg production. Any illness caused is unlikely to be different from that caused by other diseases and unlikely to strike a poultry producer as an unusual event requiring reporting of possible AI. Relying on visual observation of "unusual sickness" in birds, India's system therefore is not conducive to successful detection of LPNAI. [697]

7.360. To further support its assertion that LPNAI is present in India, the United States submits as an exhibit a study by Pawar et al. noting the detection of H5 and H7 antibodies in domestic ducks in India, from which the United States discerns that an infection has at some point been present in the birds in which the antibodies were detected.[698] The more crucial point, according to the United States, is that 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. The United States avers that 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. Even India's claim that it conducts routine laboratory and clinical surveillance is unsupported by the document that it cites; that is, merely a list of the numbers of samples tested by its national AI reference laboratory during a given period. In fact, notwithstanding LPNAI's lack of symptoms, India's AI Action Plan provides that States should not forward samples for testing to regional diagnostic laboratories, or India's national diagnostic laboratory, except where there is unusual sickness or mortality raising suspicion of AI.[699]

7.361. The United States argues that India attempts to respond to arguments about the inadequacy of its surveillance for LPNAI by arguing strenuously that LPNAI is exotic to India; however, according to the United States, such responses miss the point. India's imposition of import bans based on LPNAI detections in exporting Members discriminates against imports not because LPNAI incidents have occurred in India, but because India's surveillance for LPNAI is inadequate, resulting in a situation where controls on trade in domestic products due to domestic LPNAI will not be imposed. Indeed, the evidence that India has put forward with respect to its

[692] United States' response to Panel question No. 34; United States' second written submission, para. 85.
[693] United States' first written submission, para. 172.
[694] United States' first written submission, para. 174.
[695] United States' first written submission, para. 176; United States' second written submission, para. 86.
[696] United States' first written submission, para. 177.
[697] United States' first written submission, para. 178.
[698] United States' second written submission, para. 91.
[699] United States' opening statement at the first meeting of the Panel, para. 19.

surveillance programmes does not suggest that they are of a type capable of reliably detecting LPNAI.[700]

7.362. In relation to India's claims that LPNAI is exotic to India, the United States rejects the contention that South Asia is unique with respect to LPNAI, and states that India has offered no evidence that this is the case.[701] The United States refers in particular to LPAI carried by wild birds in numerous South Asian countries, which can carry and spread the LPAI virus to domestic Indian poultry. Moreover, the large number of H5N1 HPAI outbreaks occurring in India's poultry population would simply serve as an indicator of the high level of interaction occurring between the wild birds and domestic poultry populations, and thus of the likelihood of transmission of H5 or H7 LPAI from wild birds to domestic poultry in India – thereby producing LPNAI.[702] The United States also argues that India's assertion that LPNAI is exotic to India cannot justify India's argument that subjecting imports to AI measures more stringent than those applied to domestic products is justified.[703]

7.363. According to the United States, India's measures merely serve to exclude imports from countries like the United States that do have in place the surveillance mechanisms necessary to detect, and subsequently contain, LPNAI.[704] For the United States, what this means in practice is that while India relies on the detection of LPAI to ban the sale of products, India in fact applies LPAI-based bans only to imported products. India has failed to put in place measures that would effectively detect LPAI, so India is not taking the "steps necessary to restrict domestic products on account of LPAI". India's imposition of a ban on specified imports following LPAI detections in the exporting country therefore constitutes arbitrary or unjustifiable discrimination in breach of the first sentence of Article 2.3.[705]

7.364. Further, the United States notes that India seeks to protect against risks posed by AI, but the risks presented by foreign and domestic products in relation to LPAI are the same. There is no justification for imposing different measures on products presenting the same risk. Ironically, the countries that face import prohibitions under India's measures because they have reported LPAI are likely to have better conditions than India with respect to LPNAI risk.[706] The United States elaborates that while India is almost certain to have regular LPNAI cases that go undetected, the countries facing product restrictions are those that have the capacity to detect LPNAI and that therefore are able to take steps to contain the LPNAI.[707] 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. Here, India itself believes that it is a country with significant risk for domestic LPNAI incidents. Indeed, India purports that it does have surveillance and control measures for NAI. India cannot plausibly claim, in this circumstance, that its domestic conditions are so dissimilar from conditions in the rest of the world 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.[708]

7.365. In relation to Article 2.3, second sentence, the United States argues that a variety of facts, taken together, indicate that India's measures amount to a disguised restriction on international trade.[709] Most significant of these is India's application of drastically more stringent measures to foreign products than to domestic products, which demonstrates that, under the guise of SPS measures, India has drawn an arbitrary and unjustifiable distinction between products that present the same risk.[710]

[700] United States' second written submission, paras. 87 and 95.
[701] United States' second written submission, para. 89.
[702] United States' second written submission, paras. 88-92.
[703] United States' second written submission, paras. 104-109.
[704] United States' first written submission, paras. 175-176.
[705] United States' first written submission, para. 180.
[706] United States' first written submission, para. 181.
[707] United States' first written submission, para. 181.
[708] United States' opening statement at the first meeting of the Panel, para. 23.
[709] United States' first written submission, para. 182; United States' second written submission, para. 110.
[710] United States' first written submission, para. 182.

7.366. The United States argues that this is supported by additional relevant facts, including India's shifting position on whether its measures are justified by OIE guidelines or a risk assessment; and India's failure, in the end, to offer either a risk assessment or scientific evidence that would justify LPAI-based import bans or India's application of AI measures to entire countries, without any possibility for recognition of zones, regions or compartments with distinct AI status. Moreover, the United States argues that the manner in which India conducted its aborted attempt to construct a risk assessment further demonstrates that India's measure is a trade restriction, not an attempt to prevent the spread of avian influenza. The United States elaborates that, in response to numerous inquiries in the SPS Committee about the justification for its AI measures, in October 2010 India provided to the United States, and offered to circulate to SPS Committee delegates, a document entitled "India's Risk Assessment on Avian Influenza for imposing ban on import of poultry and poultry products from Avian Influenza positive countries". At the time, India asserted that this was a risk assessment justifying its measures, although India later clarified to the SPS Committee that this was not in fact a finalized risk assessment.[711]

7.367. The United States notes that these considerations are similar to those that the panel in *Australia – Salmon* considered to be "warning signals" and "additional factors" indicating a disguised restriction in the context of the claim under Article 5.5 in that dispute.[712] The Appellate Body upheld consideration of the "warning signals" and "additional factors" identified by the *Australia – Salmon* panel.[713]

7.6.3.1.2 India

7.368. India responds by arguing that the statutory basis for the alleged discrimination is not S.O. 1663(E), but the National Action Plan. India argues that S.O. 1663(E) does not regulate control measures to be taken domestically during an outbreak of NAI and hence is not either directly or indirectly capable of violating the obligation invoked.[714] India contends that NAP 2012 is not a measure at issue because it was not identified either by name or by virtue of a narrative in the panel request. On that count alone, the claim under Article 2.3 should be rejected.[715]

7.369. Regarding Article 2.3, first sentence, India asserts that panels have found that three elements are required in order to establish a violation of Article 2.3, first sentence, which are cumulative in nature: (i) that the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member; (ii) that the discrimination is arbitrary or unjustifiable; and (iii) that identical or similar conditions prevail in the territory of the Members concerned.[716]

7.370. India argues that "identical or similar conditions" do not exist in either of the situations identified by the United States as constituting arbitrary or unjustifiable discrimination. Turning to the first form of discrimination alleged by the United States, India states that the United States makes a "simplistic argument that while India places a country-wide ban on imports from an exporting country that notifies either HPNAI or LPNAI, when faced with an HPNAI outbreak in its own territory, India applies control measures limited to 10 km surrounding the epicentre of the outbreak.[717] India clarifies that it does not maintain a permanent ban against a country that has notified either an HPNAI or LPNAI outbreak. The ban is lifted once the exporting country notifies freedom from the disease to the OIE. According to India, this has been amply demonstrated by the granting of SIPs for imports of poultry products from countries that have reported freedom from NAI to the OIE.[718]

[711] United States' first written submission, para. 182; United States' second written submission, paras. 111-112.
[712] United States' second written submission, para. 111 (referring to Panel Report, *Australia – Salmon*, paras. 8.149-8.151).
[713] United States' second written submission, para. 111 (referring to Appellate body Report, *Australia – Salmon*, paras. 159-178).
[714] India's first written submission, para. 78.
[715] India's first written submission, para. 189.
[716] India's first written submission, para. 192; India's opening statement at the first meeting of the Panel, para. 39.
[717] India's first written submission, para. 194.
[718] India's first written submission, para. 195.

7.371. India also argues that the risks associated with a domestic outbreak of AI are highly distinct from situations in which it is an importer attempting to ensure that infected imports from countries experiencing NAI do not enter its territory. India argues that these situations involve different risks – in domestic outbreaks, the epicentre of the disease is known and identified and the risk is one of further spread, whereas with imports control measures are required to prevent agents of disease transmission entering a country and being dispersed through internal commerce and trade. Hence, "the measures that a country takes in these two situations would quite naturally and logically be different" and "it cannot be expected that a country would take identical measures to tackle both situations".[719] Similarly, India argues that in the event of a domestic outbreak, a country which experiences an outbreak of NAI is best suited to contain it and can deploy its resources to areas most urgently in need of disease containment measures. This is distinct, alleges India, from circumstances in which India is importing products, as it cannot exercise control over containment and disinfection methods applied by exporting countries and therefore it cannot be expected to certify the health and safety of imported products that are potential agents of NAI transmission. India "must gather information on an exporting country's surveillance and control mechanisms to satisfy itself that such measures are strong enough to contain outbreaks in those countries".[720] Therefore, internal control regimes for NAI cannot be compared with measures applied to prevent imports of products that are potential agents of disease transmission, meaning that the two situations the United States compares are neither identical nor similar.[721]

7.372. Turning to the second form of discrimination alleged by the United States, India argues that the United States' conjecturing regarding the presence of LPNAI in India "is solely to divert the Panel's attention from what is fundamentally a distinction between the situation prevailing in the United States which has experienced outbreaks of LPNAI and India which has only experienced outbreaks of the more serious HPNAI". India submits that LPNAI is exotic to India and "India has to date neither detected, despite routine surveillance, nor experienced outbreaks of LPNAI".[722] Furthermore, India asserts that it carries out routine laboratory as well as clinical surveillance in both poultry as well as wild birds to detect NAI, which are undertaken by several departments within the Government of India and State governments. According to India, the United States simply ignores all of these surveillance activities carried out by India and makes unsubstantiated allegations.[723] The OIE provides that countries may take trade-related measures to prevent ingress of a disease that is exotic to it.[724]

7.373. India also clarifies that routine surveillance is carried out irrespective of suspicion of an outbreak of AI and on an ongoing basis across the territory of India as prescribed under the Terrestrial Code. The High Security Animal Diseases Laboratory (HSADL), the diagnostic laboratory dedicated to this purpose, prepares weekly updates on the samples tested for AI.[725] Additionally, India states that it undertakes targeted surveillance in specific areas such as live/wet-markets and around international land borders.[726] These are areas under a heightened risk of avian influenza infection due to their proximity to wild bird populations and India maintains constant vigilance by undertaking targeted surveillance in these areas.[727] In the past, India has also undertaken targeted surveillance when unusual mortality was noticed in wild birds.[728]

7.374. In re-emphasizing that India has not experienced LPAI in poultry, and that the disease is exotic to India, India refers to the Panel in *Australia – Salmon*, in which "the Panel clearly held that '*identical or similar conditions*' could not be said to exist between Canada and Australia because in that case one of the disease[s] was endemic to Australia whereas [the] disease of concern with respect to salmon was not present or was exotic to Australia".[729] India argues that, likewise, there is a substantial difference in the disease status of the United States and India – while the

[719] India's first written submission, para. 196; India's opening statement at the first meeting of the Panel, para. 41.
[720] India's second written submission, para. 84 (referring to United States' opening statement at the first meeting of the panel, para. 21).
[721] India's first written submission, para. 199.
[722] India's first written submission, para. 201.
[723] India's first written submission, para. 205.
[724] India's first written submission, para. 206.
[725] India's response to Panel question No. 23.
[726] India's response to Panel question No. 23 (referring to Exhibit US-90).
[727] India's response to Panel question No. 23 (referring to Exhibit IND-117).
[728] India's response to Panel question No. 23 (referring to Exhibit IND-47).
[729] India's first written submission, para. 207. (emphasis original)

United States has experienced outbreaks of LPNAI, India has not and the disease is exotic to India.[730]

7.375. India notes that the Pawar et al. study submitted by the United States to substantiate its claim that India cannot ban products from countries reporting LPNAI because LPNAI occurs in India (but its surveillance system is not capable of detecting the disease), is insufficient evidence because nothing in the study indicates that the antibodies to H7 were low pathogenic. India states that the conclusion derived by the European Union and the United States (that LPNAI occurs in India but its surveillance system is not capable of detecting it) was drawn without any basis and is pure conjecture.[731]

7.376. Moreover, India argues that "mere discrimination or in other words, a formalistic distinction between measures does not suffice for purposes of Article 2.3".[732] India relies on the Appellate Body's finding in *Brazil – Retreaded Tyres* to contend that an enquiry whether discrimination is arbitrary or unjustifiable should focus on the cause of the discrimination or the rationale put forward to explain its existence.[733] India explains that the United States is suggesting "that India apply similar measures in the event of a domestic outbreak of NAI as it does for imports. This is a highly illogical suggestion because the United States essentially requires India to cull or destroy its entire poultry population and further completely put a stop to poultry trade in the country".[734] Citing the logistical difficulty and administrative burden that this would impose on India, India argues that this comparison is inappropriate.[735]

7.377. Instead, India argues that there is a clear rationale for the difference in measures that India takes to control a domestic outbreak as opposed to measures to prevent ingress of a disease into India. India notes that most countries take measures to control domestic outbreaks of NAI that are very similar to those taken by India, including the establishment of zones; culling of poultry in the high risk zone; surveillance in a buffer zone around this high risk zone; restrictions on outbound and inbound trade in poultry products from this high risk zone; and resumption of trade after disinfection of all affected premises and surveillance. India notes that none of these countries undertakes culling of all poultry within its boundaries or puts a nationwide ban on the sale of poultry products.[736]

7.378. India argues that panels have held that measures must be examined in the "specific context of the relevant risks" posed by the two situations to determine if there is any justification for the distinction in sanitary measures.[737] India repeats that the risks posed in these situations are different – "[i]n one situation, a country needs to take such measures as would prevent the spread and further establishment of a disease whereas in another situation a country would need to take such measures as would prevent ingress or entry of a disease into its territory".[738] In the context of LPNAI, India argues that the OIE states that Members may impose bans from countries on account of notifications of a disease which is exotic to the Member imposing the prohibition, and also refers to the panel in *Australia – Salmon* to argue that the risks relating to diseases present in a Member are different from those relating to diseases that are exotic[739], and reiterates that LPNAI is exotic to India.[740] In *Australia – Salmon* the Panel held that substantial difference in disease status between countries renders the two countries as not being placed in an identical or similar situation. Likewise, there is substantial difference in disease status between the United States and India. While the United States has experienced outbreaks of LPNAI, India has

[730] India's first written submission, para. 207.
[731] India's second written submission, paras. 80-81 (referring to Exhibit US-122; United States' opening statement at the first substantive meeting, para. 19; and European Union's third party statement, para. 11).
[732] India's first written submission, para. 208; and India's opening statement at the first meeting of the Panel, para. 44.
[733] India's first written submission, para. 208.
[734] India's first written submission, para. 209; India's second written submission, para. 83
[735] India's first written submission, para. 209.
[736] India's first written submission, para. 210; India's second written submission, para. 83.
[737] India's first written submission, para. 211 (citing Panel Reports, *US – Poultry*, para. 7.262; and *Australia-Salmon (Article 21.5 – Canada)*, para. 7.93); India's opening statement at the first meeting of the Panel, para. 45.
[738] India's first written submission, para. 211.
[739] India's first written submission, para. 213; India's opening statement at the first meeting of the Panel, para. 43; India's second written submission, para. 82.
[740] India's first written submission, para. 214.

not and the disease is exotic to India. In contrast, India has experienced several HPNAI outbreaks for which it has taken rigorous domestic containment measures.[741]

7.379. India adds that an LPNAI infection is more dangerous than an HPNAI infection because it is asymptomatic and is capable of causing silent asymptomatic infections in all poultry populations it infects, thus potentially infecting large populations of poultry across vast areas of the country. Moreover, introduction of LPNAI into a developing country such as India would have "unimaginable consequences"[742], because HPNAI is much easier to contain and control than LPNAI.[743] Moreover, the danger from LPNAI is due to its ability to mutate into HPNAI, which adds a new level of uncertainty because it cannot be ascertained when the virus will mutate and become highly pathogenic.[744]

7.380. Regarding Article 2.3, second sentence, India objects to the "ambiguous" nature of the claim and the lack of clarity with respect to the product specific measures that the United States believes are being applied in a manner that would constitute a disguised restriction on international trade.[745] In its claim under Article 2.3, first sentence, the United States adduced two situations which it believes result in arbitrary and unjustifiable discrimination. India argues that it is not clear whether the United States adduces the same fact situations as the basis for its claim under Article 2.3, second sentence. However, by specifically mentioning India's country-wide prohibition from LPNAI reporting countries, India infers that the United States limits the scope of its objections under Article 2.3, second sentence, to this specific fact situation. India also states that it is clear that the United States is not challenging India's prohibition from HPNAI-notifying countries under Article 2.3, second sentence.[746]

7.381. India argues that none of the facts mentioned in the United States' claim under Article 2.3, second sentence, establishes that India is applying its SPS measures in a manner that would constitute a disguised restriction on international trade. First, regarding whether products carry the same risk, India contends that the facts underlying this assertion are not stated with any level of precision. However, India explains that there is clear justification for maintaining an import prohibition from countries reporting LPNAI as the disease is not present in India and is thus exotic to India. Moreover, India says that the risks to a country from ingress of an exotic disease cannot be compared with the risk posed by an already existing disease. By suggesting that India should take similar measures in both situations is illogical and is not supported by the OIE Code or by the practice of several other countries that take similar measures in such situations.[747]

7.382. Moreover, in relation to the United States' argument regarding India's "shifting position" on whether its measures are justified by OIE guidelines or a risk assessment, India argues that it has always maintained that its measures are based on the Terrestrial Code. India stresses that it has clarified this to the United States on a number of occasions, and also that it has clearly said that it did not contend that the summary document was a risk assessment.[748] India argues that the United States' reliance on the panel's ruling in *Australia – Salmon* to draw a parallel with the events surrounding India's decision to provide a summary document to the European Union and the United States is misplaced.[749] India recalls that in *Australia – Salmon*, there was a "rather substantial change in conclusions" between the 1995 and the 1996 risk reports and Australia was unable to explain the reasons for the change.[750] India elaborates further, arguing that it has not shifted positions on whether a risk assessment was required of it, and that it was always India's understanding that, having adopted an OIE recommendation, it was not required to further conduct a risk assessment. India does note, however, that it did provide a brief summary of scientific material which India believed formed the basis of the OIE recommendation and hence

[741] India's opening statement at the first meeting of the Panel, para. 43.
[742] India's first written submission, para. 214.
[743] India's first written submission, para. 214; India's response to Panel question No. 4.
[744] India's response to Panel question No. 4.
[745] India's first written submission, para. 215; and India's opening statement at the first meeting of the Panel, para. 46.
[746] India's first written submission, para. 216.
[747] India's first written submission, para. 217.
[748] India's first written submission, para. 218.
[749] India's second written submission, para. 85.
[750] India's second written submission, para. 85 (referring to Panel Report, *Australia – Salmon*, para. 8.154).

also the justification behind India's measure.[751] India also notes that there has been no substantial change in India's measures since 2010. India refers to the panel's findings in *EC – Asbestos* to explain that the key to understanding what is covered by 'disguised restriction on international trade' is not so much the word 'restriction', but the word 'disguised'.[752]

7.383. India relies on the panel's findings in *EC – Asbestos* to argue that the natural consequence of prohibiting a given product cannot in itself lead to the conclusion that the measure has a protectionist aim. Thus a prohibition on imports of poultry products from countries reporting LPNAI cannot constitute a disguised restriction on international trade, particularly when the disease is not present in India.[753]

7.384. India asserts that none of the facts taken individually or collectively establishes that India is disguising the true intent behind the measure; the United States has simply placed certain facts before the Panel but has not explained how they amount to a "disguised" restriction on trade.[754]

7.6.4 Analysis by the Panel

7.6.4.1 Introduction

7.385. The issue before the Panel is whether India has acted inconsistently with Article 2.3 of the SPS Agreement because (i) its AI measures arbitrarily or unjustifiably discriminate between Members where similar conditions prevail, including between India's own territory and that of other Members and (ii) it has applied its measures in a manner that constitutes a disguised restriction on international trade.

7.386. We will begin our analysis by considering the legal provision at issue.

7.6.4.2 The legal provision at issue

7.387. Article 2.3 of the SPS Agreement 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.

7.388. The Appellate Body has clarified that Article 2.3 of the SPS Agreement contains two primary obligations[755], each of which corresponds to one of the sentences of Article 2.3. The first obligation is contained in the first sentence: "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". The second obligation is contained in the second sentence: "Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade". We will examine whether India's AI measures meet each of these obligations.

7.6.4.2.1 Article 2.3, first sentence, of the SPS Agreement

7.389. We proceed to examine whether India's AI measures arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between India and that of other Members. We concur with the panel's analysis in *Australia – Salmon (Article 21.5 – Canada)*, which identified three cumulative elements that must necessarily be established to find a violation of Article 2.3, first sentence. The panel stated:

> [T]hree elements, cumulative in nature, are required for a violation of this provision:

[751] India's second written submission, para. 85.
[752] India's second written submission, para. 86 (referring to India's first written submission, para. 220).
[753] India's first written submission, para. 222.
[754] India's second written submission, para. 86.
[755] Appellate Body Report, *Australia – Salmon*, para. 252.

(1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;

(2) the discrimination is arbitrary or unjustifiable; and

(3) identical or similar conditions prevail in the territory of the Members compared.[756]

7.390. Before proceeding to examine these three elements, we observe that the United States constructs its arguments under Article 2.3, first sentence, on the basis of its allegations of two "forms"[757] of discrimination. First, the United States challenges the fact that India maintains a total ban on imported products compared with a ban on domestic products only within a limited 10 km zone.[758] Second, the United States challenges the imposition of bans on imported products on account of LPNAI, while India does not even maintain surveillance requirements that would result in detection of LPNAI.[759] We will address separately each of the three elements of Article 2.3, first sentence, and each with regard to the two forms of discrimination alleged by the United States.

7.6.4.2.1.1 First element: Whether India's AI measures discriminate against imported products

7.391. To satisfy the first element of Article 2.3, first sentence, the United States must establish that India's AI measures discriminate against imported products.[760]

7.392. As mentioned above, the United States argues that India maintains two "forms" of discrimination. The first form derives from the fact that, under S.O. 1663(E), if there is an NAI outbreak anywhere in the exporting country, the importation of the covered product into India is prohibited.[761] In contrast, the United States refers to the fact that India's NAP 2012 permits the sale of domestic products in India following an outbreak of NAI, provided that the product originates outside a zone within 10 km of the location where NAI is detected.[762] The second form of discrimination, according to the United States, derives from the fact that India prohibits the importation of the covered products if LPNAI is detected in the exporting country, whereas India does not maintain surveillance sufficient to detect LPNAI in India's domestic poultry.[763]

7.393. India's primary argument in response is to contend that the Panel is barred from referring to the NAP 2012 because it is not one of the measures challenged in the panel request. We recall our findings in section 7.1.2.4.3 above that the United States was not under an obligation to identify the NAP 2012 in its panel request, and is entitled to refer to it for the purpose of its argumentation under Article 2.3.[764]

7.394. In the alternative, India argues that the Panel's inquiry *vis-à-vis* the first form of discrimination should be to consider whether there is a legitimate cause or rationale for the alleged discrimination.[765] India argues that the risks associated with imported and domestic products are entirely different because, in a domestic outbreak, the epicentre of the disease is known and identified and the risk is one of further spread beyond the originally infected area, whereas

[756] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.
[757] United States' first written submission, Sections VIII.G.2(a) and VIII.G.2(b).
[758] United States' first written submission, Section VIII.G.2(a).
[759] United States' first written submission, Section VIII.G.2(b).
[760] We note that the first element Article 2.3, first sentence, contains both a national treatment obligation and a most-favoured nation obligation. The United States has not made any arguments that India's AI measures breach the most-favoured nation obligation.
[761] United States' first written submission, para. 167.
[762] United States' first written submission, para. 167.
[763] United States' first written submission, para. 174.
[764] We also recall that the Panel has already determined in section 7.1.2.4.3 above that the United States' description in its panel request of its claim under Article 2.3 of the SPS Agreement meets the requirements of Article 6.2 of the DSU. Accordingly, the Panel has declined India's request that the United States' claim under Article 2.3 of the SPS Agreement be set aside on the basis that it is outside the jurisdiction of this Panel.
[765] India's first written submission, para. 208 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 226; *Australia – Salmon*, para. 251; and Panel Report, *US – Poultry (China)*, paras. 7.260-7.261).

infected imports require control measures because agents of disease transmission could enter a country and could be dispersed over a large area through internal commerce and trade.[766]

7.395. In relation to the second form of discrimination, India does not make arguments in relation to whether or not its AI measures are discriminatory *per se*; however, India stresses that LPNAI is exotic to India and the conditions that exist in India cannot be said to be identical or similar to those in countries reporting LPNAI.[767]

7.396. As we discussed in section 7.6.2 above, parties in previous cases have invoked Article 2.3 as a consequential breach of Article 5.5 of the SPS Agreement.[768] As a result, there is little jurisprudence to guide our understanding of Article 2.3, specifically with regard to the meaning of "discrimination".

7.397. With this in mind, the Panel recalls that the word "discrimination" has been interpreted in the context of other provisions of the covered agreements, and in particular the *chapeau* of Article XX of the GATT 1994.

7.398. The *chapeau* of Article XX states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures [enacted for the purposes listed in the subparagraphs of Article XX.]

7.399. The Appellate Body has elaborated on the meaning of "discrimination" in this context as resulting "not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries".[769]

7.400. We note that the language of Article 2.3 of the SPS Agreement is similar to that of the *chapeau* to Article XX.[770] Both provisions speak of "arbitrary" and "unjustifiable" discrimination, and a comparison between conditions prevailing in different "countries" (in the context of Article XX) or "Members" (in the context of Article 2.3). We also note that the last recital of the preamble to the SPS Agreement states that the SPS Agreement "elaborate[s] rules for the application of the provisions of GATT 1994 which relate to the use of [SPS] measures, in particular the provisions of Article XX(b)", which includes the *chapeau*. Given the similarities between these provisions and the reference to Article XX of the GATT 1994 in the preamble of the SPS Agreement, we consider it appropriate to interpret "discrimination" in Article 2.3 of the SPS Agreement in a manner similar to that which the Appellate Body adopted in the context of Article XX of the GATT 1994.[771] Hence, in the context of Article 2.3 of the SPS Agreement, we consider that discrimination may result not only (i) when Members in which the same conditions prevail (including between the territory of the Member imposing the measure, and that of other Members) are treated differently, but also (ii) where the application of the measure at issue does

[766] India's first written submission, para. 196.

[767] India's first written submission, paras. 201-207.

[768] Panel Reports, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.112-7.114; *EC – Approval and Marketing of Biotech Products*, paras. 7.1446-7.1448, 7.1765-7.1766 and 7.3405-7.3406; *US – Poultry (China)*, paras. 7.318-7.319; and *Australia – Apples*, para. 7.1095.

[769] Appellate Body Report, *US – Shrimp*, para. 165.

[770] We observe, however, that Article XX of the GATT 1994 refers to the manner in which measures "are applied", whereas Article 2.3, first sentence, requires only that Members ensure that their SPS 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. Our analysis under Article 2.3, first sentence, will therefore not focus on the manner in which the measures at issue are applied.

[771] The word "discrimination" has been given different meanings depending on the context in which that word appears. In light of these differences in context, the Panel considers these cases to be of limited assistance. For example, in the context of the TRIPs Agreement, Panel Report, *Canada – Pharmaceutical Patents*, para. 7.94. In the context of the Enabling Clause, Appellate Body Report, *EC – Tariff Preferences*, paras. 142-174.

not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country.[772]

7.401. We will therefore begin by considering whether India's AI measures treat imported products differently from the manner in which they treat Indian products. We will make this assessment in relation to each of the forms of discrimination alleged by the United States.

7.402. We note that a comparison of this kind presupposes that identical or similar conditions apply across India and other Members (and in particular those Members from which imported products originate). However, as discussed in paragraph 7.389 above, the comparison between the conditions that apply will constitute the third element of our analysis under Article 2.3, first sentence. We must therefore assume that the conditions that apply are the same for the purpose of our discrimination analysis under the first element of Article 2.3, first sentence; if we find that discrimination does exist, that finding will be confirmed if we find, as part of our subsequent analysis, that identical or similar conditions do in fact exist across India and other Members.

(i) First "form" of discrimination alleged by the United States

7.403. We begin by considering the first form of discrimination alleged by the United States and, specifically, how products from the United States and India are treated respectively.

(a) India's treatment of imported products

7.404. Regarding India's AI measures, and the manner in which India treats other WTO Members, we recall our explanation in section 2.3 above that India maintains these measures through the Livestock Act and S.O. 1663(E). We recall further that Section 3 of the Livestock Act permits the central government to (in relevant part) regulate, restrict or prohibit the import into India of any livestock that may be liable to be affected by infectious or contagious disorders.[773] Section 3A of the Livestock Act permits the central government to regulate, restrict or prohibit the import into India of any livestock product which may be liable to affect human or animal health.[774] S.O. 1663(E) was issued by the DAHD in exercise of powers conferred by the Livestock Act, and prohibits the importation of wild birds (except those reared and bred in captivity)[775], and those products enumerated in paragraphs (1)(ii)(a) to (1)(ii)(j) "from the countries reporting [NAI] (both [HPNAI] and [LPNAI])".[776] These products are specified in paragraph 2.32 above. S.O. 1663(E) does not specify the duration over which the import prohibition remains in place. However, India submits that "the measure is only applicable to countries which report outbreaks of … (NAI) to the OIE and becomes inapplicable when countries report freedom from NAI to the OIE".[777] Put another way, "when a country declares freedom after culling (or slaughter), disinfection and surveillance, which generally takes three months as recommended by the OIE, the country is no longer considered to be 'reporting [NAI]' and imports from such countries are permitted".[778] Thus, we understand that the import prohibition under S.O. 1663(E) remains in place until a country otherwise prohibited by S.O. 1663(E) declares NAI-freedom to the OIE.

(b) India's treatment of domestic products

7.405. Regarding the manner in which India treats domestic products after an outbreak of AI, we note that the United States refers to the NAP 2012 as the measure that governs the treatment afforded within the territory of India.[779] We must therefore consider the treatment afforded under the NAP 2012.[780]

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[772] Appellate Body Report, *US – Shrimp*, para. 165.
[773] Livestock Act, (Exhibit US-114), Section 3.
[774] Livestock Amendment Act, (Exhibit US-115), Section 5. As discussed in paras. 2.23-2.27 above, Section 5 of the Livestock Amendment Act amended the Livestock Act through the introduction of addition provisions, including Section 3A.
[775] S.O. 1663(E) (Exhibit US-80), paragraph 1(i).
[776] S.O. 1663(E) (Exhibit US-80), paragraphs 1(ii)(a)-1(ii)(j).
[777] India's first written submission, para. 24.
[778] India's first written submission, para. 24.
[779] India's first written submission, paras. 163-184.
[780] We recall India's argument that the "statutory basis" for the alleged discrimination in this dispute is the NAP 2012. India's first written submission, para. 78. India argues that the NAP 2012 is not a measure at

7.406. The NAP was first issued in 2006 by India's DAHD.[781] A revised version was issued in 2012 (NAP 2012) pursuant to the Prevention and Control of Infectious and Contagious Disease in Animals Act, 2009.[782]

7.407. The NAP 2012 comprises five chapters: Chapter I advises India's states on preparedness against AI outbreaks; Chapter II indicates the actions to be taken if an outbreak of AI is suspected; Chapter III describes the actions required in the event of an outbreak of the disease; Chapter IV discusses the post-operation surveillance and the declaration of freedom from AI; and Chapter V identifies persons who will handle NAI-infected poultry and advises on biosafety and biosecurity measures. The Panel has carefully reviewed these chapters and, bearing in mind the United States' allegation that the first "form" of discrimination relates specifically to treatment in light of the detection of AI, will proceed to consider the relevant provisions of the NAP 2012 which relate to the treatment afforded in the case of a confirmed outbreak of AI within India.

7.408. Where investigations under Chapter II of the NAP 2012 lead to a confirmation of an outbreak of AI, the provisions of Chapter III come into effect. According to Section III.3 of Chapter III, after an NAI outbreak occurs, India's authorities designate "[t]he area within one km from the site of confirmed NAI" as the "infected zone". The rest of the area within 10 km from the site is designated as the "surveillance zone", which "should act as a buffer-zone between the infected area and the disease-free area".[783]

7.409. Section III.5 (entitled "Absolute Ban on Movement of Poultry") bans movement of live birds to and from the infected area.[784] Section III.6[785] (entitled "Closure of Poultry and Egg Markets[ ]/ Shops") orders the closure of poultry and egg markets or shops within the 10 km surveillance zone.[786] Shops and markets dealing with poultry products and eggs within the surveillance zone "shall remain closed till completion of culling and sanitization operations". After the completion of these operations, "inward trade of eggs and processed poultry / products shall be allowed within the surveillance zone without any outward movement of poultry".[787] Section III.8 (entitled "Restriction of Movement of Persons & Vehicles") imposes restrictions on the movement of persons and vehicles into and from the surveillance zone.[788] Section III.6 (entitled "Depopulation of Birds in the Infected Zone") calls for the "stamp[ing] out" of live poultry birds within the infected zone.[789] Section III.8 (entitled "Clean-up and Disinfection") sets out procedures for the subsequent destruction of contaminated materials and disinfection of premises.[790] Subsection III.8.5 (Entitled "Sealing of the Disinfected Premises and Issue of Sanitization Certificate) provides that, after the culling and disinfection of the relevant premises have been completed, "the premises are to be sealed and a sanitization certificate issued by the State Animal Health authorities stating that culling has been carried out and the areas ha[ve] been cleaned and disinfected as per [the] Action Plan".[791] This in effect marks the end of the control operation. Thereafter, under Chapter IV, "post-operation surveillance" is to be carried out for three months.[792] During these three months, "[t]he areas where birds were culled will be repeatedly disinfected by fumigation (indoors) or sprays (open place) at every 15 days during 3 months of surveillance". [793] Restocking of poultry to the infected zone will not commence until one month

issue and, on that basis, the United States' claim under Article 2.3 "should be rejected". India's first written submission, para. 189. However, in section 7.1.2.4.3, we concluded that the NAP 2012 is not a measure at issue, and that the United States was not under an obligation to cite in its panel request the NAP 2012 for the purpose of a comparison between the treatment afforded to like domestic products and the treatment afforded to imported products under India's AI measures.

[781] NAP 2006 (Exhibit US-89).

[782] NAP 2012 (Exhibit US-90); India's first written submission, para. 40.

[783] NAP 2012, (Exhibit US-90), Section III.3, pp. 13-14.

[784] NAP 2012, (Exhibit US-90), Section III.5, p. 14.

[785] We note the confusion with the numbering of Sections in the NAP 2012. For example, there are at least two Sections numbered III.6 and at least three Sections numbered III.8. For this reason, we describe each relevant section by number and by title.

[786] NAP 2012, (Exhibit US-90), Section III.6, p. 15.

[787] NAP 2012, (Exhibit US-90), Section III.6, p. 15.

[788] NAP 2012, (Exhibit US-90), Section III.8, p. 15

[789] NAP 2012, (Exhibit US-90), Section III.6, p. 15.

[790] NAP 2012, (Exhibit US-90), Section III.8, p. 17.

[791] NAP 2012, (Exhibit US-90), Subsection III.8.5, p. 19.

[792] NAP 2012, (Exhibit US-90), Chapter IV, p. 19.

[793] NAP 2012, (Exhibit US-90), Subsection III.8.5, p. 19.

after the issuance of the Sanitization Certificate.[794] Under Section IV.2 (entitled "Freedom from Disease"), if there is no other outbreak within the surveillance zone and no positive samples are collected from the post operation surveillance tests for three months after the issuance of the Sanitization Certificate, disease-free status can be declared.[795]

(c) Comparing India's treatment of imported and domestic products

7.410. We make the following comments on the basis of this description of S.O. 1663(E) and NAP 2012. First, we observe that S.O. 1663(E) prohibits the importation of all the products enumerated in paragraphs (1)(ii)(a) to (1)(ii)(j) from a given exporting country in the event that the country notifies NAI (either HPNAI or LPNAI) within its territory. This prohibition remains in place until the country in question declares NAI-freedom to the OIE. India's NAP 2012, in contrast, restricts the movement of poultry products within India in the event of an outbreak of NAI. Specifically, a ban on the movement of poultry into, and from, the infected area is put in place. "Inward trade" of products within 10 km of the surveillance zone once culling and sanitization operations are complete is permitted, although "outward movement" of poultry is not permitted until disease-free status is declared.[796]

7.411. India's AI measures exclude from India all products listed in paragraphs (1)(ii)(a) to (1)(ii)(j) of S.O. 1663(E) that come from the territory of an exporting country if that country notifies NAI. That is, products originating in countries that notify NAI to the OIE are prohibited from entering India. They are necessarily also prohibited from being transported, sold or marketed within India. Conversely, the regime applied in the case of NAI outbreaks within India limits the movement of those poultry products that originate in the affected territory to within 10 km of the site of the infection (i.e. those within the surveillance zone). There are no restrictions on Indian products from outside the surveillance zone. These contrasting limitations on the movement and sale of poultry products within India are probative of the fact that S.O. 1663(E) and the NAP 2012 treat differently the products of India and of other WTO Members (in this case, the United States) in the event of an outbreak of NAI. Consistent with our interpretation of "discrimination" under Article 2.3, we conclude that India's AI measures treat imported products differently from domestic products, and are therefore discriminatory.

(ii) Second "form" of discrimination alleged by the United States

7.412. We will now consider the second "form" of discrimination claimed by the United States; i.e. whether India prohibits the importation of products on account of LPNAI while it does not maintain surveillance requirements that would result in the detection of LPNAI occurring in India's domestic poultry flocks.[797] More specifically, the United States submits that India's surveillance regime is not mandatory, and that the principal means of detection is visual observation.[798] According to the United States, the effect of this is that "in practice … while India relies on the detection of LPAI to ban the sale of products, India in fact applies LPAI-based bans only to imported products because India has failed to put in place measures that would effectively detect LPAI, and so India is not taking steps necessary to restrict domestic products on account of LPAI".[799]

7.413. In response, India argues that LPAI is exotic to India, and that it nonetheless maintains surveillance of poultry and wild birds in order to detect NAI.[800] Specifically, India argues that it maintains "random clinical" surveillance, "random laboratory" surveillance, and "targeted" surveillance in order to detect NAI within its territory.[801] In summary, India claims that the United States' submission is based on a "flawed understanding of India's NAP 2012 and the on-going laboratory and clinical surveillance activities being undertaken throughout [India]".[802]

[794] NAP 2012, (Exhibit US-90), Section III.5, p. 14.
[795] NAP 2012, (Exhibit US-90), Subsection IV.3, p.21.
[796] NAP 2012, (Exhibit US-90), Subsection III.6, p. 15.
[797] United States first written submission, para. 174.
[798] United States first written submission, paras. 176-178.
[799] United States first written submission, para. 179.
[800] India's first written submission, paras. 204-207.
[801] India's first written submission, paras. 43-51.
[802] India's first written submission, para. 201.

7.414. In order to determine whether India discriminates against other WTO Members (including the United States) because it maintains an import prohibition on products coming from countries that have notified LPNAI, while not maintaining adequate surveillance to detect LPAI within its territory (and therefore not taking steps necessary to restrict domestic products on account of LPAI), we must first analyse India's surveillance regime for LPAI, as described in the NAP 2012.

7.415. Chapter 1 of the NAP 2012 is entitled "General Preparedness against Avian [I]nfluenza". Section I.2 is entitled "Surveillance: It is very important and there is a serious need to remain alert and prepared".[803] This Section prescribes rules on surveillance on account of AI, which "must include both poultry and migratory birds".[804] In particular, the NAP 2012 provides that AI surveillance includes "Routine Surveillance" and "Arrangements for Immediate reporting of Unusual Sickness and Mortality in Birds".[805]

7.416. Regarding "routine surveillance", the NAP 2012 "advises" India's state governments to "develop routine surveillance plans by taking a block as a geographical unit, and together with Department of Forest taking into account" factors related to the population and movement of poultry and wild birds.[806] Subsection I.2.1 of Chapter I elaborates on "routine surveillance" as including "[p]hysical/clinical" surveillance and "[v]irological testing of cloacal and tracheal swabs in poultry and wild birds where possible".[807] Subsection I.2.1 "advises" India's state governments to develop routine surveillance plans "by taking a block as a geographical unit, and taking into account appropriate factors related to population and density of poultry in each block (both in backyard and commercial establishments); the flyways of migratory-birds; live-bird markets including wet-markets; the existence of wildlife sanctuaries, national-parks, and water-bodies visited by migratory and wild birds; the areas adjacent to international land-borders, especially those affected with AI; and interstate borders with the AI affected States".[808] Section I.3 of the NAP 2012 stipulates in that "[t]he States[]UTs must distinguish at their level between unusual sickness[]mortality and normal incidences of sickness and mortality in poultry".[809] Paragraph (i) further provides that "[o]nly in case of unusual sickness [] mortality raising suspicion of AI, forward the samples immediately either to respective Regional Disease Diagnostic Laboratory or directly to [High Security Animal Diseases Laboratory]".[810] Paragraph (ii) of Section I.3 provides that "[r]epresentative[]random sampling may be done from an area [] farm. Samples from four (4) birds consisting of at least one cloacal swab, one tracheal-swab and one serum-sample from affected farm[]backyard poultry[]duck units should be collected".

7.417. From this description, the Panel understands that India maintains a surveillance regime for AI through the NAP 2012. We turn now to consider whether this surveillance regime is adequate to detect LPNAI.

7.418. The Panel asked the individual experts whether India's surveillance activities would reliably detect LPNAI in poultry. In response to a written question from the Panel on this issue, Dr Honhold reviewed the exhibits on which India relies to describe its current regime for domestic AI surveillance, and for its assertion that the regime can detect AI. Dr Honhold concluded that "[i]n summary, no evidence was found [to] support a conclusion that India is conducting surveillance activities that would reliably detect LPNAI in poultry".[811] Professor Brown stated that "[t]he evidence does not support a conclusion that India is conducting surveillance activities that would reliably detect LPNAI in poultry", and that "other approaches … are required for coherent reliable detection of LPNAI and applied at national and regional level to assure absence of infection in all production sectors".[812] Dr Guan responded succinctly with "[n]o".[813]

7.419. All three experts reiterated their views during the Panel's meeting with the experts in the presence of the parties. Dr Honhold stated that "the surveillance system isn't strong enough to

[803] NAP 2012, (Exhibit US-90), Subsection I.2.1.
[804] NAP 2012, (Exhibit US-90), Subsection I.2.1.
[805] NAP 2012, (Exhibit US-90), Subsection I.2.1.
[806] NAP 2012, (Exhibit US-90), Subsection I.2.1.
[807] NAP 2012, (Exhibit US-90), Subsection I.2.1.
[808] NAP 2012, (Exhibit US-90), Subsection I.2.1.
[809] NAP 2012, (Exhibit US-90), Subsection I.3.(i).
[810] NAP 2012, (Exhibit US-90), Subsection I.3.(i).
[811] Dr Honhold's response to Panel question No. 5.
[812] Professor Brown's response to Panel question No. 5.
[813] Dr Guan's response to Panel question No. 5.

say" whether there is LPAI or LPNAI in India.[814] He further stated that, while India did provide exhibits that demonstrate that there is "some degree of surveillance system", there is "no evidence that it is an adequate surveillance system".[815] Although Dr Honhold did note that "India has clearly demonstrated that on occasions its surveillance system does detect LPAI viruses", he attributed this to "passive surveillance, as opposed to … active surveillance", leading him to query whether LPAI detection was a matter of "luck [or] chance".[816]

7.420. Dr Guan said that "there are no data to show that the Indian colleagues have conducted long-term surveillance in healthy poultry, or that maybe looks like healthy poultry; there is not this kind of data".[817] Dr Guan added that existing surveillance "is response surveillance, not … long term … monitoring activity to prevent the [disease] coming".[818] Dr Guan also said that "the current surveillance system in India is not fully mature".[819]

7.421. Professor Brown said that:

> I've seen nothing in the documents, and I apologise if I have overlooked it, that clearly tells me the demography of poultry production in India, where it's located, the poultry type, the number of holdings containing the poultry, and how they're selected for surveillance, actively, at what frequency, and by region. I would expect to see under a national plan a clear structure laid out. I haven't seen any evidence of that … I would suggest [that] the absence of a clear plan … [does] not suggest to me that it is structured, and therefore [does] not meet the requirements for showing LPNAI-freedom.[820]

7.422. Professor Brown also said that "[the experts] don't see any evidence that there is an evolving programme that is informed by scientific evidence".[821]

7.423. It is clear to us that all three individual experts are in agreement that India does not have in place a surveillance system capable of reliably detecting LPNAI. Accordingly, we cannot conclude, on the basis of the evidence before us, that the surveillance regime that exists under India's NAP 2012 is adequate to reliably detect LPNAI. In the light of this conclusion, we turn now to consider whether the fact that India maintains an import prohibition against products originating in countries that notify NAI, and in particular LPNAI, while not maintaining adequate surveillance mechanisms for the detection of LPNAI, amounts to discrimination within the meaning of Article 2.3 of the SPS Agreement.

7.424. In our view, the answer is straightforward. India prohibits imports of products enumerated in paragraphs (1)(ii)(a) to (1)(ii)(j) of S.O. 1663(E) from WTO Members who notify LPNAI to the OIE. In contrast, India does not have in place a surveillance system capable of reliably detecting that same risk within its territory, and, therefore, India is not in a position to systematically impose LPNAI-based restrictions on the products covered by S.O. 1663(E) within its territory. Therefore, India treats domestic and imported products differently with respect to the risk of LPNAI, depending on whether that risk originates within India or in another Member.

7.425. Having concluded that India's AI measures discriminate between India and other Members, we will consider the second element of Article 2.3, first sentence, of the SPS Agreement.

7.6.4.2.1.2 Second element: whether the discrimination is arbitrary or unjustifiable

7.426. To satisfy the second element of the first sentence of Article 2.3 of the SPS Agreement, the United States must demonstrate that the manner in which India's AI measures discriminate between the territory of India and the territory of other Members is arbitrary or unjustifiable.

[814] Dr Honhold, Transcript, para. 1.216.
[815] Dr Honhold, Transcript, para. 1.260.
[816] Dr Honhold, Transcript, para. 1.308.
[817] Dr Guan, Transcript, para. 1.73
[818] Dr Guan, Transcript, para. 1.83.
[819] Dr Guan, Transcript, para. 1.345.
[820] Professor Brown, Transcript, paras. 1.275-1.276.
[821] Professor Brown, Transcript, para. 1.286.

7.427. As was the case with the word "discriminate"[822], there is a lack of jurisprudence in the specific context of Article 2.3 of the SPS Agreement regarding the interpretation of the words "arbitrarily or unjustifiably". However, we recall our observation that the similarity of the language used in Article 2.3 of the SPS Agreement and Article XX of the GATT 1994 renders the interpretation of "arbitrary or unjustifiably" in the latter context of some utility in understanding the meaning of those same words in the context of Article 2.3. We will therefore be guided, where appropriate, by the Appellate Body's interpretation of these terms in the context of Article XX of the GATT 1994.

7.428. The Appellate Body has summarized its own jurisprudence in relation to the *chapeau* of Article XX and concluded that an analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence.[823] More specifically, the Appellate Body said that:

> [T]here is arbitrary or unjustifiable discrimination when a measure provisionally justified under a paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure. … Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.[824]

7.429. The Panel therefore considers that the meaning of "arbitrary or unjustifiable discrimination" within the context of Article 2.3 of the SPS Agreement involves a consideration of the "cause" or "rationale" put forward to explain the discrimination in question, and whether there is a "rational connection" between the reasons given for the discriminatory treatment and the objective of the measure. In the context of the present dispute, having found that India's AI measures discriminate between domestic and imported products on the two separate grounds discussed above, our analysis will focus on the rationale that India has put forward to explain each of the forms of discrimination caused by its measures.

(i) First "form" of discrimination alleged by the United States

7.430. We turn to the first form of discrimination alleged by the United States. The United States notes first that India has not provided a justification for its disparate treatment of imported products as compared with domestic products, and also that India's differential treatment of imported products is not a function of any difference in the conditions prevailing in India and other countries, or in countries' measures or procedures for AI control.[825]

7.431. India, for its part, argues that the discrimination is not arbitrary or unjustifiable given that a number of countries take domestic control measures that are similar to those maintained in India.[826] Moreover, India argues that the risks presented by the two situations are different because the epicentre of a domestic outbreak is known and the risk is one of spread beyond this initial area of infection, whereas in the absence of import restrictions, imports can cause agents of disease transmission to enter a country and be dispersed widely through internal commerce. In this sense, India distinguishes between measures to prevent the spread and further establishment of a disease with measures to prevent ingress of a disease into its territory.[827]

7.432. As discussed above, we consider that jurisprudence developed in the context of the *chapeau* of Article XX of the GATT 1994 is relevant to our interpretation of "arbitrary or unjustifiable discrimination" within the context of Article 2.3 of the SPS Agreement. More

[822] Paras. 7.396-7.400 above.
[823] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226.
[824] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227. (footnotes omitted)
[825] United States' first written submission, paras. 171-172.
[826] India's first written submission, para. 210.
[827] India's first written submission, para. 211.

specifically, we find the Appellate Body's observations in *US – Shrimp* to be useful in this analysis. In that case, the United States maintained a ban on the importation of shrimp from countries that did not require commercial shrimp trawlers to use devices that would prevent sea turtles from being caught in nets (so-called "Turtle Excluder Devices", or "TEDs").[828] The Appellate Body cited several reasons for finding that the United States' ban amounted to unjustifiable discrimination, including that the United States did not permit imports of shrimp harvested in a manner comparable in effectiveness to that required under the United States' measures, solely because the shrimp in question originated in waters of countries not certified under the United States measure.[829] Furthermore, the Appellate Body observed that the application of the measure required other WTO Members to adopt a regulatory programme that was essentially the same as that applied to United States vessels. In assessing this fact, the Appellate Body said that unjustifiable discrimination may exist within the meaning of the *chapeau* when a measure is applied in a "rigid and unbending" manner across Members without any regard for differences between those Members.[830]

7.433. The Panel considers this reasoning to be of assistance in the present case for the following reasons. As India implies, there may be asymmetries in the risks presented by the importation of poultry products from countries notifying NAI, as compared with the risks associated with domestic outbreaks of NAI. Furthermore, such asymmetries may manifest themselves in the ability of authorities within India to control the spread of these respective risks within India. However, the Panel cannot identify in India's AI measures any mechanism that takes account of instances in which such asymmetries do *not* exist. Specifically, India's AI measures do not account for the possibility that an exporting country (be it the United States or otherwise) that notifies NAI may be able to demonstrate that its exports of poultry products do not pose an NAI-related risk. India's AI measures prohibit the importation of the products listed in paragraphs (ii)(a)-(j) of S.O. 1663(E) from exporting countries upon notification of NAI by the exporting country to the OIE, irrespective of whether all or some of the exports of products from that country are, for whatever reason, not affected by NAI. Such reasons may be natural, regulatory, or otherwise; regardless, there is no scope in India's AI measures to allow for any differences between Members, if and where they exist, that may have some bearing on the risk associated with the products in question.

7.434. In this same regard, we note that India's AI measures do not pay any regard to the possibility that an exporting country maintains measures that will contain and/or control the spread of NAI within its territory. In this way, India's measures do not take account of the fact that different conditions may prevail in an exporting country that affect the likelihood that NAI will infect consignments of exported poultry. In this regard, India asserts that it "cannot exercise control over containment and disinfection methods applied by exporting countries and therefore it cannot be expected to certify the health and safety of imported products which are potential agents of NAI transmission".[831] However, it is not synonymous with this assertion that there *do not exist* measures that are effective in addressing the spread of NAI. India's AI measures do not allow for the recognition of measures that may be so effective, and therefore do not take account of the possibility that such measures may exist in an exporting country. Furthermore, there is no evidence on the record that India, in light of its inability to "exercise control over containment and disinfection methods applied by exporting countries", has engaged in good faith efforts to assess the measures applied by its trading partners with the aim of addressing NAI outbreaks within their territory.[832]

7.435. For these reasons, we consider that India has failed to take into account differences that may exist between and among WTO Members from which India imports the products enumerated in paragraphs (ii)(a)-(j) of S.O. 1663(E), specifically with regard to circumstances in which imported products do not pose a risk even though they originate in a NAI-reporting country. Indeed, India's AI measures represent a "rigid and unbending" requirement and do not exhibit any

[828] Appellate Body Report, *US – Shrimp*, paras. 3-5.
[829] Appellate Body Report, *US – Shrimp*, para. 165.
[830] Appellate Body Report, *US – Shrimp*, para. 163.
[831] India's first written submission, para. 199.
[832] In this regard, we note that the Appellate Body in *US – Shrimp* was critical of the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, "in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members". Appellate Body Report, *US – Shrimp*, para. 166.

flexibility with regard to such differences among exporting countries. This does not "connect with" the rationale India has put forward to explain this form of discrimination (namely, that the risk associated with foreign outbreaks of NAI is always different from that associated with domestic outbreaks), because India's AI measures do not account for circumstances in which there is no risk associated with a foreign outbreak.

7.436. For this reason, the Panel finds that India's treatment of foreign poultry products amounts to unjustifiable discrimination within the meaning of Article 2.3 of the SPS Agreement.

(ii) Second "form" of discrimination alleged by the United States

7.437. The Panel will now consider whether the second form of discrimination is arbitrary or unjustifiable within the meaning of Article 2.3 of the SPS Agreement.

7.438. In this regard, the United States submits that the risks in relation to Indian products and foreign products are the same in relation to AI, and that there is no basis for imposing differential treatment upon these products. The United States argues that, in practice, India's AI measures ban only imported products because it has failed to implement measures that would effectively detect LPAI, and therefore does not restrict domestic products on account of LPAI.[833]

7.439. India argues that LPNAI is exotic to India and that India has neither detected nor experienced outbreaks of LPNAI. It asserts that that the risk associated with the introduction of LPNAI means that "India is fully justified in prohibiting imports of poultry and poultry products from countries upon a declaration of LPNAI".[834]

7.440. In order to determine whether the discriminatory treatment maintained by India through the application of different standards to foreign and Indian products, respectively, is arbitrary or unjustifiable, we will focus on the cause of the discrimination we found in paragraph 7.424 above and the rationale put forward by India to explain its existence.[835]

7.441. As discussed, India's explanation for the differential treatment it applies to products that originate in countries that have notified LPNAI is that LPNAI is exotic to India[836], and that a disease exotic to a territory "is cause for greater concern in terms of risk of introduction and potential impact".[837] The Panel will therefore consider whether LPNAI is indeed exotic to India.

7.442. In doing so, we recall the Appellate Body's statement that the burden of proof under the SPS Agreement is such that the initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.[838] In *Japan – Apples*, the Appellate Body clarified that this does not mean that the complainant is responsible for proving all facts in a given dispute, but instead that the responding party must prove the case it seeks to make in response.[839] Thus, the Appellate Body distinguished between a complainant's burden of establishing a *prima facie* case of inconsistency with a provision of a covered agreement, and the principle that the party that asserts a fact is responsible for providing proof thereof.[840] In that case, the Appellate Body determined that Japan was responsible for providing proof of those factual allegations it adduced in response to the United States' *prima facie* case.[841] Indeed, "it was not for the United States to provide proof of the facts asserted by Japan".[842] With this in mind, we make the preliminary observation that India has the burden of proving that LPNAI is exotic to India.

[833] United States' first written submission, para. 181.
[834] India's first written submission, para. 214.
[835] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226.
[836] India's first written submission, paras. 213-214; India's second written submission, para. 82.
[837] India's second written submission, para. 82.
[838] Appellate Body Report, *EC – Hormones*, para. 98.
[839] Appellate Body Report, *Japan – Apples*, para. 154.
[840] Appellate Body Report, *Japan – Apples*, para. 157.
[841] Appellate Body Report, *Japan – Apples*, paras. 155-156.
[842] Appellate Body Report, *Japan – Apples*, para. 157.

7.443. The Panel sought the advice of the experts in this regard, in order to help it evaluate the parties' arguments and the evidence supporting the presence, or lack thereof, of LPNAI in India. Specifically, the Panel asked (i) whether the evidence provided by India[843] supports India's statement that LPNAI is exotic to poultry in India; (ii) whether it is plausible that a country that has experienced multiple H5N1 HPNAI outbreaks, such as India, is free from LPNAI; and (iii) whether anything can be inferred about the LPNAI situation in India from a study, submitted by the United States, in which H5 and H7 antibodies were found in ducks in India (the Pawar et al. study). We summarize the comments of each of the three experts in relation to each of these questions. We also note relevant comments from the individual experts made at the Panel's meeting with the experts.

(a) Whether the evidence provided by India supports India's statement that LPNAI is exotic to poultry in India

7.444. In response to the question whether LPNAI is exotic to India, Dr Honhold stated that "[t]here is no *a priori* reason to believe that India is free from H5 and H7 LPNAI avian influenza viruses. Avian influenza A viruses are ubiquitous in several wild water bird families and in particular in the Anatidae (largely ducks) … [and] India has substantial populations of both resident and migratory wild water birds".[844] Dr Honhold observed that LPNAI viruses have been isolated in at least two south Asian countries (Pakistan and Sri Lanka), which "tends to contradict" India' statement that South Asia has a unique ecology[845] and that this is the reason that LPNAI has not been detected.[846] Dr Honhold observed further that other LPAI viruses are found in domestic poultry (such as H9N2 and H4N6), which indicates that LPAI is present in India[847], and that LPNAI (which is a subset of LPAI) does not behave any differently with regard to its survival in the environment, transmission between wild birds, or transmission to or within domestic poultry. Dr Honhold noted that "[a]bsence can never be 100% proven in practice". Referring to Exhibits IND-7 to IND-14, which India cited in support of its contention that India is LPNAI-free[848], Dr Honhold stated that none of these exhibits has any direct relevance to the question. Referring to the annual report of the Indian veterinary research institute for 2011-12[849], Dr Honhold noted that this refers only to H5N1 and H9N2 and, without more, it is not possible to assess the presumption therein that only these virus types were isolated. In sum, Dr Honhold stated that it is not possible from the information available in the exhibits to draw the conclusion that LPNAI is not present in, or exotic to, India, as the details given are insufficient to allow the depth of analysis required to assess the reliability of the lack of a positive finding of LPNAI.[850]

7.445. In response to the question whether LPNAI is exotic to India, Dr Guan succinctly stated "not really". Dr Guan noted that it "is correct that India has not reported any avian influenza activities in poultry, which are associated with LPAI H5 or H7 viruses", but also that no systematic influenza surveillance has been conducted in India.[851] At the Panel's meeting with the experts, Dr Guan observed that "any country [that] has domestic ducks as a population … [has] a chance [of getting] LPNAI … [n]o country can say 100% that [it is] H5 or H7 [LPAI] free if [it has] ducks".[852]

7.446. Professor Brown noted that LPNAI was not the precursor to the H5N1 HPNAI detected in India. However, Professor Brown also stated that the United States' assertion that LPAI viruses may also be introduced from wild birds that occur in abundance in regions of poultry production "is not unfounded", and that potential carriage of these viruses and introduction into poultry could result in the emergence of LPNAI (and these could also mutate to HPAI). Professor Brown

[843] The Panel's question asked that the experts consider the evidence provided by India, including Exhibits IND-7 to IND-15.
[844] Dr Honhold's response to Panel question No. 1.
[845] Dr Honhold's response to Panel question No. 1 (citing India first written submission, paras. 15 and 49).
[846] Dr Honhold's response to Panel question No. 1 (citing Exhibit US-148).
[847] Dr Honhold's response to Panel question No. 1 (citing Exhibits IND-15 and US-122).
[848] India's first written submission, paras. 12-15 (and footnotes thereto).
[849] Exhibit IND-15.
[850] Dr Honhold's response to Panel question No. 1.
[851] Dr Guan's response to Panel question No. 1.
[852] Dr Guan, Transcript, para. 1.222.

therefore concluded that the risk posed by birds infected with both H5 and H7 LPAI "is not without foundation".[853]

(b) Whether it is plausible that a country that has experienced multiple H5N1 HPNAI outbreaks, such as India, is free from LPNAI

7.447. In response to the question whether it is plausible that a country that has experienced multiple H5N1 HPNAI outbreaks is free from LPNAI, Dr Honhold stated that the question assumes a link between the occurrence of HPNAI H5N1 and LPNAI, but that this is not a safe assumption and so "the occurrence or not of H5N1 HPNAI does not affect the plausibility of LPNAI-freedom".[854] Dr Honhold reviewed several exhibits[855] and concluded that "none of the documents give any evidence either way to the linkage of the occurrence of HPAI H5N1 and LPNAI as addressed in the question". After further explanation, Dr Honhold summarized that "whilst the lack of a finding of LPNAI, which is introduced by the same mechanism as H5N1 in the first instance, in the presence of the number of introductions of H5N1 by wild birds is perhaps improbable, it is not impossible or implausible. Disease introduction is a random unpredictable event and is by no means inevitable".[856] Moreover, at the Panel's meeting with the experts, Dr Honhold observed that "the attempt to create this linkage between the [H5N1 HPAI outbreaks and LPNAI] does not take into account the unique nature of the epidemiology of H5N1 HPAI"[857], and that "H5N1 has been unique in whilst it did arise from local precursors many years ago in Guangdong in Southern China, it has proven able, unlike other HPAI viruses, to spread and maintain over very long distances. So its presence in India doesn't indicate a precursor was present of any LPNAI".[858]

7.448. Dr Guan responded as follows:

> Any countries have chances to detect or isolate LPNAI H5 or H7 viruses if influenza surveillance is conducted in aquatic birds, such as migratory ducks. Both subtypes are not rare in most regions of the world. The Northeast of India is located in the Central Asia Migratory flyway, and harbours lots of migratory aquatic birds. Amongst these birds, LPNAI viruses should be easily detected. However, no such kind of findings has been reported.[859]

7.449. At the Panel's meeting with the experts, Dr Guan noted that India "did a good job to detect each of the outbreak episodes in the border region since … 2008, [such that it is] possible scientifically [that] the virus [was repeatedly introduced] into India, but that the precursor [LPNAI is] not in India".[860] Professor Brown endorsed this view[861], and also said that "these cases are clearly not related to LPNAI, and … we would all accept that … H5N1 HPNAI is completely different".[862]

7.450. Professor Brown noted that certain evidence[863] was not appropriate for the detection of LPNAI, and noted the lack of detail regarding the system for the detection of LPNAI that "may partially be in place". Professor Brown concluded by noting the inadequacy of the sampling frame to detect a level of infection that would be typical of LPNAI in the absence of clinical presentation in susceptible poultry species.[864]

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[853] Professor Brown's response to Panel question No. 1.
[854] Dr Honhold's response to Panel question No. 2.
[855] The question invited the experts to consider, for the purpose of this question, the exhibits submitted by the parties including Exhibits US-89, US-90, US-92, US-106, US-122, US-143, US-144, US-145, IND-47, IND-115 and IND-117.
[856] Dr. Honhold's response to Panel question No. 2.
[857] Dr Honhold, Transcript, para. 1.40.
[858] Dr Honhold, Transcript, para. 1.41.
[859] Dr Guan's response to Panel question No. 2.
[860] Dr Guan, Transcript, para. 1.198.
[861] Professor Brown, Transcript, para. 1.200.
[862] Professor Brown, Transcript, para. 1.220.
[863] Professor Brown's response to Panel question No. 2 (referring to Exhibit IND-115).
[864] Professor Brown's response to Panel question No. 2.

(c) Whether anything can be inferred about LPNAI in India from the Pawar et al. study's conclusion regarding H5 and H7 antibodies in ducks

7.451. Dr Honhold observed that the Pawar et al. study[865] was "undertaken in a limited area of India… [and] the districts sampled were specifically chosen as being those where outbreaks of HPAI H5N1 had occurred". He stated that "[c]onclusions about the whole country cannot be drawn from this one paper". Thus, while it "presents strong evidence for antibodies to H7 LPAI avian influenza viruses in domestic poultry indicating exposure to the virus … [which] would indicate that this virus had been present at some time in the recent past in domestic poultry[, the] finding of only serological evidence rather than virus isolation does not constitute an event reportable to the OIE and does not indicate the current circulation of LPNAI viruses but it does not rule it out".[866] At the Panel's meeting with the experts, Dr Honhold spoke of the Pawar et al. study and said that it was never intended as anything else other than a piece of research, and that "some caution should be placed on over analysing it" because "[the] findings of the study are really preliminary" and "[are] not definitive".[867]

7.452. Dr Guan stated the prevalent rate of LPNAI viruses may be low in India as there is a very small population of domestic ducks. He concluded by noting that LPNAI could be said to be very rare, but one "cannot say there is no[ne]".[868]

7.453. Professor Brown responded that the Pawar et al. study demonstrated presence of H7 in ducks and that in the absence of clinical signs it is "quite plausible" that this would have been LPNAI. However, he added that "[t]he presence of antibodies of course does not exclusively confirm the presence of infection but it does indicate that at some time in that animal's life it has had an exposure to an H7 virus". Professor Brown also noted that "the testing itself was not robustly conducted in accord with the [i]nternational standard".[869] At the Panel's meeting with the experts, Professor Brown said of the Pawar et al. study that, absent follow-up sampling, "you cannot be confident about what those results are telling you".[870]

(d) Conclusion on the presence of LPNAI in India

7.454. In light of the above comments from the Panel's experts, we conclude that there is insufficient evidence on the record to support a finding that LPNAI is exotic to India. In reaching this conclusion, we take particular account of the experts' observations that the documents submitted by India to support the assertion that LPNAI is exotic to India do not support this contention. Furthermore, without prejudice to this conclusion, we recall our statement in paragraph 7.423 above, that all three individual experts have affirmed that the evidence on the record concerning India's surveillance regime indicates that it is not adequate to reliably detect LPNAI. This conclusion also detracts from India's argument that LPNAI is exotic to India. Indeed, as Dr Honhold observed, "absence of evidence is not evidence of absence".[871] Therefore, without a suitable surveillance system capable of reliably detecting LPNAI, it is difficult for India to maintain its assertion that LPNAI does not exist.

7.455. In making this conclusion, we stress that we are not making a finding on whether or not LPNAI is exotic to India. We limit our conclusion to a determination whether the assertion that LPNAI is exotic to India is supported by the facts and the evidence before us.

(e) Conclusions on arbitrary or unjustifiable discrimination for the second "form" of discrimination

7.456. In the light of our conclusion that we cannot determine whether or not LPNAI is exotic to India, the Panel can complete its assessment of the parties' respective arguments regarding whether the discrimination maintained in India's AI measures is arbitrary or unjustifiable.

[865] Exhibit US-122.
[866] Dr Honhold's response to Panel question No. 3.
[867] Dr Honhold, Transcript, para. 1.44.
[868] Dr Guan's response to Panel question No. 3.
[869] Professor Brown's response to Panel question No. 3.
[870] Professor Brown, Transcript, para. 1.171.
[871] Dr Honhold, Transcript, para. 1.132.

7.457. We recall our discussion of the burden of proof under the SPS Agreement in paragraph 7.441 above, and stress in particular that India bears the burden proving those facts that it asserts[872]; namely that LPNAI is exotic to India. As we have explained, the three individual experts have unanimously affirmed that there is no basis on the record of this dispute to support this conclusion. Moreover, the experts have concluded that India does not maintain a regime for the surveillance of AI that could reliably detect LPNAI. We cannot, therefore, conclude that India has proven that LPNAI is exotic to India, as it asserts. Accordingly, considering that the alleged absence of LPNAI in India constitutes the rationale for India's refutation of the United States' argument that India unjustifiably treats imported products differently from domestic products, we find that India has not rebutted the United States' *prima facie* case of arbitrary and unjustifiable discrimination. In other words, India has not satisfied the requirement set out by the Appellate Body in *Brazil – Retreaded Tyres* that there must be a "rational connection" between the reasons given for the discriminatory application of the measure and the objective of the measure. We therefore find that the discrimination India maintains, through its AI measures, against foreign products on account of LPNAI is arbitrary and unjustifiable contrary to Article 2.3 of the SPS Agreement.[873]

7.6.4.2.1.3 Third element: whether identical or similar conditions prevail

7.458. As we explained above, the third element that a complainant must prove in order to demonstrate that a measure is inconsistent with Article 2.3, first sentence, of the SPS Agreement is that identical or similar conditions prevail. Once again, we will consider whether identical or similar conditions exist in the context of each of the "forms" of discrimination alleged by the United States.

7.459. The meaning of "identical or similar conditions" was discussed by the panel in *Australia – Salmon (Article 21.5 – Canada)*. In that dispute, Canada claimed that Australia's import requirements for salmonids from Canada were discriminatory because Australia applied no internal control measures on the movement of dead Australian fish. The panel found that Canada had not demonstrated that distinctions in Australia's ALOPs were arbitrary or unjustifiable in the context of Article 5.5 of the SPS Agreement because the panel's experts considered the differential treatment in question to be scientifically justified[874], and because the risk associated with imported salmonids was greater than for dead fish because the disease associated with salmonids was not present in Australia.[875] The panel found that these facts indicated, in addition to a violation of Article 5.5 of the SPS Agreement, that Canada had not demonstrated that Australia's discrimination against salmonids was arbitrary or unjustifiable within the meaning of Article 2.3 of the SPS Agreement.

7.460. Of particular note for our analysis is the panel's reliance in that case on the same factors used in its Article 5.5 analysis of arbitrary or unjustifiable discrimination to inform its analysis of whether "identical or similar conditions" existed for the purpose of the analysis under the third element of Article 2.3 of the SPS Agreement. In that case, the panel referred in this respect to the "substantial difference in disease status" between Canada and Australia that was relevant to its Article 5.5 analysis and concluded, as it had with respect to Article 5.5, that there was no violation of the third element of Article 2.3.[876] Accordingly, the Panel understands that the same facts that inform whether or not discrimination is arbitrary or unjustifiable may also inform whether or not identical or similar conditions prevail. The Panel also understands from that panel's interpretation and application of Article 2.3 that the relevant "conditions", for the purpose of a given analysis, may be the presence of a disease within a territory (and the concomitant risk associated with that disease). On the basis of this understanding, the Panel will now consider whether identical or similar conditions prevail with regard to each of the "forms" of discrimination alleged by the United States.

[872] Appellate Body Report, *Japan – Apples*, para. 157.
[873] In reaching this conclusion, we note that we have not examined whether India's argument that LPNAI is exotic to India would nonetheless have been sufficient to justify the difference in treatment afforded to domestic and foreign products, respectively, in the event that India had been able to discharge its burden of proof.
[874] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.92-93.
[875] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.93.
[876] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.113-7.114.

(i) First "form" of discrimination alleged by the United States

7.461. In the context of the first form of discrimination, the United States argues that India's differential treatment of imported products and domestic products is not a function of any difference in conditions prevailing in India and other countries, or in countries' measures or procedures for control of AI.[877]

7.462. India submits that the detection of AI within India is distinct from when it attempts to prevent the entry of infected products into its territory via importation.[878] Specifically, India argues that the epicentre of an outbreak is known in the case of a domestic outbreak, and so the risk relates to containment of the risk to the contaminated area. With imports, India argues, in the absence of control measures, the disease could enter the country and be dispersed through internal trade.[879] India maintains that these situations are "highly distinct".[880]

7.463. The Panel observes that India's AI measures prohibit the importation of certain agricultural products from countries reporting NAI. The Panel considers that the relevant "conditions" in this analysis refer to the presence of NAI in India or another Member. Under conditions where NAI is present in a country other than India (and is notified to the OIE), India's AI measures apply. Thus when NAI is present in an exporting country, India applies an import prohibition. Under conditions where NAI is present in India, the relevant provisions of the NAP 2012 apply, allowing movement and trade outside the surveillance zone. Unlike in the situation between Canada and Australia referred to above, this is not a case of a "substantial difference in disease status" between India and the United States justifying different treatment. In this dispute, the measures in question address the same condition – the presence of NAI – and they do so differently. In other words, here the conditions are binary – NAI is present in a country, or it is not – such that once the condition of the presence of NAI exists, the conditions are identical or similar, no matter where they are. That is not to say that the *disease* situation of India is identical or similar to the *disease* situation of the United States – India has frequent outbreaks of HPNAI and no notifications of LPNAI, whereas the United States is free of HPNAI and occasionally notifies LPNAI. Notwithstanding this observation, for the purpose of this analysis, the relevant *condition* for our analysis under the third element of Article 2.3 is the presence of NAI in India or another Member because that is the relevant distinction that triggers the import prohibition imposed by India's AI measures.

7.464. In sum, we consider that the relevant conditions are identical or similar between India and other countries (including the United States) for the purpose of the third element of Article 2.3 of the SPS Agreement.

(ii) Second "form" of discrimination alleged by the United States

7.465. In the context of the second form of discrimination, the United States argues that India seeks to protect against risks posed by AI, but the risks presented by foreign and domestic products in relation to LPAI are the same, and there is no justification for imposing different measures on products presenting the same risks.[881]

7.466. India argues that the panel report in *Australia – Salmon (Article 21.5 – Canada)* supports its contention that the presence of a disease in one country, and its absence in another such that there is a "substantial difference in disease status", means that two countries (in this case, India and the United States) are not in identical of similar situations.[882]

7.467. We agree with India that the panel report in *Australia – Salmon (Article 21.5 – Canada)* supports the notion that if the relevant disease is present in one country but not in another, this may be an indication that identical or similar conditions do not exist.[883] However, as discussed in paragraphs 7.437–7.457 above, India has not discharged its burden of proving the fact that it

[877] United States' first written submission, para. 172.
[878] India's first written submission, para. 196.
[879] India's first written submission, para. 196.
[880] India's first written submission, para. 196.
[881] United States' first written submission, para. 181.
[882] India's first written submission, para. 207.
[883] Panel Report, *Australia – Salmon (Article 21.5 - Canada)*, paras. 7.92-7.93, 7.103, 7.113.

contends; namely, that LPNAI is exotic to India. We also reiterate our conclusion that India does not maintain surveillance that is adequate to detect LPNAI, notwithstanding the existence (or lack thereof) of LPNAI within its territory. Therefore, there is no foundation upon which to base an application of the reasoning of the panel in *Australia – Salmon (Article 21.5 – Canada).*

7.468. The Panel recalls its discussion in paragraph 7.460 above, and the Panel's understanding that the presence of a disease, or lack thereof, can be considered both in relation to whether discrimination is arbitrary or unjustifiable, and in relation to whether identical or similar conditions prevail. As explained above, we consider that this reasoning is relevant to the present analysis, insofar as it demonstrates that similar factors can be considered for the purposes of determining both whether a measure discriminates in a manner that is arbitrary or unjustifiable, and whether identical or similar conditions prevail as that phrase is used in Article 2.3.

7.469. On that basis, the Panel observes that the risk against which India is protecting (in the context of the second form of discrimination alleged by the United States) is LPNAI. There is no evidence before the Panel to suggest that the risks associated with LPNAI are in any way different on the basis of the origin of the relevant product. Thus, India is protecting against an identical or similar risk when it takes measures to protect against LPNAI, regardless of whether the relevant product originates in India or the United States or somewhere else.

7.470. We therefore find, based on the evidence before us, that the risks against which India is protecting constitute conditions that are similar in India and other Members (including the United States).

7.471. We also recall that, in paragraph 7.402 above, we stated that our analysis of whether or not discrimination exists in this case would assume sameness for that purpose, and that if discrimination does exist, that finding will be confirmed if we find that identical or similar conditions do in fact exist across India and other Members. Having found that similar conditions do exist, we confirm our finding that India's AI measures discriminate between imported and domestic products.

7.6.4.2.1.4 Conclusion on Article 2.3, first sentence, of the SPS Agreement

7.472. In light of the foregoing, having established the three cumulative elements of Article 2.3, first sentence, the Panel finds that India's AI measures are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminate between India and other Members in which the same or similar conditions prevail.

7.6.4.2.2 Article 2.3, second sentence, of the SPS Agreement

7.473. The United States argues that India's AI measures amount to a disguised restriction on international trade. According to the United States, a series of factors are relevant in this regard, namely, India's application of "drastically more stringent measures to foreign products than to domestic products"[884], but also India's shifting position on whether its measures are justified by OIE guidelines or a risk assessment, and India's failure to provide a risk assessment or scientific evidence that would justify LPAI-based import bans.[885]

7.474. In response, India argues the United States' submission does not support a conclusion that its AI measures constitute a disguised restriction on international trade. India contends that there is clear justification for its measures because LPNAI is exotic to India, and the risks posed by ingress of an exotic disease cannot be compared with the risk associated with an existing disease.[886] Moreover, India argues that it has always maintained that its measures are based on the Terrestrial Code, and that India has not shifted its position on whether a risk assessment was required of it.[887]

[884] United States' first written submission, para. 182.
[885] United States' first written submission, para. 182; United States' second written submission, paras. 111-112.
[886] India's first written submission, para. 217.
[887] India's first written submission, paras. 218-219; India's second written submission, paras. 85-86.

7.475. The Panel observes that the phrase "disguised restriction on international trade" has not been interpreted by a panel or the Appellate Body in the context of Article 2.3 of the SPS Agreement. However, the Appellate Body has made observations regarding what factors might indicate that a Member maintains a disguised restriction on international trade within the context of Article 5.5 of the SPS Agreement.[888] In *Australia – Salmon*, the Appellate Body was asked to review a series of factors taken into account by the panel in determining that distinctions in levels of protection amounted to a disguised restriction on international trade. The Appellate Body stated that a finding that an SPS measure is not based on risk assessment, including instances in which there was no risk assessment at all, is a strong indication that the measure "is not really concerned with the protection of human, animal or plant life or health but is instead a trade restrictive measure taken in the guise of an SPS measure, i.e., a 'disguised restriction on international trade'".[889] The Appellate Body also said that, where a panel has doubts regarding whether a responding Member applies similarly strict standards to the internal movement of products associated with a risk within its territory as it does to imports of those products, that may be considered a factor to be taken into account when determining whether distinctions in levels of protection amount to a disguised restriction on international trade (albeit such doubts would not be conclusive in this regard).[890]

7.476. We recall our discussion in paragraph 7.400 above regarding the similarity between Article 2.3 of the SPS Agreement and the *chapeau* to Article XX of the GATT 1994 and the utility in interpreting Article 2.3 of rulings interpreting Article XX. We observe that both provisions prohibit the application of measures that would constitute a disguised restriction on international trade. In the context of Article XX, the Appellate Body noted that "arbitrary discrimination", "unjustifiable discrimination", and "disguised restriction on international trade" impart meaning to one another.[891] The Appellate Body has said that "'disguised restriction', whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX".[892] Consistently with our observations in paragraph 7.400 above, regarding the similarities between Article XX of the GATT 1994 and Article 2.3 of the SPS Agreement, we consider that, in the context of the latter provision, "disguised restriction on international trade" may similarly be read to encompass measures that constitute arbitrary or unjustifiable discrimination.[893]

7.477. Based on this understanding of "disguised restriction on international trade", the Panel makes the following observations. We recall our finding in paragraph 7.457 that India's AI measures arbitrarily and unjustifiably discriminate against foreign products. We note that an

[888] Article 5.5 of the SPS Agreement requires (in relevant part) that "each Member shall avoid arbitrary or unjustifiable distinctions in the levels [of sanitary or phytosanitary protection] it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade". We also note that a finding of inconsistency with Article 5.5 can be presumed to imply a violation of the more general obligation in Article 2.3. Panel Report, *Australia – Salmon*, para. 8.109, and Appellate Body Report, *Australia – Salmon*, para. 178.

[889] Appellate Body Report, *Australia – Salmon*, para. 166.

[890] Appellate Body Report, *Australia – Salmon*, paras. 174-176.

[891] Appellate Body Report, *US – Gasoline*, p. 25.

[892] Appellate Body Report, *US – Gasoline*, p. 25.

[893] The Panel is mindful of the discussion by the Appellate Body in *Australia – Salmon* regarding the assessment of "disguised restriction on international trade". The panel in that case based its finding that Australia's distinction in ALOPs amounted to a disguised restriction on international trade on several "warning signals" and "additional factors". The panel considered the first warning signal was the arbitrary or unjustifiable character of the differences in levels of protection maintained by Australia. Panel Report, *Australia – Salmon*, para. 8.149. The panel considered as an "additional factor" that "the concept of 'disguised restriction on international trade' in Article 5.5 includes, among other things, restrictions constituting arbitrary or unjustifiable discrimination between certain products". Panel Report, *Australia – Salmon*, para. 8.153. On appeal, the Appellate Body stated that this factor should be excluded from the examination of whether a disguised restriction on international trade existed under Article 5.5 on the basis that this additional factor was "not different from the first warning signal, and should not be taken into account as a *separate factor* in the determination of whether an SPS measure results in a 'disguised restriction on international trade'". Appellate Body Report, *Australia – Salmon*, para. 169. In the present dispute, we consider that this reasoning can be distinguished on the basis that we have not made any findings under Article 5.5 regarding whether India maintains arbitrary or unjustifiable distinctions regarding the level of protection it considers to be appropriate. We therefore do not think we are precluded from considering arbitrary or unjustifiable discrimination as an independent factor in our analysis of whether India's AI measures are a disguised restriction on international trade.

element of the analysis that led to this finding was our observation that India does not apply similar standards to the internal movement of products associated with the risk of AI as it does to imports of those products. We also recall our findings in sections 7.4.2.2 and 7.4.2.3 above that India's AI measures and the recommendations of Chapter 10.4 of the Terrestrial Code contradict each other and that, accordingly, India's measures are not based on and thus do not conform to the Terrestrial Code, in particular Chapter 10.4 thereof. Furthermore, we have found in sections 7.5.3.2.3 and 7.5.3.2.4 above that India has not conducted a risk assessment upon which to base its AI measures. In the light of the Appellate Body's explanation above as to what constitutes a disguised restriction on international trade, we consider that all of these findings, taken together, support a finding that India's AI measures are applied in a manner that constitutes a disguised restriction on international trade.

7.6.4.2.2.1 Conclusion on Article 2.3, second sentence, of the SPS Agreement

7.478. We therefore find that India's AI measures are applied in a manner that constitutes a disguised restriction on international trade, and are therefore inconsistent with Article 2.3, second sentence, of the SPS Agreement.

7.6.5 Conclusion on the United States' claim pursuant to Article 2.3 of the SPS Agreement

7.479. On the basis of the foregoing, the Panel concludes that India's AI measures are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail. We also find that India's AI measures are inconsistent with Article 2.3, second sentence, because they are applied in a manner which constitutes a disguised restriction on international trade.

7.7 Conclusion on the United States' alternative claim pursuant to Article 5.5 of the SPS Agreement

7.480. We recall our discussion in section 7.6.2 above, in which we observed that the United States believes India's measures are properly analysed under Article 2.3 of the SPS Agreement[894], and therefore that its claim under Article 5.5 of the SPS Agreement is an "alternative" claim.[895]

7.481. Having found that India's AI measures are inconsistent with Article 2.3 of the SPS Agreement, the Panel is of the view that it need not consider the United States' alternative claim under Article 5.5 of the SPS Agreement.

7.8 Whether India's AI measures are inconsistent with Article 5.6 and, consequently, with Article 2.2 of the SPS Agreement

7.8.1 Arguments of the parties

7.8.1.1 United States

7.482. The United States claims that India has breached Article 5.6 of the SPS Agreement because India's AI measures are more trade-restrictive than required to achieve its ALOP.[896] According to the United States, because the Terrestrial Code is a reasonably available alternative that exceeds India's ALOP and is less trade-restrictive, India breached Article 5.6.[897] The United States further claims that a finding by the Panel that India has acted inconsistently with Article 5.6 would result in consequential breach of Article 2.2 of the SPS Agreement.[898]

7.483. The United States suggests that the Panel follow the order of analysis adopted by the panels in *Australia – Apples* and *Australia – Salmon* and first examine whether there is a measure

[894] United States' response to Panel question No. 33.
[895] United States' first written submission, Section VIII.H.
[896] United States' request for the establishment of a panel, p. 3.
[897] United States' first written submission, paras. 17 and 133; United States' second written submission, para. 50.
[898] United States' first written submission, para. 141.

that achieves the Member's ALOP, then establish that the measure is reasonably available, and finally, determine whether the reasonably available alternative is significantly less trade-restrictive. The United States submits that this approach is appropriate in this case because resolution of this issue, particularly if the Panel finds that India's ALOP is low as the United States suggests, should facilitate review of the subsequent elements. In particular, the United States notes that it should not be difficult to ascertain whether the Terrestrial Code recommendations are available (since numerous countries already practice them) and are less trade-restrictive than outright import prohibitions.[899]

7.484. According to the United States, there is a clear, scientifically based alternative to India's AI measures that is reasonably available, namely, measures based on the Terrestrial Code. The United States argues that this alternative is technically feasible because the Terrestrial Code is developed and used the world over. Additionally, the Terrestrial Code was formulated through the expertise of veterinary authorities around the world who are "familiar with real world practicalities".[900] In response to India's assertion that the Terrestrial Code recommendations are not reasonably available because they would require India to place "full faith" in the exporting country's attestations, the United States submits that it "is not arguing that India is not entitled to conduct customs measures, but that there are alternatives to an outright ban and that the recommendations in the [Terrestrial] Code constitute precisely such an alternative".[901] Moreover, the United States argues that, rather than requiring Members to accept imports "*carte blanche*"[902], the Terrestrial Code requires the exporting country, as per Article 10.4.30, to provide evidence that it maintains an effective surveillance programme. For the United States, this information can confirm that the territory has the status – e.g. HPNAI-free or LPNAI-free – that it purports to have. In addition, Article 10.4.31 requires further evidence after an outbreak to establish that the country, zone, or compartment has regained freedom from NAI or HPNAI.[903] The United States asserts that India is currently placing "full faith" in the word of exporting countries by relying on a country's self-notification to the OIE to ascertain if such country is free of NAI. If India is willing to accept attestations from a country that its surveillance has not detected NAI, then it cannot contend that relying on OIE-compliant veterinary certificates is somehow less reliable.[904]

7.485. The United States adds that adoption of the Terrestrial Code's "prescriptions" poses no economic barrier to India, because the Terrestrial Code provides for the application of control measures by the exporting country. Thus, the expense of control measures is not incurred by an importing country such as India. The United States considers unpersuasive India's contention that it would bear a burden in reviewing the veterinary certificates that the Terrestrial Code recommends that it accept. This is because India already requires SIPs in which the veterinary authority in the exporting country must attest to a variety of conditions. Adoption of measures based on the Terrestrial Code would simply mean that Indian officials, instead of reviewing certificates for the conditions they currently require – such as country-wide freedom from NAI – would instead confirm that the conditions of the Terrestrial Code have been satisfied.[905] The United States underscores that the Terrestrial Code recommendations present no additional burden given that India already requires veterinary certificates for imports; the "key distinction is simply what is being attested to".[906]

7.486. The United States observes that India does not refer to an Indian government document in discussing the United States' controlled marketing system, but rather to an article submitted by the United States with its first written submission, which discusses US control measures. Accordingly, the United States argues, it does not appear that India had any concerns with the United States' controlled marketing system until this dispute arose. The United States then explains its controlled marketing system as follows. In the United States, LPNAI infection can be resolved through two methods. First, the affected flock can be "stamped out", which means that it is culled and disinfection procedures are implemented. Alternatively, and used less frequently, there is controlled marketing, which is governed by a regulation issued by the United States Animal Health and Plant Inspection Service. Under controlled marketing, the flock is contained for

[899] United States' response to Panel question No. 40.
[900] United States' first written submission, para. 134.
[901] United States' response to Panel question No. 37.
[902] United States' response to Panel question No. 37.
[903] United States' response to Panel question No. 37.
[904] United States' second written submission, paras. 60-61.
[905] United States' first written submission, para. 135.
[906] United States' second written submission, para. 59.

21 days. As noted in Article 10.4.1.4 of the Terrestrial Code, the incubation period for avian influenza is 21 days. Accordingly, the time period is intended to ensure that the infection has subsided. Then, seven days before the flock is slaughtered, the flock is retested. Only if the test results confirm no infection can the poultry proceed to slaughter. The United States notes that Articles 10.4.3 and 10.4.19 of the Terrestrial Code explicitly provide that in case of LPNAI infections, poultry may be kept for slaughter and that "the United States is allowing these products to be served to its own citizens".[907]

7.487. The United States contends that, although India has not stated its ALOP, after an examination of its domestic surveillance and control measures, India's ALOP "appears to be quite low". For the United States, assuming *arguendo* that India's ALOP is extremely high – to prevent any infection by LPNAI subtypes – the control measures in the Terrestrial Code are sufficient to achieve it.[908] In response to India's assertion that the United States failed to properly identify India's ALOP, the United States submits that as India is the Member maintaining the measures at issue, the burden is on India to clarify its ALOP with respect to AI. In addition, the United States highlights that India has failed to respond to its information request, which was made pursuant to Article 5.8 of the SPS Agreement.[909] Moreover, the United States contends that India's description of its ALOP as set forth in its opening statement at the first meeting of the Panel with the parties and in its response to Panel question No. 35, does not qualify under the definition of ALOP provided in Annex A(5) of the SPS Agreement. The United States relies on the Appellate Body's report in *Australia – Salmon* to clarify the relationship between an ALOP and an SPS measure, and to explain that importing Members are obliged to determine their ALOP.[910] Since India has failed to do so, the United States argues that its only alternative is to infer the ALOP from examination of India's measures. In this context, the United States reiterates that India's ALOP is relatively modest with respect to HPNAI and negligible when it comes to LPNAI, since surveillance is unlikely to detect it.[911]

7.488. The United States reiterates that the product-specific recommendations and those with respect to zoning and compartmentalization set forth in the Terrestrial Code would achieve India's ALOP. In its view, not only would the achieved ALOP be higher than the one inferred from India's domestic measures, it would be sufficiently high to achieve whatever ALOP India could "choose from", since such recommendations are designed to preclude the disease from entering the importing country.[912]

7.489. The United States explains its assertions on this point as follows. First, India's ban extends to products such as poultry meat and eggs that are not vehicles for LPAI transmission. The virus is not found in those products. Accordingly, absent contamination – which the Terrestrial Code confirms – they will not transmit the disease.[913] Second, the Terrestrial Code's provision for containment of AI, through zoning and compartmentalization and trade in products originating outside the area where AI was detected, is consistent with India's measures with respect to domestic products, which impose controls and restrictions on movement of products only within a limited area following an AI outbreak. The United States explains that the establishment of a zone or compartment in accordance with the Terrestrial Code necessarily entails the establishment of surveillance, control, and biosecurity measures to ensure that trade in products from outside the zone or compartment is safe, and allows for the application of distinct requirements (or no requirements) for products from outside the zone or compartment.[914] Third, in the United States' view, the control measures have proven effective over an extended period of time. According to the United States, it is one of the world's largest exporters of poultry commodities. Yet, there is no evidence that any country has suffered LPNAI – or HPNAI – infections as a result of United States exports. For the United States, the prescriptions of the Terrestrial Code have thus proven, in real world conditions, more than sufficient to prevent transmission of LPNAI.[915]

[907] United States' response to Panel question No. 38.
[908] United States' first written submission, para. 136.
[909] United States' second written submission, para. 52.
[910] United States' second written submission, paras. 53-54.
[911] United States' second written submission, para. 55.
[912] United States' second written submission, paras. 56-58.
[913] United States' first written submission, para. 137.
[914] United States' first written submission, para. 138.
[915] United States' first written submission, para. 139.

7.490. The United States posits further that, as the "[Terrestrial] Code allows for trade from countries reporting outbreaks of LPNAI – and India's measures do not – the [Terrestrial] Code is inherently less trade[-]restrictive".[916] Additionally, the Terrestrial Code "recognizes that zoning can be an appropriate method to control for [AI] risks".[917] In contrast, India rejects any consideration of regional conditions and would impose a country-wide ban even if the outbreak were geographically isolated and thousands of kilometres away from the exporting facility.[918] The United States highlights that prohibiting trade for any amount of time is obviously more trade-restrictive than allowing trade, and that this principle applies to zoning as well; containment measures should be applied in the areas where they are necessary instead of being applied to the whole country.[919]

7.491. The United States contends that in *Australia – Apples*, the Appellate Body determined that a breach of Article 5.6 may result in a consequential breach of Article 2.2.[920] According to the United States, a finding under Article 5.6 necessitates a determination that a viable alternative measure that achieves a Member's ALOP exists and is less trade-restrictive than the responding Member's measure. The United States suggests that Articles 5.6 and 2.2 contain "similar obligations"[921], and that "[t]he existence of such an alternative measure – and the concomitant finding that the Member has declined to adopt it – may lead to the conclusion … that a Member has adopted a measure that is applied to a greater extent than necessary and is accordingly inconsistent with Article 2.2 as well".[922] For the United States, this indicates that Article 5.6 is actually a specific application of Article 2.2.[923]

7.492. The United States further argues that the case in question supports its interpretation of the relationship between Article 2.2 and Article 5.6. In its view, because application of the Terrestrial Code will achieve India's ALOP, the import prohibition that India currently has in place exceeds what is necessary to achieve India's ALOP, meaning that India's breach of Article 5.6 also results in a breach of Article 2.2.[924]

7.8.1.2 India

7.493. India responds that, were the Panel to find that India's import "suspension" on eggs and fresh meat of poultry from countries reporting LPNAI conforms to the Terrestrial Code, such finding would necessarily also result in a finding of consistency with Article 5.6.[925] In any event, India submits that the United States' claim under Article 5.6 "is not only highly deficient for want of arguments and evidence fulfilling the three cumulative elements of Article 5.6, but is also inherently devoid of any merit on account of the identification of an incorrect ALOP".[926]

7.494. Referring to the panel report in *Australia – Salmon*, India argues that a complainant must satisfy a three-pronged test to establish a violation of Article 5.6 by examining whether there is an alternative SPS measure that: (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (iii) is significantly less restrictive to trade than the SPS measure contested.[927]

7.495. India recalls that the panels in *Australia – Salmon*[928], *Australia – Apples*[929], and *US – Poultry (China)*[930] recommended that, while all three elements prescribed under Article 5.6 are

[916] United States' first written submission, para. 140.
[917] United States' first written submission, para. 140.
[918] United States' first written submission, para. 140.
[919] United States' second written submission, para. 62.
[920] United States' first written submission, para. 141.
[921] United States' second written submission, para. 64.
[922] United States' first written submission, para. 141.
[923] United States' second written submission, para. 64.
[924] United States' second written submission, para. 65.
[925] India's first written submission, para. 239.
[926] India's first written submission, para. 236 (referring to Appellate Body Reports, *Australia – Apples*, para. 337; and *Australia – Salmon*, para. 194; and Panel Reports, *US – Poultry (China)*, para. 7.331; *Australia – Apples*, para. 7.1107; *Australia – Salmon*, para. 8.167; *Australia – Salmon (Article 21.5 – Canada)*, para. 7.117; and *Japan – Agricultural Products II*, para. 8.72).
[927] India's first written submission, para. 236 (referring to Panel Report, *Australia – Salmon*, para. 8.167).
[928] India's response to Panel question No. 40.

cumulative in nature, the Panel must first approach its analysis by identifying the second element, i.e. the ALOP implicit in the measure under challenge and the ALOP achieved by the alternative measure proposed. India agrees with this guidance as it must first and foremost be established that the alternative measure fulfils India's ALOP; that is, an alternative measure suggested by the United States would need to ensure the same ALOP as the import prohibition currently does.[931]

7.496. India considers that the United States "is asking the Panel to compare the trade[-]restrictiveness of S.O. 1663(E) with the ALOP it believes should apply, rather than the level of protection which is reflected in S.O. 1663(E) itself".[932] Referring to the panel's finding in *US – Poultry (China)*, India concludes that the United States has not established that the two alternative measures it has proposed achieve India's ALOP.[933]

7.497. According to India, the United States has identified the "wrong ALOP" because it refers to India's domestic surveillance and control measures instead of the measure being challenged, namely S.O. 1663(E). India submits that "[i]n any event, as previously explained in India's rebuttal to the Article 2.3 claim, India's domestic surveillance and control measures as reflected in the NAP 2012 are not SPS measures within the meaning of Article 1 of the SPS Agreement because they do not directly or indirectly affect international trade". India's view is that the identification of the wrong ALOP leads to a fatal error in the US analysis and strikes "at the very root of the United States allegation under Article 5.6".[934] India adds that the level of protection that a Member deems appropriate to protect human, animal or plant life or health is a decision to be made by the Member itself and not by any other WTO Member or international organization.[935] It is the importing Member's prerogative to choose its own ALOP.[936] India argues that the United States, having identified an "obviously" incorrect ALOP, still bears the burden of proof to establish a *prima facie* case of inconsistency under Article 5.6.[937]

7.498. India explains that the Panel in *US – Poultry (China)* declined to enter into a speculative exercise as to what ALOP a Member must adopt. It stated categorically that the ALOP is a prerogative of the Member maintaining the measure and the alternative measure must be one that fulfils this ALOP. The complaining Member does not fulfil its burden merely by suggesting an alternative ALOP.[938] In India's view, the Panel should determine if the alternative measure is significantly less restrictive to trade than the SPS measure contested, and it should ascertain whether it is reasonably available taking into account technical and economic feasibility.[939] Further, relying on the Appellate Body's findings in *Australia – Apples* and *Australia – Salmon*, India adds that "if any of these elements is not fulfilled, the measure in dispute would be consistent with Article 5.6. Thus, if there is no alternative measure available, taking into account technical and economic feasibility, or if the alternative measure does not achieve the Member's [ALOP], or if it is not significantly less trade-restrictive, the measure in dispute would be consistent with Article 5.6".[940]

7.499. India contends that the United States does not identify with any level of clarity the specific alternative measure which it believes fulfils the cumulative requirements under Article 5.6. The United States simply refers to the alternate measure "ambivalently" as "control measures in the

[929] India's response to Panel question No. 40 (referring to Panel Report, *Australia – Apples*, para. 7.1107).
[930] India's response to Panel question No. 40 (referring to Panel Report, *US – Poultry (China),* para. 7.333).
[931] India's response to Panel question No. 40 (referring to Panel Report, *Japan – Agricultural Products II*, paras. 8.78-8.82).
[932] India's first written submission, para. 253.
[933] India's first written submission, para. 254.
[934] India's first written submission, para. 241; India's opening statement at the first meeting of the Panel, para. 51.
[935] India's first written submission, para. 242 (referring to Appellate Body Report, *Australia – Salmon*, para. 199; and Panel Reports, *Australia – Salmon*, para. 8.172; and *Australia – Apples*, para. 7.1134).
[936] India's first written submission, para. 242 (referring to Panel Report, *US – Poultry (China)*, para. 7.333).
[937] India's first written submission, para. 242.
[938] India's response to Panel question No. 40 (referring to Panel Report, US – Poultry (China), para. 7.333).
[939] India's response to Panel question No. 40.
[940] India's first written submission, para. 236 (referring to Appellate Body Reports, *Australia – Apples*, para. 337; and *Australia – Salmon*, para. 194).

Terrestrial Code".[941] For instance, the United States does not specify which particular product specific standard the United States believes constitutes the alternative significantly less restrictive measure that India could adopt. India argues that "Chapter 10.4.1 of the Terrestrial Code contains several different standards which lay down guidelines for trade in various products on account of [AI]". Furthermore, "[a]ll of the standards are recommendatory in nature in that they permit a country to adopt a specific standard based on its ALOP … [T]he United States does not explain why some or all of the standards achieve India's ALOP, are reasonably available taking into account technical and economic feasibility and are significantly less restrictive to trade".[942] In effect, India contends that the United States has not fulfilled its burden of proof to establish a *prima facie* case of a violation of Article 5.6 by India.[943]

7.500. India surmises that, as the alternative measure is not clearly identified, the United States may be suggesting as alternative measures: (1) "unrestricted trade in fresh meat of poultry and eggs from LPNAI countries"; and (2) "trade of fresh meat of poultry and eggs from recognized zones and compartments from a LPNAI country".[944] For "unrestricted trade", India interprets this suggestion to be that, even during active outbreaks, India must import from an infected country purely on the strength of its veterinary certificate. India argues that it is obvious that this "reasonably available alternative measure" actually requires India to ignore the explicitly provided "condition of entry" in the Terrestrial Code. India submits that the United States is asking the Panel to require India to ignore portions of the Terrestrial Code so that its trade flow remains unimpeded, irrespective of the biological consequences this may have for India as an importing country.[945] With regard to the second alternative measure (namely, "trade of fresh meat of poultry and eggs from recognized zones and compartments from a LPNAI country")[946], India notes that it is not clear whether the United States considers this as an appropriate alternative measure. According to India, the United States does not say so in clear terms. It only suggests that the Terrestrial Code's standards on zoning and compartmentalisation "need to be kept in mind".[947]

7.501. India contends that the proposed alternative measures do not in any event fulfil India's ALOP. India reiterates that LPNAI is not present in India and is exotic to it. It further states that, contrary to the United States' submission, eggs and fresh meat of poultry present an identifiable risk of transmitting an LPNAI infection. By adopting S.O. 1663(E), India seeks to prevent the ingress and establishment of an exotic disease and it is precisely the risk of transmission of that disease that necessitates application of appropriate controls on trade in the commodities from LPNAI infected countries.[948]

7.502. India notes that "the Terrestrial Code explicitly recognizes the importing country's right to seek NAI country freedom from the exporting country before the poultry commodities in question may be imported".[949] Moreover, it allows an immediate prohibition on trade in these products from a country reporting LPNAI.[950] According to India, despite the existence of an international standard which not only recognizes the right of an importing country to impose an immediate ban on imports of eggs and meat from countries notifying LPNAI, but also further enables an importing country to require NAI-freedom on a country-wide basis, the United States claims that it is India's obligation to adopt a more lenient approach. It states that India should eschew international standards and must instead permit the trade in eggs and fresh meat of poultry even from a country which is experiencing an active LPNAI outbreak. The overall level of risk associated with unrestricted trade in these commodities does not fulfil India's ALOP, which is to prevent ingress of an exotic disease through products that are clearly identified as risk factors even by the OIE.

[941] India's first written submission, paras. 237 and 243; and India's opening statement at the first meeting of the Panel, para. 50.
[942] India's first written submission, para. 238.
[943] India's first written submission, para. 238.
[944] India's first written submission, para. 244; India's opening statement at the first meeting of the Panel, para. 52.
[945] India's opening statement at the first meeting of the Panel, para. 52.
[946] India's first written submission, para. 248.
[947] India's first written submission, para. 249.
[948] India's first written submission, paras. 245 and 247.
[949] India's first written submission, para. 246.
[950] India's first written submission, para. 245.

Unrestricted trade presents exactly the type of risk of introduction of LPNAI which S.O. 1663(E) guards against.[951]

7.503. India also argues that when India as a member of the OIE has determined that its ALOP is country freedom from NAI as clearly reflected in the recommendations of the Terrestrial Code, a reading which restricts the right of India to seek NAI country freedom in favour of only HPNAI country freedom is untenable as it undermines India's sovereign right to determine its ALOP.[952]

7.504. With regard to the second alternative measure, i.e. trade of fresh meat of poultry and eggs from recognized zones and compartments from a country with LPNAI, India notes that the United States' claim is deficient because of reliance on a faulty ALOP, which was derived from India's domestic containment measures in the NAP 2012. India's ALOP for trade in poultry commodities from countries reporting LPNAI (a disease which is exotic to India) is achieved through S.O. 1663(E) and not the NAP 2012.[953]

7.505. Furthermore, India argues, the United States misreads the OIE's standards on zoning and compartmentalization. Zoning or compartmentalization can only be given effect if the exporting country provides necessary evidence thereof and objectively demonstrates to the importing Member that such zones or compartments are free from NAI. According to India, "[i]mporting Members are under no obligation to *suo moto* recognise zones or compartments in the absence of either a request or documents provided to this effect by the exporting country. It is only when the [biosecurity] of such zones or compartments is verified and established and an agreement reached between the importing and exporting countries that the importing country is under an obligation to permit trade from such recognised zones or compartments during an avian influenza outbreak". The high level of biosecurity that is required of zones or compartments is to ensure that products originating in such zones or compartments are safe for trade despite an outbreak in other parts of the country.[954]

7.506. India observes that it has indicated to the United States that it is willing to consider trade from compartments; yet, to date, the United States has neither made a request to India nor submitted relevant documentation evidencing establishment of biosecure compartments. In India's view, without an explicit recognition by India of compartments in the United States, India is under no obligation to apply the principle of regionalization for imports of poultry products from the United States. Moreover, in the absence of an arrangement with India, this option is not feasible either.[955] According to India, unless the biosecurity area of the zone or the compartment is shown to be first established by the United States and then further verified by India, it would not be a reasonably available alternative measure, as it would be unclear if such zone or compartment ensures the same level of protection as the import prohibition currently does.[956] In the absence of affirmative documentation establishing the safety of products from disease free areas, India argues, India is under no obligation to permit trade in poultry commodities from certain areas of the United States every time the United States notifies LPNAI. This alternative will certainly not achieve India's ALOP.[957]

7.507. India argues that the United States has also proposed two additional measures based on the Terrestrial Code – "control measures or veterinary certificate requirements prescribed under Chapter 10.4 of the OIE Code"[958], and that India "require exporting countries to provide evidence that they maintain effective surveillance programs".[959] Addressing the first of these proposals, India argues that it is not reasonably available because veterinary certificate requirements would not meet India's ALOP. India claims the United States has suggested an alternative ALOP which India ought to apply with respect to imports. India relies on *US – Poultry (China)* to argue that the ALOP is a prerogative of the Member maintaining the measure and the alternative measure must be one that fulfils this ALOP. The complaining Member does not fulfil its burden merely by

[951] India's first written submission, para. 248.
[952] India's closing statement at the first meeting of the Panel, para. 3.
[953] India's first written submission, para. 250; India's opening statement at the first meeting of the Panel, para. 51.
[954] India's first written submission, para. 251.
[955] India's first written submission, para. 255.
[956] India's opening statement at the first meeting of the Panel, para. 53.
[957] India's first written submission, para. 252.
[958] India's second written submission, para. 89.
[959] India's second written submission, para. 93.

suggesting an alternative ALOP.[960] Regarding veterinary certificates, India submits that these are not technically and economically feasible. According to India, such feasibility (of the alternative) must be viewed with respect to India's capacity to handle the volume of imports that will result if it does not restrict imports during an active outbreak. India refers to the panel report in *Australia – Apples* and points out that as the volume increases, so does the probability that a given biological event may occur, increasing the chances that the relevant pest will gain entrance into the importing country.[961]

7.508. In response to the United States' second additional proposal that India require evidence from exporting countries that they maintain an effective surveillance programme[962], India states that this alternative is neither technically and economically feasible nor significantly less restrictive to trade. India contends that the United States is suggesting that India gather information on exporting countries' surveillance systems and establish if such systems are adequate. This alternative is not technically and economically feasible given its current human resources working in veterinary and scientific matters.[963]

7.509. India also states that it currently permits trade to commence after a three-month period following an outbreak, as recommended by the OIE. India contends that a suggestion that "India follow Article 10.4.30 and 10.4.31 and grant access to an exporting country after efficacy of a country's surveillance program is determined essentially amounts to suggesting that India prohibit imports from all countries and then allow access after intensive verification process of countries' surveillance systems. India believes this alternative could extend the period of an import ban beyond three months until such time as it gains confidence in an exporting country's surveillance. Under the circumstances, the suggested measure does not appear to be a significantly less trade[-]restrictive alternative".[964]

7.510. In response to the United States' assertion that the scope of reference of the dispute extends to all products referred to in S.O. 1663(E), India submits that merely impugning the entirety of a measure does not result in raising claims with respect to all products in the absence of evidence and argument concerning the same. Furthermore, India acknowledges that although the Panel has decided that the entirety of S.O. 1663(E) is within its terms of reference, the United States provided arguments on apparent violations by India under the SPS Agreement only with respect to eggs and meat, as is evident from various passages of the United States' submissions.[965] Based on this argument, India claims that: (a) the United States' replies to the Panel's questions confirm that its Article 5.6 claim is limited to eggs and fresh meat of poultry from countries declaring LPNAI[966]; and (b) while responding to the Panel on the manner in which the Terrestrial Code should be read, the United States provides illustrative examples relating to importation of eggs.[967]

7.511. India posits that the United States has failed to establish that the alternative measures are significantly less trade-restrictive than the measures adopted by India. For India, "[t]he United States is required to explain and demonstrate how the alternative measures would involve significantly increased market access to India than S.O. 1663(E)".[968] Instead, the United States simply stated that "as the Terrestrial Code allows for trade from countries reporting outbreaks of LPNAI – and India's measures do not – the Terrestrial Code is inherently less trade[-]restrictive".[969]

7.512. India submits that "the Panel should note that import suspension of products under S.O. 1663(E) from countries reporting LPNAI is only until such time as the country declares freedom. This usually takes 3 months from disinfection".[970] India further argues that "[t]rade from the country can commence once the country declares freedom [and that, therefore] [t]he United States has not established how the alternative measure is significantly less restrictive to

[960] India's second written submission, para. 90.
[961] India's second written submission, para. 91.
[962] India's second written submission, paras. 93-94.
[963] India's second written submission, paras. 93-94.
[964] India's second written submission, para. 95.
[965] India's second written submission, paras. 97-100.
[966] United States' second written submission, para. 101.
[967] United States' second written submission, para. 102.
[968] India's first written submission, para. 256.
[969] India's first written submission, para. 256.
[970] India's first written submission, para. 256.

trade than the limited 3 month import suspension currently applied in accordance with the Terrestrial Code".[971]

7.513. In response to the United States' consequential claim under Article 2.2 of the SPS Agreement, India rejects this claim as "unsubstantiated". India says that the passage from the Appellate Body Report in *Australia – Apples* upon which the United States relies does not support its argument. Indeed, India argues that the Appellate Body noted similarities between the Articles but "explicitly stated that such similarity cannot lead to the assumption that a violation of Article 5.6 will in all cases lead to a violation of Article 2.2".[972] Moreover, India asserts that Articles 2.2 and 5.6 make no reference to one another and that the United States has failed to provide a "cogent reason" for linking the two provisions.[973]

7.8.2 Analysis by the Panel

7.8.2.1 Introduction

7.514. The question before the Panel is whether India's AI measures are inconsistent with Article 5.6 of the SPS Agreement, as claimed by the United States. In particular, the Panel must assess whether India's AI measures are more trade-restrictive than required to achieve India's ALOP, taking into account technical and economic feasibility. If we find India's AI measures to be inconsistent with Article 5.6, the Panel is also asked to conclude that, as a consequence, India's AI measures are inconsistent with Article 2.2 of the SPS Agreement.

7.515. We first address the United States' claim under Article 5.6, and, in case of a finding of inconsistency, then consider the United States' consequential claim under Article 2.2 of the SPS Agreement.

7.516. Before commencing the legal analysis of Article 5.6, we note India's assertion that the United States' claims under Articles 5.6 and 2.2 of the SPS Agreement are limited to fresh meat of poultry and eggs from countries notifying LPNAI.[974] India maintains that the United States has not challenged S.O. 1663(E) in relation to the import prohibition of any of the products listed in S.O. 1663(E) on account of HPNAI.[975] We recall our preliminary ruling of 22 May 2013, which, as stipulated in paragraph 7.4 above, forms an integral part of the present findings. In particular, we refer to our finding that the ten categories of products listed in S.O. 1663(E) and the United States' panel request fall within the scope of this dispute.[976] Furthermore, the United States has confirmed to the Panel that its claims, including those pursuant to Articles 5.6 and 2.2, concern all the products listed in S.O. 1663(E).[977] Accordingly, we are not persuaded by India's submission that the United States' claim under Articles 5.6 and 2.2 of the SPS Agreement pertains only to fresh meat of poultry and eggs.

7.517. In addition, we recall our findings in sections 7.4.2.2.5 and 7.4.2.2.6 above that India's AI measures are not based on the Terrestrial Code and that, as explained in section 7.4.2.3 above, they do not conform to the Terrestrial Code. Therefore, India cannot rely on the alleged conformity of its AI's measures to the Terrestrial Code in order to justify a presumption of consistency of those measures with the remainder of the SPS Agreement, including Articles 5.6 and 2.2. Furthermore, as found in section 7.4.2.2.2 above, such defence would not apply in respect of live pigs as these are not covered by Chapter 10.4 of the Terrestrial Code and, to our knowledge, there is no other relevant international standard for AI applicable to live pigs. We also refer to our findings in section 7.4.2.2.2 above that there is no product-specific recommendation in Chapter 10.4 of the Terrestrial Code for "pathological material and biological products from birds", and that we do not have sufficient evidence on record to determine whether India's AI measures in respect of these products are based on the recommendations of Chapter 5.8 of the Terrestrial Code.

[971] India's first written submission, para. 256.
[972] India's first written submission, para. 257.
[973] India's first written submission, para. 258; India's opening statement at the second meeting of the Panel, para. 28.
[974] India's first written submission, para. 237; India's second written submission, para. 89.
[975] India's first written submission, para. 237; India's second written submission, para. 89.
[976] Preliminary ruling of 22 May 2013, paras. 3.27-3.30, 3.37, 3.92-3.93 and 3.140.
[977] United States' response to Panel question No. 12(e).

7.8.2.2 Whether India's AI measures are inconsistent with Article 5.6 of the SPS Agreement

7.518. The Panel will begin its analysis under Article 5.6 by setting out the text of the legal provision at issue.

7.8.2.2.1 The legal provision at issue

7.519. Article 5.6 of the SPS Agreement states:

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.[3]
>
> (footnote original) [3] For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

7.520. The phrase "appropriate level of sanitary or phytosanitary protection", i.e. the ALOP, is defined in Annex A(5) of the SPS Agreement as:

> The level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory.
>
> NOTE: Many Members otherwise refer to this concept as the "acceptable level of risk".

7.521. In *Australia – Salmon*, the Appellate Body agreed with the panel that Article 5.6 of the SPS Agreement, and footnote 3 thereto, establish three cumulative elements that must be satisfied in order to establish a violation of Article 5.6. Specifically, the Appellate Body found that:

> The three elements of [the] test under Article 5.6 are that there is an SPS measure which:
>
> (1) is reasonably available taking into account technical and economic feasibility;
>
> (2) achieves the Member's appropriate level of sanitary or phytosanitary protection (ALOP); and
>
> (3) is significantly less restrictive to trade than the SPS measure contested.[978]

7.522. The Appellate Body explained that these three elements are "cumulative in the sense that, to establish inconsistency with Article 5.6, all of them have to be met".[979] This means that, "[i]f any of these elements is not fulfilled, the measure in dispute would be consistent with Article 5.6".[980]

7.523. We note that both parties acknowledge that a claim under Article 5.6 requires the satisfaction of this three-pronged test.[981] Moreover, the parties have suggested that the Panel proceed by examining first the second element of the test, i.e. whether the alternative measure

[978] Appellate Body Report, *Australia – Salmon*, para. 194.
[979] Appellate Body Reports, *Australia – Salmon*, para. 194; and *Australia – Apples*, para. 337.
[980] The Appellate Body concluded: "Thus, if there is no alternative measure available, taking into account technical and economic feasibility, or if the alternative measure does not achieve the Member's appropriate level of sanitary or phytosanitary protection, or if it is not significantly less trade-restrictive, the measure in dispute would be consistent with Article 5.6". Appellate Body Report, *Australia – Salmon*, para. 194; Appellate Body Report, *Australia – Apples*, para. 337.
[981] United States' first written submission, para. 133; India's first written submission, para. 236.

would achieve India's ALOP.[982] A review of the existing jurisprudence shows that no panel, nor the Appellate Body, has commented definitively on a singular approach to the order in which an analysis of the three elements under Article 5.6 must take place. Indeed, different approaches have been taken in past disputes.[983]

7.524. In line with the Appellate Body's reasoning in *Australia – Salmon*, if the alternative measure fails to meet any of the three elements of Article 5.6, India's AI measures would be consistent with Article 5.6.[984] Hence, the order of the analysis would not have an impact on the result. In the absence of compelling reasons to the contrary, we have decided to analyse the elements under Article 5.6 in the order in which they have been described by the Appellate Body.

7.525. Whatever the approach, the Appellate Body has stressed that it is the complaining Member, in this case the United States, that bears the burden of proof of establishing a *prima facie* case that there is an alternative measure that meets all three elements under Article 5.6.[985] In the present case, the Panel notes that the identification by the United States of an alternative measure has been a point of disagreement between the parties. Specifically, India has advanced various arguments that call into question whether the United States has actually identified reasonably available alternative SPS measures and, if so, which precise alternative measures the United States has proposed.[986] Accordingly, a necessary step in our analysis, before entering into the study of each of the three elements of Article 5.6, is to establish whether the United States has indeed identified one or more alternative measures for the purposes of this provision.

7.8.2.2.2 Whether the United States has identified one or more alternative measures

7.526. The United States argues that it proposes measures based on the Terrestrial Code as the alternative measures for the purposes of Article 5.6.[987] It elaborates that there is a recommendation in the Terrestrial Code that provides for safe importation of each of the products India bans.[988] The United States cites as examples Article 10.4.19 (which recommends requiring veterinary certificates attesting to the conditions in which poultry was kept and slaughtered as well as ante- and post-mortem inspections) and Article 10.4.14 (regarding the certification of eggs for human consumption from an HPNAI-free country) of the Terrestrial Code.[989] It also notes that the Terrestrial Code requires, per Article 10.4.30, that an exporting country declaring freedom from NAI or HPNAI for the country, zone or compartment provide evidence that it maintains an effective surveillance programme.[990]

7.527. India first argues that the United States has not identified "with any level of clarity the specific alternative measure which it believes fulfils the cumulative requirements under Article 5.6".[991] In particular, India argues that the United States does not identify the product-specific standard that it suggests India should adopt[992], but instead states "perfunctorily" that "the Terrestrial Code is reasonably available", or refers to "control measures in the Terrestrial Code" without explaining the "controls" to which it refers.[993] India therefore submits that it "is forced to assume" that the United States is "suggesting … (i) unrestricted trade in fresh meat of poultry and

[982] India's response to Panel question No. 39; United States' response to Panel question No. 40.
[983] For instance, both the panel and the Appellate Body in *Australia – Salmon* took a sequential approach; the panel in *Japan – Agricultural Products II* considered the first and third elements before turning to the second element; the compliance panel in *Australia – Salmon (Article 21.5 – Canada)* examined the second element first – as it was "the most controversial" element of Article 5.6 – and then turned to the other elements. This was also the order of analysis chosen by the panel in *Australia – Apples* at the request of Australia. The panel in *US – Poultry (China)* was silent on the issue because it refrained from ruling on this claim. Respectively, Panel Report, *Australia – Salmon*, paras. 8.167-8.183; Appellate Body Report, *Australia – Salmon*, paras. 194-213; Panel Reports, *Japan – Agricultural Products II*, paras. 8.72-8.104; *Australia – Salmon* (*Article 21.5 – Canada*), para. 7.127*; Australia – Apples*, para. 7.1107; and *US – Poultry (China)*, para. 7.337.
[984] Appellate Body Reports, *Australia – Salmon*, para. 194; and *Australia – Apples*, para. 337.
[985] Appellate Body Report, *Japan – Agricultural Products II*, para. 126.
[986] India's first written submission, paras. 237-243; India's second written submission, paras. 88-94.
[987] United States' first written submission, para. 134; United States response to Panel question No. 37.
[988] United States' response to Panel question No. 37.
[989] United States' response to Panel question No. 37
[990] United States' response to Panel question No. 37.
[991] India's first written submission, para. 237.
[992] India's first written submission, para. 238.
[993] India's first written submission, para. 243.

eggs from LPNAI countries (ii) trade of fresh meat of poultry and eggs from recognized zones and compartments from a LPNAI country".[994]

7.528. In its later submissions, India argues that the United States suggested two additional alternatives. According to India, the United States' reference to the recommendations in Chapter 10.4 of the Terrestrial Code amounts to one alternative measure.[995] The second alternative proposed by the United States is that India require exporting countries to provide evidence that those exporting countries maintain effective surveillance programmes in order to confirm their NAI status.[996]

7.529. Our task under these circumstances is to determine whether the United States has identified one or more alternatives to India's AI measures. We observe that, in its various submissions, the United States referred to "measures based on the Terrestrial Code" and to "the Terrestrial Code" as reasonably available alternatives to a prohibition on the importation of products from countries reporting NAI.[997] The United States asserted that "for almost all of the products India bans, there is a specific recommendation in the Terrestrial Code that provides for safe importation".[998] In particular, the United States identifies the recommendations in Chapter 10.4 that correspond to the products covered by S.O. 1663(E) (to the extent that those products are within the scope of Chapter 10.4 of the Terrestrial Code) in table format[999], which is reproduced below:

S.O. 1663: Bans from all countries reporting NAI (including LPNAI and HPNAI)	**Alternative OIE Code Recommendation**
domestic and wild birds (including poultry and captive birds);	Articles 10.4.5 and 10.4.6
day old chicks, ducks, turkey, and other newly hatched avian species;	Articles 10.4.7 and 10.4.8
un-processed meat and meat products from Avian species, including domesticated, wild birds and poultry;	Articles 10.4.19 and 10.4.20
hatching eggs;	Articles 10.4.10, 10.4.11, and 10.4.12
eggs and egg products (except Specific Pathogen Free eggs);	Articles 10.4.13, 10.4.14, and 10.4.15
un-processed feathers;	Article 10.4.22 and Article 10.4.23
products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use; and	Article[] 10.4.21
semen of domestic and wild birds including poultry.	Articles 10.4.17 and 10.4.18

7.530. The United States also highlighted specific articles of Chapter 10.4 to provide examples of measures that India can implement as alternatives to an import prohibition. For instance, it refers to the recommendations for fresh poultry meat in Article 10.4.19, which provides that "a veterinary certificate should be provided that attests that poultry from which the meat was derived has been kept in a country, zone, or compartment free from HPNAI since they were hatched or at least 21 days and have been slaughtered and subject to inspection". It also refers to Article 10.4.14, which provides that "eggs for human consumption from an HPNAI-free country require[] a certificate attesting they produced or packed in an HPNAI-free territory, have had surface sanitation, and are transported in new and appropriately sanitized materials".[1000]

[994] India's first written submission, para. 244. The Panel notes that India's first written submission does not separate these two alternatives with the words "and" or "or", such that it is not clear whether India submits that the United States has proposed one or both of these alternatives.

[995] India's second written submission, para. 89.

[996] India's second written submission, para. 93.

[997] United States' first written submission, para. 134; United States response to Panel question No. 37; United States' second written submission, paras. 50 and 59-61.

[998] For instance, United States' response to Panel question No. 36; United States' second written submission, paras. 59-61 (with regard to the availability of zoning, in the context of "[t]he recommendation in the Terrestrial Code [being] reasonably available").

[999] United States' second written submission, para. 57.

[1000] United States' response to Panel question No. 37.

7.531. In addition, the United States submits that the Terrestrial Code recommends zoning and compartmentalization, and refers to Chapters 4.3 and 4.4 of the Terrestrial Code to support this argument. It explains that "a Member rather than apply its trade measures broadly against a country as a whole can apply them simply to an affected area without unnecessarily disturbing trade elsewhere".[1001]

7.532. We consider that the cumulative effect of these submissions is that the United States is proposing that India base its AI measures on the Terrestrial Code, and in particular, the recommendations in Chapter 10.4 specifically highlighted by the United States. Accordingly, we do not agree with India that the proposed alternative measures lack clarity. We conclude that the United States has identified measures based on the Terrestrial Code as a reasonably available alternative to India's AI measures for the purposes of Article 5.6 of the SPS Agreement.

7.533. In relation to live pigs as well as pathological material and biological products from birds, we note our finding in section 7.4.2.2.2 above that Chapter 10.4 of the Terrestrial Code does not include product-specific recommendations regarding these products. The United States has not suggested any alternative measures other than the recommendations of the Terrestrial Code as discussed above. For this reason, we conclude that the United States has not proposed any alternative measure in relation to live pigs and pathological material and biological products from birds for the purposes of Article 5.6 of the SPS Agreement.

7.534. We now proceed to examine whether measures based on the recommendations of the Terrestrial Code identified by the United States meet the three cumulative elements of Article 5.6 of the SPS Agreement.

7.8.2.2.3 Whether measures based on the recommendations in the Terrestrial Code are reasonably available, taking into account technical and economic feasibility

7.535. The first element of Article 5.6 of the SPS Agreement that we will consider is whether SPS measures based on the recommendations in Chapter 10.4 of the Terrestrial Code are reasonably available, taking into account technical and economic feasibility.

7.536. The United States argues that measures based on the Terrestrial Code's recommendations are economically feasible because the Terrestrial Code is developed and used around the world, and because its formulation benefits from the expertise of veterinary authorities from around the world.[1002] The United States explains that the control measures envisaged in the Terrestrial Code must be applied by the exporting Member. Moreover, to the extent that the Terrestrial Code requires OIE members to review veterinary certificates, the United States argues that this is feasible on the basis that authorities in India already review the attestations made pursuant to each SIP.[1003] The United States adds that the worldwide use of the recommendations in the Terrestrial Code is indicative of their technical feasibility.[1004] In response to India's argument that it does not have capacity to handle the volume of imports that would result if it does not restrict imports during an active outbreak, the United States observes that "[t]his is interesting because India claims that it allows imports if countries are free from NAI for three months".[1005]

7.537. India's submission, as the Panel understands it, rejects the United States' assertion that its proposed alternative measures are technically and economically feasible for India because the provisions of the Terrestrial Code shift responsibility for the Code's application to exporting countries.[1006] In India's view, real world risks "encompass risks related to failures in inspection, risk of contamination in transport and risks of incorrect certification among others", as well as the fact that poultry and poultry products from areas reporting LPNAI may be traded under the controlled marketing system.[1007] India submits that determining whether an exporting country's surveillance system is adequate is not technically or economically feasible given "current

[1001] United States' second written submission, para. 58.
[1002] United States' first written submission, para. 134.
[1003] United States' first written submission, para. 135.
[1004] United States' second written submission, para. 50.
[1005] United States' opening statement at the second meeting of the Panel, para. 29 (referring to India's first written submission, paras. 29-33 and 195).
[1006] India's first written submission, para. 255; United States' first written submission, para. 135.
[1007] India's first written submission, para. 255.

veterinary and scientific human resource[s]".[1008] Furthermore, India indicates that it is not prepared to put "full faith" in the United States' attestations regarding AI and to import products without implementing other controls.[1009]

7.538. In addition, India argues that requiring veterinary certificates as recommended in the Terrestrial Code is not technically and economically feasible because India does not have the capacity to handle the volume of imports that will result if it does not restrict imports during an active outbreak.[1010] This is so because India has quarantine facilities only at six ports and it would have to significantly enhance capacity at those ports in order to verify the sanitary condition of each consignment of imports from NAI-reporting countries.[1011]

7.539. Concerning trade in products from recognized zones, India also argues that such trade is not feasible because "without an explicit recognition by India of compartments in the United States, India is under no obligation to apply the principle of regionalization for imports of poultry products from the United States".[1012] We will address this last argument below at section 7.9 below, in the context of our findings in relation to Article 6 of the SPS Agreement.

7.540. In *Japan – Apples (Article 21.5 – US)* the panel, with respect to the element of technical and economic feasibility, reasoned that a panel must determine "whether the alternative measure would constitute an option reasonably available taking into account technical and economic feasibility in the real world", and that "the risk of incorrect enforcement is part of the technical feasibility of a measure".[1013] We concur with this approach.

7.541. The Panel observes that India currently makes use of exporting countries' own declarations regarding their AI-status in several different contexts. For instance, India notes that it "relies on a country's self-notification to the OIE to ascertain if a country is free of NAI".[1014] Moreover, as discussed in section 7.1.2.4.4 above, each consignment of poultry products must, pursuant to S.O. 655(E), be accompanied by a health certificate that contains sanitary requirements to which the official veterinarian in the exporting country must attest including, most relevantly, and depending on the conditions applicable to the products in a given consignment, a declaration of the HPNAI or LPNAI status of the exporting country.[1015] Indeed, as India states, "if a country is free from HPNAI or LPNAI, the health certificate for poultry products would nonetheless require that this fact is confirmed".[1016]

7.542. Based on this evidence, it is clear to the Panel that India already makes use of attestations from an exporting country for the purpose of determining, or confirming, that the exporting country has not detected NAI within its territory. Moreover, implicit in India's reliance on such attestations is an assumption on India's part that domestic surveillance and control in the exporting country is adequate to substantiate an attestation made by the official veterinarian. The Panel cannot identify any argument from India that establishes why attestations made pursuant to the measures envisaged by the Terrestrial Code's recommendations are of lesser quality or reliability than those that India currently requires of exporting countries. Furthermore, India's mistrust of certifications to be issued by the United States' authorities is not substantiated with evidence. We find no support for India's statements that attestations by veterinary authorities in the United States carry risks related to failures in inspection, risk of contamination in transport and

[1008] India's second written submission, para. 94.
[1009] India's first written submission, para. 255.
[1010] India's second written submission, para. 90.
[1011] India's second written submission, paras. 91-92.
[1012] India's first written submission, para. 255.
[1013] Panel Reports, *Japan – Apples (Article 21.5 – US)*, para. 8.171; and, *Australia – Apples*, para. 7.1334.
[1014] India's response to Panel question No. 21.
[1015] India's first written submission, para. 98.
[1016] India's first written submission, para. 98. While a health certificate may require that a country "confirm" its HPNAI or LPNAI status, the Panel reiterates its conclusion in section 7.1.2.4.4 that the health certificates that accompany a SIP and that are issued pursuant to S.O. 655(E) are not "related to" or "implementing" the import prohibition reflected in S.O. 1663(E) and, therefore, are not measures at issue in this dispute.

risks of incorrect certification, "among others"[1017], that are higher or different from those associated with attestations by veterinary authorities pursuant to S.O. 655(E).

7.543. Moreover, we are not persuaded by India's argument that reliance on the exporting country's veterinary certificates is not technically and economically feasible because India does not have the capacity to handle the volume of imports that will result if it does not restrict imports during an active outbreak.[1018] We do not find this argument convincing. Indeed, as noted by the United States[1019], India submits that it "does not maintain a permanent ban on poultry and poultry products from NAI[-]reporting countries"[1020] and that the import prohibition "is lifted once the exporting country notifies freedom from [NAI] to the OIE".[1021] This suggests that India does have the capacity to respond to increases in imports that are contingent on circumstances, such as the NAI status of an exporting country, that are outside India's control. We see no reason, and India has not persuaded us, as to why India could not utilize this capacity to handle an increase of imports were the ban to be lifted. In addition, if a WTO Member could justify an import ban on the basis that it is less administratively burdensome than an alternative measure and therefore the alternative measure is not feasible, this would render meaningless the requirement in Article 5.6 that a Member ensure that its SPS measures are not more trade-restrictive than required to achieve the ALOP.

7.544. We note that India cites the Panel report in *Australia – Apples* as support for its argument in respect of its capacity to handle imports during an outbreak.[1022] In our view, India's contention is not supported by this reference because the passage India relied upon does not address whether an alternative measure was technically and economically feasible, but rather the likelihood of the introduction of the relevant pests.

7.545. Nor has India persuaded us that those alleged risks would be magnified because contaminated poultry in the United States are not exterminated but instead domestically traded under the United States' controlled marketing system. India asserted that the controlled marketing system makes the risk that contaminated products will enter its territory all the more possible[1023] and suggests that it is for the United States to substantiate the safety of these products.[1024] We disagree. The Appellate Body has been clear that it is not the burden of one party to prove the facts asserted by another.[1025]

7.546. On the basis of the foregoing, the Panel concludes that measures based on the recommendations of the Terrestrial Code are technically and economically feasible, and reasonably available alternatives to India's AI measures. Accordingly, the alternative measures identified by the United States fulfil the first element of Article 5.6 of the SPS Agreement. We now proceed to examine whether those measures also fulfil the second element.

7.8.2.2.4 Whether measures based on the recommendations of the Terrestrial Code achieve India's ALOP

7.547. The second element in the test under Article 5.6 of the SPS Agreement refers to whether the alternative measures – in this case, the SPS measures based on the recommendations in the Terrestrial Code – achieve India's ALOP.

7.548. The Appellate Body has provided guidance concerning the analysis that a panel must conduct when assessing whether a proposed reasonably available alternative achieves a Member's ALOP under Article 5.6 of the SPS Agreement:

[1017] India's first written submission, para. 255.
[1018] India's second written submission, para. 91.
[1019] United States' opening statement at the second meeting of the Panel, para. 29 (referring to India's first written submission, paras. 29-33 and 195).
[1020] India's first written submission, para. 33.
[1021] India's first written submission, para. 195.
[1022] India's second written submission, para. 91 (citing Panel Report, *Australia – Apples*, para. 7.504).
[1023] India's first written submission, para. 255.
[1024] India's first written submission, para. 255.
[1025] Appellate Body Report, *Japan – Apples*, para. 157.

> Under Article 5.6, in order to assess whether a significantly less trade-restrictive alternative measure that would meet the appropriate level of protection is available, we consider that a panel must identify both the level of protection that the importing Member has set as its appropriate level, and the level of protection that would be achieved by the alternative measure put forth by the complainant. Thereupon the panel will be able to make the requisite comparison between the level of protection that would be achieved by the alternative measure and the importing Member's appropriate level of protection. If the level of protection achieved by the proposed alternative meets or exceeds the appropriate level of protection, then (assuming that the other two conditions in Article 5.6 are met) the importing Member's SPS measure is more trade restrictive than necessary to achieve its desired level of protection.[1026]

7.549. We accordingly undertake three related and consecutive tasks, namely (i) identification of India's ALOP, (ii) identification of the level of protection that would be achieved by the SPS measures based on the recommendations of the Terrestrial Code, and (iii) comparison between the level of protection that would be achieved by the alternative measures and India's ALOP.

7.8.2.2.4.1 Identification of India's ALOP

7.550. Concerning our first task, we recall that the phrase "appropriate level of sanitary or phytosanitary protection", i.e. the ALOP, is defined in Annex A(5) of the SPS Agreement as "[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory". The note to Annex A(5) states that "[m]any Members otherwise refer to this concept as the "'acceptable level of risk'". The Appellate Body clarified in *Australia – Apples* that a Member's ALOP is "equated" with a Member's acceptable level of risk.[1027]

7.551. In *Australia – Salmon*, the Appellate Body stressed that the determination of the ALOP "is a *prerogative* of the Member concerned"[1028], and that neither a panel nor the Appellate Body may substitute its own reasoning for an ALOP expressed consistently by a Member.[1029] The Appellate Body further observed that, while there is no explicit provision which obliges WTO Members to determine their ALOP, such an obligation is nonetheless implied in, *inter alia*, Article 5.6 of the SPS Agreement.[1030] The Appellate Body explained that, although a Member's ALOP need not be determined in quantitative terms, the ALOP cannot be determined "with such vagueness or equivocation that the application of the relevant provisions of the SPS Agreement, such as Article 5.6, becomes impossible".[1031]

7.552. Although in the specific context of the *Australia – Salmon* dispute, the Appellate Body considered that Australia had determined its ALOP "with sufficient precision to apply Article 5.6"[1032], the Appellate Body did envisage circumstances in which a Member does not determine its ALOP, or does so with insufficient precision.[1033] In such circumstances, the Appellate Body conceded that a panel may "establish" the Member's ALOP "on the basis of the level of protection reflected in the SPS measure actually applied".[1034] The Appellate Body, however, cautioned panels against substituting their own reasoning about the level of protection implied in a measure for the ALOP that is explicitly specified by the Member itself.[1035]

7.553. We agree with India that it is the prerogative of every Member to determine its own ALOP.[1036] At the same time, in order for us to carry out an assessment of the United States' claims

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[1026] Appellate Body Report, *Australia – Apples*, para. 344.
[1027] SPS Agreement, Annex A(5); Appellate Body Report, *Australia – Apples*, para. 369.
[1028] Appellate Body Reports, *Australia – Salmon*, para. 199 (emphasis original); and *US – Continued Suspension*, para. 523.
[1029] Appellate Body Report, *Australia – Salmon*, para. 199.
[1030] Appellate Body Report, *Australia – Salmon*, para. 205.
[1031] Appellate Body Reports, *Australia – Salmon*, para. 206; and *US – Continued Suspension*, para. 523.
[1032] Appellate Body Report, *Australia – Salmon*, para. 207.
[1033] Appellate Body Report, *Australia – Salmon*, para. 207.
[1034] Appellate Body Report, *Australia – Salmon*, para. 207.
[1035] Appellate Body Report, *Australia – Salmon*, paras. 197-199.
[1036] India's first written submission, paras. 117 and 242; India's opening statement at the first meeting of the Panel, para. 19.

under the SPS Agreement, we must nonetheless identify India's ALOP.[1037] We have examined India's written and oral submissions and identified a number of statements in which India alludes to an ALOP. For instance, in its first written submission, India states that its ALOP "is to *prevent ingress* of an exotic disease through products that are clearly identified as risk factors even by the OIE".[1038] Similarly, India argued in response to questions from the Panel that "India's level of protection *as reflected in S.O. 1663(E)* is to *prevent ingress of LPNAI and HPNAI* from disease notifying countries through imports of products that are clearly identified as risk factors even by the OIE".[1039] India also argues that its "*current* level of protection *is achieved* by maintaining import restrictions against countries notifying HPNAI or LPNAI … *[t]his is reflected in S.O. 1663(E)*".[1040] In its closing statement at the first substantive meeting, India said that "[w]hen India as a member of the OIE has determined *that its ALOP is country freedom from NAI* as clearly reflected in the recommendations of the Terrestrial Code, a reading which restricts the right of India to seek NAI country freedom in favour of only HPNAI country freedom is untenable as it undermines India's sovereign right to determine its ALOP".[1041]

7.554. From this survey, the Panel discerns that India has stated two ALOPs for its AI measures. The first is the "prevention of ingress of LPNAI and HPNAI". India adds that this stated ALOP would be "reflected in" and "achieved by" S.O. 1663(E). India's second stated ALOP is "country freedom from NAI".

7.555. The United States submits that, notwithstanding the fact that India has referred to the "prevention of ingress" and "NAI-freedom" as its ALOPs, India has failed to specify its ALOP.[1042] To the United States, neither are true ALOPs – the first is an "objective or characterization of India's measure", and the latter is "simply the status of an exporting territory under the Terrestrial Code".[1043] The United States argues that India's failure to identify its ALOP means that the ALOP must be inferred based on the record of evidence[1044], and that India's ALOP can be discerned from the NAP 2012, thereby indicating that India's ALOP is "quite low"[1045] or "relatively modest with respect to HPNAI and negligible with respect to LPNAI since surveillance is unlikely to detect it".[1046]

7.556. In addressing the question of whether India has determined an ALOP for its AI measures, we need to examine whether India has determined its ALOP within the meaning of the definition of "appropriate level of protection" or "acceptable level of risk" in Annex A(5) of the SPS Agreement. We also need to determine whether it has defined its ALOP "with sufficient precision to apply Article 5.6"[1047]; that is, without "such vagueness or equivocation that the application of the relevant provisions of the SPS Agreement, such as Article 5.6, becomes impossible".[1048] Since we have discerned that India has put forward two different ALOPs, we shall examine each of them in turn.

(i) India's ALOP as "prevention of ingress of LPNAI and HPNAI"

7.557. The first ALOP stated by India is the "prevention of ingress of LPNAI and HPNAI". We recall that the United States argues that such a statement is not an ALOP but rather an "objective or characterization of India's measure". We will therefore consider in greater detail the definition of "appropriate level of protection" in Annex A(5) of the SPS Agreement, which provides that "[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory". We recall that a Member's ALOP is equated to its acceptable level of risk.[1049]

[1037] Appellate Body Report, *Australia – Apples*, para. 344.
[1038] India's first written submission, para. 248. (emphasis added)
[1039] India's response to Panel question Nos. 35(a), No 35(c), and No 62(a). (emphasis added)
[1040] India's response to Panel question No. 62(b). (emphasis added)
[1041] India's closing statement at the first meeting of the Panel, para. 3. (emphasis added)
[1042] United States' second written submission, para. 53.
[1043] United States' second written submission, para. 53.
[1044] United States' second written submission, para. 55.
[1045] United States' first written submission, para. 136.
[1046] United States' second written submission, para. 55.
[1047] Appellate Body Report, *Australia – Salmon*, para. 207.
[1048] Appellate Body Reports, *Australia – Salmon*, para. 206; and *US – Continued Suspension*, para. 523.
[1049] SPS Agreement, Annex A(5); Appellate Body Report, *Australia – Apples*, para. 369.

7.558. We note that the Appellate Body discussed the meaning of this provision in terms of the meaning of "risk", and therefore the relationship between the meaning of ALOP or acceptable level of risk and the definition of "risk" in "risk assessment" in Annex A(4) of the SPS Agreement.[1050]

7.559. In the particular circumstances of this case, given that India has stated that its ALOP is "prevention of ingress of LPNAI and HPNAI", we consider that we should also examine the meaning of the word "level" in "appropriate level of protection" and "acceptable level of risk".

7.560. The word "level" has a very large number of dictionary meanings.[1051] However, as the Appellate Body has noted, "dictionary meanings leave many interpretive questions open"[1052], as "they typically aim to catalogue *all* meanings of words – be those meanings common or rare, universal or specialized".[1053] Our task is therefore to understand which of those meanings is to be attributed to the word as used in its context.[1054]

7.561. For this reason, we consider the ordinary meanings of the adjectives that qualify the meaning of "level" – namely, "appropriate" and "acceptable". The ordinary meaning of the word "appropriate" is "attached or belonging to as an attribute, quality or right; peculiar to; inherent, characteristic; specially suitable for or to; proper, fitting".[1055] These definitions suggest that the adjective "appropriate" conveys the notion of something being "adapted" or "suited" to the particular situation at hand.[1056] The ordinary meaning of the word "acceptable" is "[w]orth accepting; likely to be accepted; pleasing, welcome; tolerable".[1057] With these definitions in mind, we consider that the adjectives "appropriate" and "acceptable" in Annex A(5) have a relative effect, which demarcates the distinction between the "level" that is, or is not, tolerable or suitable or adapted.

7.562. In the light of this understanding, and further to a survey of the many definitions of "level"[1058], we consider that the appropriate definition in the present context is "a position (on a real or imaginary) scale in respect of amount, intensity, extent, etc.; a relative … amount or value".[1059] Notwithstanding the fact that a Member's ALOP or acceptable level of risk need not be expressed in quantitative terms[1060], we consider that an ALOP or acceptable level of risk will express a certain threshold that denotes the position of the relevant Member in relation to the intensity, extent, or relative amount of protection or risk that the Member deems to be tolerable or suitable.

7.563. In drawing this conclusion, we are cognizant of the prerogative of all Members to determine their own ALOP.[1061] Though we are not circumscribing this prerogative, it is our role in this dispute to interpret the definition of ALOP or acceptable level of risk in Annex A(5), and assess whether India's stated ALOP falls within the scope of this definition. We note that our

[1050] For example, in *Australia – Apples*, the Appellate Body said the concept of ALOP or acceptable level of risk is informed by the meaning of "risk" in the phrase "risk assessment" in Annex A(4), such that the "risk" associated with a pest or disease may encompass "consequences". Appellate Body Report, *Australia – Apples*, para. 405. Similarly, in *EC – Hormones*, the Appellate Body isolated and defined the specific risk in that dispute, namely "the carcinogenic or genotoxic *potential* of the residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes". The Appellate Body therefore understood the risk in that case as including the "carcinogenic or genotoxic *potential*" of the hormone residues, indicating that the meaning of "risk" can also incorporate the "potential" element within the definition of "risk assessment" in Annex A(4). Appellate Body Report, *EC – Hormones*, para. 200.

[1051] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. I, pp. 1586-1587.

[1052] Appellate Body Reports, *Canada – Aircraft*, para. 153; and *EC – Asbestos*, para. 92.

[1053] Appellate Body Report, *US – Gambling*, para. 164.

[1054] Appellate Body Report, *US – Gambling*, para. 167.

[1055] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. I, p. 106.

[1056] Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, para. 4.46.

[1057] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. I, p. 13.

[1058] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. I, pp. 1586-1587.

[1059] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. I, p. 1587.

[1060] Appellate Body Reports, *Australia – Salmon*, para. 206; and *US – Continued Suspension*, para. 523.

[1061] Appellate Body Reports, *Australia – Salmon*, para. 199; and Appellate Body Report, *US – Continued Suspension*, para. 523.

interpretation of ALOP or acceptable level of risk is consistent with the variety of ALOPs and acceptable levels of risk that have been assessed by prior panels and the Appellate Body.[1062]

7.564. Bearing this in mind, we turn to consider whether India's stated ALOP – namely, the "prevention of ingress of LPNAI and HPNAI" – is an ALOP within the meaning of Annex A(5).

7.565. As concluded above, an ALOP or acceptable level of risk will express a certain threshold that denotes the position of the relevant Member in relation to the intensity, extent, or relative amount of protection or risk that the Member deems to be tolerable or suitable. We cannot discern from India's characterization of its ALOP as "prevention of ingress of LPNAI and HPNAI" the intensity, or extent, or amount of protection or risk that India will tolerate or that it considers suitable. Put differently, India has made no comment regarding its tolerance towards NAI. Though India has noted on numerous occasions that it seeks to "prevent ingress" of NAI, we do not think that this alone is sufficient to meet the definition in Annex A(5). Specifically, we think it axiomatic of an SPS measure that it be directed to the "prevention" of the materialization of sanitary or phytosanitary risks, notwithstanding the fact that determination of the level of protection is an element in the decision-making process that logically precedes, and is separate from, the establishment or maintenance of the SPS measure.[1063] We do not consider that this, on its own, is synonymous with a description of the *level* of protection that a Member considers suitable, nor the *level* of risk that a Member deems tolerable. Indeed, we are of the view that in order to be sufficiently precise, a Member's statement of its ALOP, or its acceptable level of risk, must at least satisfy the definition in Annex A(5). Therefore, we are not persuaded that India's statement satisfies this standard.

7.566. Rather than substitute our own reasoning for India's express statements[1064] with regard to its ALOP or acceptable level of risk, we will instead examine the record of evidence (including the measures at issue) in order to determine whether India has provided information that allows us to understand India's ALOP with any greater precision.

7.567. S.O. 1663(E) is an import prohibition. The Appellate Body noted in *Australia – Salmon* that an import prohibition is "undisputedly a 'zero-risk level' of protection".[1065] We consider this to elaborate on India's statement that its ALOP is the "prevention of ingress of LPNAI and HPNAI". However, we must consider whether this is dispositive of India maintaining a zero-risk level of protection against the ingress of LPNAI and HPNAI.

7.568. We note India's statement that its "current level of protection is *achieved by* [and] *is reflected in* S.O. 1663(E)".[1066] In the circumstances of this case and in the light of the particularities of India's AI situation and the manner in which AI is transmitted, we express doubt as to whether S.O. 1663(E) achieves a zero-risk level of protection. For instance, from the end of 2003 to 12 March 2013, India notified to the OIE 95 outbreaks of HPAI (subtype H5N1) in poultry

[1062] For example, in *Australia – Salmon*, Australia defined its ALOP as "a high or 'very conservative' level of sanitary protection aimed at reducing risk to 'very low levels', 'while not based on a zero-risk approach'". Panel Report, *Australia – Salmon*, para. 8.107. Though the Appellate Body considered this to be sufficiently precise, the compliance panel in *Australia – Salmon (Article 21.5 – Canada)* noted "parenthetically[] that a more explicit and in particular a quantitative expression of a Member's ALOP would greatly facilitate the consideration of compliance with not only Article 5.6 but with other provisions of the SPS Agreement as well". Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7129. In *Japan – Agricultural Products*, in relation to Japan's requirements relating to testing and demonstration of quarantine efficacy, the Panel found that Japan's ALOP was reflected in its requirement that quarantine treatment had to achieve "complete mortality in large-scale tests on a minimum of 30,000 coddling moths". Panel Report, *Japan – Agricultural Products II*, paras. 8.11 and 8.82. This finding was not appealed. However, before the compliance panel Japan argued that its ALOP was "the level of protection that provides a security level which will not compromise Japan's status as a fire blight-free country through commercial shipment of fresh apple fruit, in the absence of illicit acts". Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 8.190. In *Australia – Apples*, the Appellate Body found that Australia's ALOP was "providing a high level of sanitary or phytosanitary protection aimed at reducing risk to a very low level, but not to zero". Appellate Body Report, *Australia – Apples*, para. 385.

[1063] Appellate Body Report, *Australia – Salmon*, para. 203.

[1064] Appellate Body Report, *Australia – Salmon*, para. 199.

[1065] Appellate Body Report, *Australia – Salmon*, para. 197.

[1066] India's response to Panel question No. 62(b).

in India.[1067] As explained by Dr Honhold, "[i]t is accepted that HPAI H5N1 is introduced directly by wild birds … HPAI H5N1 in India has been concentrated in West Bengal … and given the high levels of infection in Western Bangladesh and the porous nature of the border it cannot be ruled out that at least some infection is spread from that region".[1068] India is aware of the risks posed by such movement.[1069] We also note that the three individual experts were unable to conclude that LPNAI is exotic to India due, *inter alia*, to the fact that LPNAI can be transmitted by wild birds.[1070] More generally, the OIE notes that a zero risk importation policy may require total prohibition on all imports or the imposition of measures that are disproportionately onerous given the actual level of risk, and that even such approaches would not be sufficient to eliminate all risk (because, for example, of natural incursions).[1071]

7.569. While we stress that we make no comment on whether WTO Members can adopt a zero-level of protection in general, *in casu* we observe that the particularities of India's AI situation and the manner in which AI is transmitted, leads us to doubt that an import ban can achieve a zero-risk level of protection with regard to AI. This is because the disease is transmitted not only through commercial channels of trade, but also by wild birds and informal and illicit trade.

7.570. With this in mind, given the particularities of India's AI situation and the manner in which AI is transmitted (of which India is aware), we conclude that India has not adopted a zero-risk level of protection against AI. Rather, mindful of the fact that India's ALOP is "achieved by" and "reflected in S.O. 1663(E)"[1072], we conclude that India's ALOP is *very high* or *very conservative*. We consider that this formulation of India's ALOP is consistent with India's statement that its ALOP is achieved by S.O. 1663(E), as well as the particularities of India's AI situation and the manner in which AI is transmitted. We also consider that this formulation of India's ALOP is sufficiently precise to enable the application of the SPS Agreement (including the provisions of Article 5.6).

7.571. For these reasons, we conclude that India's statement that its ALOP is the "prevention of ingress of LPNAI and HPNAI" is, on its own, insufficient to satisfy the definition of ALOP or acceptable level of risk in Annex A(5) of the SPS Agreement. Taking into account India's arguments during this dispute, as well as the nature of India's AI measures, and the particular circumstances of the risk in this case, we conclude that India's ALOP is very high or very conservative.

(ii) India's ALOP as "country freedom from NAI"

7.572. We follow the same process to examine whether India's statement that its ALOP is "country freedom from NAI" constitutes an ALOP within the definition of ALOP in Annex A(5) of the SPS Agreement. Significantly, India's statement (taken in full) is that "[w]hen India as a member of the OIE has determined that its ALOP is country freedom from NAI as clearly reflected in the recommendations of the Terrestrial Code a reading which restricts the right of India to seek NAI country freedom in favour of only HPNAI country freedom is untenable as it undermines India's sovereign right to determine its ALOP".[1073] The Panel notes that this statement by India is in the context of its more general argument that India's AI measures represent a condition of entry for poultry products entering India, namely, that poultry products originate from a country that is free of NAI.

[1067] See table on *Outbreaks of Highly Pathogenic Avian Influenza (subtype H5N1) in poultry notified to the OIE * from the end of 2003 to 12 March 2013,* accessed 17 January 2014, <http://www.oie.int/fileadmin/Home/eng/Animal_Health_in_the_World/docs/pdf/graph_avian_influenza/graphs_HPAI_12_03_2013.pdf>.

[1068] For example, India's first written submission, paras. 15 and 203.

[1069] For example, India's first written submission, paras. 15 and 203.

[1070] For example, in para. 7.446, Professor Brown noted that LPAI could be introduced by wild birds, and that this carriage could lead to LPNAI. Professor Brown's response to Panel question No. 1. Moreover, as noted in para. 7.447, Dr Honhold summarized that "whilst the lack of a finding of LPNAI, which is introduced by the same mechanism as H5N1 in the first instance, in the presence of the number of introductions of H5N1 by wild birds is perhaps improbable, it is not impossible or implausible". Dr. Honhold's response to Panel question No. 2. In recalling these statements, we also stress our conclusion in para. 7.455 that we make no finding on whether or not LPNAI is exotic to India.

[1071] OIE's response to Panel question No. 8(d).

[1072] India's response to Panel question No. 62(b).

[1073] India's closing statement at the first meeting of the Panel, para. 3.

7.573. The Panel understands that this statement by India refers to the fact that it is only prepared to accept products that originate in NAI-free countries. That is, India seeks country-wide NAI-freedom from its trading partners.

7.574. The Panel does not consider that this statement represents India's ALOP. We recall the Appellate Body's explanation that an ALOP represents an objective that logically precedes the establishment or decision on the maintenance of a measure.[1074] We do not consider that India's objective is the NAI-freedom of its trading partners; rather, India's objective relates to its own AI status, which it purportedly achieves through S.O. 1663(E), which prohibits importation of the products listed therein if the exporting country is not NAI-free. Furthermore, we have concluded in section 7.3 above that the measures at issue are SPS measures within the meaning of Annex A(1)(a)-(c), an element of which is that the SPS measures are measures applied to protect against the enumerated risks "within the territory of Member".[1075] For these reasons, the Panel does not consider India's statement that its ALOP is "country freedom from NAI", made in the context of its condition of entry, truly reflects India's ALOP. Rather, we interpret India as saying that its ALOP can only be met by products that originate in NAI-free countries, not by products from countries that are only HPNAI-free, where LPNAI may exist.

(iii) Conclusion on India's ALOP

7.575. We therefore conclude that India's ALOP for its AI measures is very high, or very conservative.

7.8.2.2.4.2 Identification of the level of protection that would be achieved by alternative measures based on the recommendations of the Terrestrial Code

7.576. Having established that India's ALOP for its AI measures is very high, or very conservative, we proceed to the next task, i.e. to determine the level of protection that would be achieved by the adoption of measures based on the Terrestrial Code's recommendations.

7.577. We begin this task by considering the level of protection reflected in the recommendations of the Terrestrial Code. In this regard, the Panel observes that the OIE, in response to questioning by the Panel, stated that "[t]he Terrestrial Code does not contain specific or general recommendations about the level of protection provided by the recommendations in disease chapters or other Code texts, nor does it contain recommendations on how OIE Members should go about setting their [ALOP]".[1076] Notwithstanding this observation, the Panel notes the OIE's comment that "[a]ll measures recommended by the OIE *provide for safe trade in animals and animal products*, based on the most up to date scientific information and available techniques"[1077] and more specifically that "the Terrestrial Code establishes measures that are proportional to risk, with the *objective of facilitating safe trade* and avoiding unjustifiable trade barriers".[1078]

7.578. Furthermore, we observe that paragraph A.2 of the User's Guide to the Terrestrial Code states that:

> The recommendations in each of the disease chapters in Volume II of the [OIE] Code are designed to prevent the disease in question being introduced into the importing country, taking into account the nature of the commodity and the animal health status of the exporting country. Correctly applied, OIE recommendations provide for trade in animals and animal products to take place with an optimal level of animal health security, based on the most up to date scientific information and available techniques.[1079]

7.579. We also note that, according to the Foreword to the Terrestrial Code, the recommendations in the Code "should be used" to prevent the transfer of disease "via international

[1074] Appellate Body Report, *Australia – Salmon*, para. 200.
[1075] Annex A(1) of the SPS Agreement.
[1076] OIE's response to Panel question No. 8(a)-(c).
[1077] OIE's response to Panel question No. 17(a). (emphasis added)
[1078] OIE's response to Panel question No. 11. (emphasis added)
[1079] User's Guide, para. A.2; United States' second written submission, para. 56.

trade".[1080] Chapter 10.4 of the Terrestrial Code includes the recommendations aimed specifically at preventing the ingress of NAI into the importing country, thus ensuring safe trade.

7.580. The Panel takes particular note of the OIE's multiple references to the fact that OIE standards and guidelines, and in particular the recommendations in the Terrestrial Code, facilitate "safe trade".[1081] We understand "safe" to mean "free from risk".[1082] Moreover, we recall that the recommendations in the Terrestrial Code, if correctly applied, provide for trade in animals and animal products to take place with an "optimal level" of animal health security, based on the most up to date scientific information and available techniques.[1083] Furthermore, the recommendations in Chapter 10.4 specifically address the measures necessary to ensure safe trade because of concerns of AI. Indeed, "the application of measures that comply with the provisions in Chapter 10.4 can be relied upon to avoid the introduction of [AI] into an importing country".[1084]

7.581. In summary, we are of the view that the Terrestrial Code, and in particular Chapter 10.4 thereof, provides for an optimal level of security, under which safe trade may be facilitated in order to prevent AI from being introduced into an importing country.

7.8.2.2.4.3 Comparing India's ALOPs with the level of protection of the alternative measures

7.582. We will now compare India's ALOP for its AI measures, which is very high or very conservative, with the level of protection that would be achieved by measures based on the recommendations of the Terrestrial Code, and in particular Chapter 10.4 thereof, which are designed to achieve an optimal level of security. We understand that "optimal" means "best, most favourable, [especially] under a particular set of circumstances; optimum".[1085] In our view, measures based on the recommendations of the Terrestrial Code would achieve a level of protection that is at least as high as India's "very high" or "very conservative" level of protection.

7.583. We are mindful of the Appellate Body's concerns about the need for the alternative measures to be based on science for a complainant to satisfy its burden of proof that its proposed alternative measure would meet the ALOP under Article 5.6.[1086] In this respect, the Appellate Body has noted that the evidence required to establish a presumption that the alternative measure would meet the responding Member's ALOP will necessarily vary from measure to measure and from case to case, but that a "panel's assessment of whether this burden has been met is a matter of legal characterization and not a scientific assessment of risk that must conform to the first three paragraphs of Article 5".[1087]

7.584. The Panel understands from the Appellate Body's reasoning that, in order to discharge its burden of proof under the second element of Article 5.6, the United States' assertion that its alternative measure satisfies India's ALOP must be based on evidence that demonstrates that its

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[1080] Foreword to the Terrestrial Code (21st edition), first paragraph. OIE, "Terrestrial Animal Health Code", accessed 4 November 2013, <http://www.oie.int/international-standard-setting/terrestrial-code/>.
[1081] OIE's response to Panel question Nos. 2, 7(b), 8(a)-(c), 11, 17(a).
[1082] *Shorter Oxford English Dictionary*, p. 2646.
[1083] User's Guide, para. A.2; United States' second written submission, para. 56.
[1084] OIE's response to Panel question No. 17(b).
[1085] *Shorter Oxford English Dictionary*, p. 2014.
[1086] The Appellate Body explained:
> The objective of ensuring protection against risks to human, animal or plant life or health is key to SPS measures, to a Member's appropriate level of protection, and to the SPS Agreement as a whole. Furthermore, the basic obligations set out in Article 2—which inform the more specific obligations in Article 5—include the stipulation in Article 2.2 that SPS measures must be based on scientific principles and not maintained without sufficient scientific evidence. This implies that evidence demonstrating that a proposed alternative measure takes adequate account of these key characteristics of SPS measures will necessarily form part of a complainant's attempt to prove that a contested SPS measure fails to meet the requirements of Article 5.6. In our view, this is also reinforced by the important role that science plays throughout the SPS Agreement in maintaining "the delicate and carefully negotiated balance in the SPS Agreement between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings.

Appellate Body Report, *Australia – Apples*, para. 364.
[1087] Appellate Body Report, *Australia – Apples*, para. 366.

alternative takes adequate account of scientific principles and the requirement that SPS measures are not maintained without sufficient scientific evidence. We will therefore consider whether the alternative measures proposed by the United States – measures based on the recommendations in the Terrestrial Code – satisfy this standard.

7.585. We observe that the OIE's Terrestrial Animal Health Standards Commission bears responsibility for the development of the recommendations contained in the Terrestrial Code. This Commission draws upon the expertise of internationally renowned specialists to prepare draft texts for new articles of the Terrestrial Code or revise existing articles in the light of advances in veterinary science.[1088] The resulting standard consists of health measures based on the latest available scientific evidence[1089], which should be used by the veterinary authorities of importing and exporting countries to, *inter alia*, prevent the transfer of agents pathogenic to terrestrial animals and/or humans via international trade in terrestrial animals and terrestrial animal products, while avoiding unjustified sanitary barriers to trade.[1090] We believe that these circumstances are sufficient to characterize the recommendations of the Terrestrial Code as taking into account scientific principles, and therefore we believe that measures based on these recommendations are capable of satisfying the requirements of the second element of Article 5.6 of the SPS Agreement.

7.586. Taken together, the Panel concludes that the above analysis indicates that the United States' proposal that India's measures be based on the Terrestrial Code discharges its burden of identifying an alternative measure that is based on scientific principles and is supported by sufficient scientific evidence. Moreover, we believe that this proposed alternative would achieve India's ALOP.

7.8.2.2.5 Whether the measures based on the Terrestrial Code are significantly less trade-restrictive

7.587. Having concluded on the first two elements of Article 5.6, we now proceed to examine the third and last element of this provision: whether the United States has demonstrated that the measures based on the Terrestrial Code's recommendations are significantly less restrictive to trade than India's AI measures.

7.588. The United States argues that the Terrestrial Code is significantly less trade-restrictive than India's AI measures because the Terrestrial Code allows for trade with countries that report NAI, whereas India's measures do not.[1091] The United States describes India's measures as "vastly more trade[-]restrictive than required to achieve the level of protection reflected in the regime applicable to its domestic products".[1092] The United States argues that, "[a]dditionally, the Terrestrial Code recognizes that zoning can be an appropriate method to control for avian influenza risks" whereas India imposes a country-wide ban even if the outbreak of LPNAI is geographically isolated from the exporting facility.[1093] Thus, according to the United States, whereas India's measures cause country-wide trade disruptions, the Terrestrial Code limits trade measures to the affected areas.[1094]

7.589. In response, India argues that the United States' submission does not demonstrate how its alternative measure is significantly less trade-restrictive. India argues that the United States must demonstrate how the alternative measures "would involve significantly increased market access to India than S.O. 1663(E)".[1095] India argues that the United States has not done so given that S.O. 1663(E) only suspends imports from countries reporting LPNAI until such time as that country declares freedom, which usually takes three months from disinfection.[1096] India asserts that the

[1088] OIE, "Terrestrial Animal Health Code", accessed 4 November 2013, <http://www.oie.int/international-standard-setting/terrestrial-code>. This is also reflected in the User's Guide. User's Guide, para. A.2.
[1089] Foreword to the Terrestrial Code, fourth paragraph.
[1090] Foreword to the Terrestrial Code, first paragraph. OIE, "Terrestrial Animal Health Code", accessed 4 November 2013, <http://www.oie.int/international-standard-setting/terrestrial-code/>.
[1091] United States' first written submission, para. 140.
[1092] United States' closing statement at the second meeting of the Panel, para. 7.
[1093] United States' first written submission, para. 140.
[1094] United States' second written submission, para. 50.
[1095] India's first written submission, para. 256.
[1096] India's first written submission, para. 256.

United States has not shown that its alternative would bring about a recommencement of trade within three months.[1097] With specific reference to Articles 10.4.30 and 10.4.31 of the Terrestrial Code (which discuss the provision of evidence regarding surveillance programs), India argues that this would require India to "prohibit imports from all countries and then allow access after [an] intensive verification process of countries' surveillance systems", which could extend the period of an import ban beyond [three] months owing to the time taken to "gain[] confidence in an exporting country's surveillance".[1098]

7.590. The Panel recalls that India's AI measures are those that "prohibit" the importation of certain agricultural products from countries reporting NAI. We concur with the panel in *Australia – Salmon* that any measure imposing conditions upon importation, even if stringent, "would still be significantly less restrictive to trade than an outright prohibition".[1099]

7.591. With this observation in mind, the Panel proceeds to consider whether measures based on the recommendations of the Terrestrial Code are significantly less restrictive to trade than the outright prohibition in India's AI measures.

7.592. We recall that the Terrestrial Code has the objective of setting international "standards for the improvement of terrestrial animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals (mammals, birds and bees) and their products".[1100] As described above, the User's Guide to the Terrestrial Code provides that "[c]orrectly applied, OIE recommendations provide for trade in animals and animal products to take place with an optimal level of animal health security, based on the most up to date scientific information and available techniques".[1101]

7.593. With particular regard to Chapter 10.4, in relation to infection with NAI viruses, the OIE explains that even if an exporting country is not free of LPAI, importation of certain products can take place from a country, zone or compartment that is free from infection with HPAI.[1102] This is reflected in those articles of the Code which provide specifically for importation from an HPNAI-free country, zone or compartment (for instance, Article 10.4.14 (regarding eggs for human consumption), Article 10.4.17 (regarding poultry semen), Article 10.4.19 (regarding fresh meat of poultry)).

7.594. With regard to zoning and compartmentalization in Chapters 4.3 and 4.4 of the Terrestrial Code, and in the product-specific recommendations in Chapter 10.4 (to which the United States refers)[1103], the OIE explains that "[z]oning and compartmentalisation are concepts promoted by the OIE, both to prevent and control diseases and to allow safe trade from countries [that are] not [disease] free".[1104] This is reflected in Article 4.3.1 of the Code, and the procedures for the definition, establishment and application of zones or compartments are elaborated in the remainder of Chapters 4.3 and 4.4 of the Code.

7.595. This analysis, and our analysis in section 7.4.2.2.4.1 above in relation to Article 3 of the SPS Agreement, show that the Terrestrial Code, and in particular Chapter 10.4 thereof, does not envisage, either explicitly or implicitly, the imposition of import prohibitions with respect to poultry products. Rather, the Terrestrial Code identifies conditions under which products may be safely traded even if their country of origin is affected by NAI.

[1097] India's first written submission, para. 256.
[1098] India's second written submission, para. 95.
[1099] Panel Report, *Australia – Salmon*, para. 8.182. We note that the panel also observed that the products it imported subject to conditions proposed under the alternatives would have been capable of serving a greater variety of uses than those products that had been treated in the manner required by the Australian measure. We also note that, though the Appellate Body overturned elements of the Panel's report on the basis that the Panel based its analysis on an incorrect identification of the measure at issue, the Appellate Body did not reverse this reasoning. Appellate Body Report, *Australia – Salmon*, paras. 90-105.
[1100] Foreword to the Terrestrial Code, first paragraph.
[1101] User's Guide, para. A.2.
[1102] OIE's response to Panel question No. 17(a).
[1103] United States' second written submission, paras. 57-58 and footnote 90.
[1104] OIE's response to Panel question No. 2.

7.596. The Panel therefore concludes that the alternative proposed by the United States, namely that India base its measures on the recommendations in the Terrestrial Code, is significantly less restrictive to trade than India's AI measures with respect to the products covered by Chapter 10.4.

7.8.2.2.6 Conclusion on the United States' claim under Article 5.6 of the SPS Agreement

7.597. We have found that the United States identified measures based on the Terrestrial Code as a reasonably available alternative to India's AI measures for the products that are within the scope of Chapter 10.4. We have also found that the alternative is technically and economically feasible, would achieve India's ALOP, and is significantly less restrictive to trade than India's AI measures. Therefore, we conclude that the United States has demonstrated that India's AI measures are significantly more trade-restrictive than required to achieve India's ALOP, in respect of these products. Accordingly, we find that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement, with respect to the products covered by Chapter 10.4 of the Terrestrial Code.[1105]

7.8.2.3 Whether India's AI measures are inconsistent with Article 2.2 of the SPS Agreement as a consequence of their being inconsistent with Article 5.6 of the SPS Agreement

7.8.2.3.1 Introduction

7.598. Having found that India's AI measures are inconsistent with Article 5.6 with respect to the products covered by Chapter 10.4, the Panel will now consider whether, as the United States claims, India's breach of Article 5.6 results in a consequential breach of Article 2.2 of the SPS Agreement.

7.599. We begin our analysis by setting out the legal provision at issue.

7.8.2.3.2 The legal provision at issue

7.600. Article 2.2 of the SPS Agreement provides that:

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

7.601. The Appellate Body in *Australia – Apples* examined the relationship between Article 2.2 and the provisions of Article 5, including 5.6, as follows:

> The Appellate Body has observed that Article 2.2 "informs", "impart[s] meaning to", and "is made operative in", other provisions of the SPS Agreement, including certain of the more specific obligations set out in Article 5, which is entitled "Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection". Thus, in *EC – Hormones*, the Appellate Body stated that "Articles 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1". The same type of relationship exists between Articles 2.2 and 5.2 and between Articles 2.2 and 5.6. In this connection, we take particular note of the similarities between the requirement in Article 2.2 that Members apply their SPS measures "only to the extent necessary to protect", and the requirement in Article 5.6 that SPS measures be "no more trade-restrictive than required to achieve" the relevant objectives.[1106]

7.602. We note that, although the United States has argued that the Appellate Body in *Australia – Apples* suggested that a breach of Article 5.6 may result in a consequential breach of

[1105] We refer to our findings in section 7.4.2.2.2, that there are no product specific recommendations for live pigs and pathological and biological materials in Chapter 10.4 of the Terrestrial Code and accordingly that the United States has not proposed an alternative to S.O. 1663(E) in relation to these products.

[1106] Appellate Body Report, *Australia – Apples*, para. 339 (footnotes omitted).

Article 2.2[1107], the Appellate Body declined, in that case, to determine conclusively whether a violation of Article 5.6 will be presumed to imply a violation of Article 2.2 in a manner similar to the relationship between Article 2.2 and Articles 5.1 and 5.2.[1108] Nevertheless, the Appellate Body did say in *Australia – Salmon* that "[t]he establishment or maintenance of an SPS measure which implies or reflects a higher level of protection than the appropriate level of protection determined by an importing Member, could constitute a violation of the necessity requirement of Article 2.2".[1109]

7.603. From the above findings of the Appellate Body, the Panel understands that Articles 2.2 and 5.6 should constantly be read together, and that the basic concept in Article 2.2 imparts meaning to Article 5.6. Moreover, a finding that a Member has enacted a measure that reflects a higher level of protection than that Member's ALOP may imply a violation of Article 2.2.

7.604. However, this observation alone is not sufficient to address the United States' argument regarding the relationship between Article 2.2 and 5.6 in its entirety.

7.605. The United States' submission is that a violation of Article 5.6 necessitates a determination that a reasonably available less trade-restrictive measure would achieve the responding Member's ALOP, and that this determination "may lead to the conclusion that a Member has adopted a measure that is applied to a greater extent than necessary" and is accordingly inconsistent Article 2.2.[1110] In our view, the crux of the United States' submission, and of the relationship between Articles 5.6 and 2.2, relates to the extent to which "necessity" in Article 2.2 may be understood in light of the substance of the more specific obligation in Article 5.6.

7.606. In addressing this question, the Panel will first consider the meaning of necessity in Article 2.2 of the SPS Agreement. To this end, the Panel notes the presence of the principle of "necessity" elsewhere in the covered agreements. For example, Article XX of the GATT 1994 permits certain measures that are "necessary" for the protection of the values set out in the subparagraphs of Article XX.[1111] Article XIV of the GATS makes provision for certain "necessary" measures, using very similar language.[1112] Article 2.2 of the TBT Agreement provides (in relevant part) that:

[1107] Appellate Body Report, *Australia – Apples*, para. 340.
[1108] Appellate Body Report, *Australia – Apples*, para. 340.
[1109] Appellate Body Report, *Australia – Salmon*, para. 213, footnote 99.
[1110] United States' first written submission, para. 141.
[1111] Article XX provides, in relevant part, that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> ...
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement[.]

[1112] In relevant part, Article XIV of GATS states that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals or to maintain public order;
>
> (b) necessary to protect human, animal or plant life or health;

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

7.607. The Panel will now consider whether the meaning of "necessity" in these various provisions can provide any guidance with respect to the meaning of necessity in Article 2.2 of the SPS Agreement and, moreover, the relationship between Articles 2.2 and 5.6 of the SPS Agreement.

7.608. We turn first to consider the meaning of necessity in the context of Article XX of the GATT 1994. In *Korea – Various Measures on Beef*, the Appellate Body said of "necessary" in Article XX of the GATT 1994 that the term can be understood as existing on a continuum, at one end of which lies "indispensable", and at the other lies "making a contribution to".[1113] The Appellate Body considered that a "'necessary' measure" is located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".[1114] In *Brazil – Retreaded Tyres*, the Appellate Body indicated that an analysis of necessity requires a panel to consider 'relevant factors', including "the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness".[1115] According to the Appellate Body, a panel may, on this basis, reach a preliminary conclusion that the measure is necessary, in which case that conclusion "must be confirmed by comparing the measure with possible alternatives[] which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective".[1116] The Appellate Body added that this comparison should be carried out in the light of the importance of the interests or values at stake.[1117]

7.609. We also note that, in *Brazil – Retreaded Tyres*, the Appellate Body cited with approval its report in *US – Gambling*, which used this analysis in its interpretation of "necessity" in the context of Article XVI(a) of the GATS.[1118] In that case, the Appellate Body said that "necessity" is to be determined by weighing and balancing "the contribution of the measure to the realization of the ends pursued by it" and the "restrictive impact of the measure on international commerce", and by a comparison between the challenged measure and possible alternatives, considered in light of the importance of the interests at stake.[1119]

7.610. Turning to consider Article 2.2 of the TBT Agreement, the Appellate Body has observed that the sentences in Article 2.2 are linked by the notion of "necessity", and that "necessity" in this context requires a "relational analysis of the trade-restrictiveness of the technical regulation, the degree of contribution that it makes to the achievement of a legitimate objective, and the risks

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> (c necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
>
> (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
>
> (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
>
> (iii) safety [.]

[1113] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161. The Appellate Body has also noted this comment in the context of its interpretation of Article 2.2 of the TBT Agreement. Appellate Body Report, *US – Tuna II (Mexico)*, footnote 642.

[1114] Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

[1115] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178.

[1116] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178.

[1117] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178.

[1118] Appellate Body Report, *US – Gambling*, paras. 306-307. This approach has also been endorsed and applied in subsequent cases. For example, Appellate Body Report, *China – Publications and Audiovisual Products*, para. 242.

[1119] Appellate Body Report, *US – Gambling*, paras. 306-307.

non-fulfilment would create".[1120] Moreover, referring to the words "more … than" in Article 2.2, and citing its comments in the context of Article XX of GATT 1994 and Article XIV of the GATS, the Appellate Body observed that an analysis under Article 2.2 "would involve a comparison of the trade-restrictiveness and the degree of achievement of the objective by the measure at issue with that of possible alternative measures that may be reasonably available and less trade restrictive than the challenged measure, taking account of the risks non-fulfilment would create".[1121] Indeed, comparison with reasonably available alternatives is a "conceptual tool" which may assist in ascertaining whether a challenged measure is more trade-restrictive than necessary.[1122]

7.611. We note that there are some differences in the text of, in particular, Article XX of the GATT 1994 and Article XIV of the GATS (on one hand) and Article 2.2 of the TBT Agreement (on the other). We also note that the Appellate Body has relied on language that appears in Article 2.2 of the TBT Agreement (for example, "more … than", or "taking account of the risks non-fulfilment would create") in formulating its interpretation of "necessity" in that provision. Notwithstanding these differences, there are common elements to the interpretation of each of these provisions. Specifically, an analysis under each provision involves consideration of the trade-restrictiveness of the measure, the contribution the measure make to the objective in question, and a comparison with alternative measures that may be less trade-restrictive.

7.612. Turning to the SPS Agreement, the Panel is particularly mindful of the resonance of these common elements of "necessity" in Article XX of the GATT 1994, Article XIV of the GATS, and Article 2.2 of the TBT Agreement, with the elements that must be demonstrated under Article 5.6 of the SPS Agreement.

7.613. The Appellate Body's interpretation of each of these provisions is probative of the relationship between Article 2.2 and Article 5.6 of the SPS Agreement. The Appellate Body's interpretation of "necessity" in the respective contexts discussed above accords to a substantial degree with the requirements of Article 5.6 of the SPS Agreement. Just as an analysis of "necessity" in Article XX of the GATT 1994 and Article 2.2 of the TBT Agreement involves an assessment of a measure's trade-restrictiveness, the contribution of a measure to its purported objective, and whether that contribution may be made by a less trade-restrictive alternative, Article 5.6 of the SPS Agreement requires a Panel to identify whether there is a reasonably available alternative SPS measure that would achieve a Member's ALOP while also being significantly less trade-restrictive.[1123] That the elements of Article 5.6 so closely resemble the elements of "necessity" indicates to the Panel that the specific obligation in Article 5.6 elaborates on the notion of "necessity" in the SPS Agreement and therefore on the more general obligation in Article 2.2 in the manner suggested by the Appellate Body in *Australia – Apples*.

7.614. Furthermore, based on this finding, and considering the fact that Article 2.2 is "made operative in" the specific obligations in Article 5[1124], and that Article 2.2 and Article 5.6 should be constantly read together[1125], we consider that a finding that a measure is inconsistent with Article 5.6 may lead to a presumption that the same measure is inconsistent with the obligation in Article 2.2 to ensure that an SPS measure is applied only to the extent necessary to protect human, animal or plant life or health.

7.615. Such a presumption arises in the present case as a result of our findings in section 7.8.2.2.6 above. We note that India has not made arguments regarding why its measures are not inconsistent with Article 2.2, having limited its argument to the relationship between Articles 2.2 and 5.6 of the SPS Agreement. Accordingly, we find that India has not adduced arguments to rebut a presumption that, as its measures are more trade-restrictive than required to achieve India's ALOP, those measures are also applied beyond the extent necessary to protect human and animal life or health. Therefore, having found that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement, we find that India's AI measures are consequentially inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect human and animal life or health.

[1120] Appellate Body Report, *US – Tuna II (Mexico)*, para. 318.
[1121] Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.
[1122] Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.
[1123] Appellate Body Report, *Australia – Salmon*, para. 194.
[1124] Appellate Body Report, *US/Canada – Continued Suspension*, para. 674.
[1125] Appellate Body Report, *Australia – Apples*, para. 339.

7.8.3 Overall conclusion on the United States' claims under Articles 5.6 and 2.2 of the SPS Agreement

7.616. The Panel therefore finds that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement because they are significantly more trade-restrictive than required to achieve India's ALOP, with respect to the products covered by Chapter 10.4 of the Terrestrial Code.

7.617. Having found that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement, we find that India's AI measures are consequentially inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect human and animal life or health.

7.9 Whether India's AI measures are inconsistent with Articles 6.1 and 6.2 of the SPS Agreement

7.9.1 Arguments of the parties

7.9.1.1 United States

7.618. The United States puts forward two separate claims under each of Articles 6.1 and 6.2 of the SPS Agreement. With respect to Article 6.1, the United States claims that India's AI measures are inconsistent with Article 6.1, first sentence, because they are not adapted to the sanitary characteristics of the area from which the imports originated, and they are inconsistent with Article 6.1, second sentence, because, in failing to assess the sanitary characteristics of particular areas from which imports originate, India has not taken into account disease-free areas, areas of low disease prevalence, the existence of an eradication or control programme, or the relevant OIE guidelines.[1126] With respect to Article 6.2, the United States claims that India's AI measures are inconsistent with Article 6.2, first sentence because they do not recognize the concept of disease-free areas or areas of low disease prevalence[1127], and they are inconsistent with Article 6.2, second sentence because, by precluding the recognition of disease-free areas with respect to AI, India's measures preclude it from determining AI-free areas based on the factors explicitly mentioned in Article 6.2, second sentence.[1128]

7.619. The United States submits that India's measures explicitly ban poultry from all parts of a country whenever NAI is detected anywhere in that country, noting that the wording of the measures "leaves no room for deviation".[1129] According to the United States, this precludes the application of AI restrictions on a regionalized basis as provided for in the Terrestrial Code and as required under Article 6 of the SPS Agreement.[1130]

7.620. The United States further argues that India's AI measures preclude India from taking regional conditions (SPS characteristics) into account, as these measures explicitly require a ban on covered imports from all parts of a country whenever there is a detection of HPAI or LPNAI anywhere in the country.[1131]

7.621. The United States maintains that it "has not been silent over the years" about the need for India to apply its AI measures on a less-than-country-wide basis. According to the United States, it requested India to do so as early as 2007 and that over the years, India has refused.[1132] In 2007,

[1126] United States' request for the establishment of a panel, p. 3.
[1127] United States' request for the establishment of a panel, p. 3. United States' first written submission, para. 153; United States' opening statement at the first meeting of the Panel, para. 28.
[1128] United States' first written submission, para. 154.
[1129] United States' first written submission, para. 142.
[1130] United States' first written submission, para. 142.
[1131] United States' first written submission, para. 145. Moreover, the United States contends that India's requirement that official veterinarians certify that the entire exporting country is disease-free for a particular consignment of poultry meat is also contrary to India's obligations under Article 6.1, as this requirement is not adapted to the characteristics of the area from which the product originated, but rather relates to the country of exportation as a whole (United States' first written submission, para. 147). We recall our finding in section 7.1.2.4.4 above that these health certificates are not within our terms of reference. Therefore, we will not address this specific argument.
[1132] United States' opening statement at the first meeting of the Panel, para. 29 (referring to Exhibit US-120).

India told the United States' Foreign Agricultural Service that it would "insist on country freedom" and that its conditions for import are "uniform".[1133] The United States also emphasizes that India has been asked at numerous meetings of the WTO SPS Committee, by the United States and other Members, to regionalize its AI-related import restriction.[1134] However, India has refused to alter its requirement for country-level certification on the grounds that the requirement is "uniform", and that it has a "uniform" policy of requiring country-level certification. Moreover, according to the United States, at the May 2012 meeting of the OIE, India criticized Chapter 10.4 of the Terrestrial Code, asserting that, for India, "the concept of zoning looked irrelevant as far as [AI] was concerned".[1135]

7.622. The United States refers to a document issued in 2010 and provided in Exhibit IND-121 which says that India was "[[..... SCI ....]]".[1136]. The United States submits that India, however, has provided no indication of how that debate might be resolved, or when it might be concluded. Moreover, for the United States, the responses in that document to the various requests from the United States to consider the applicability of the concept of zoning and compartmentalization to different products in accordance with the Terrestrial Code revealed "a definite unwillingness" to conclude at that time that the concept applied to NAI. [1137] For example, the United States argues, India responded to a 2007 complaint of the United States that India's requirement of certification that the country of export is free from HPAI for shipment of processed poultry products is not OIE-consistent with the remark that"[[..... SCI ....]]".[1138]

7.623. With respect to the second sentence of Article 6.1, the United States argues that, in failing to adapt its measures the sanitary characteristics of particular US areas from which imports originate, India did not take into account disease-free areas, areas of low disease prevalence, the existence of an eradication or control programme, or the relevant OIE guidelines, in assessing the sanitary characteristics of a region.[1139] The United States explains that by banning products from areas thousands of kilometres from an AI detection, India appears not to have taken account of "the level of prevalence" of AI in those areas. Moreover, by banning imports from all parts of an exporting country, India also does not appear to have accounted for "the existence of [an AI] eradication or control program" that an exporting country uses to limit the spread of AI once it has been detected.[1140]

7.624. In addition, the United States asserts that India has not taken into account the relevant international standard, Chapter 10.4 of the Terrestrial Code, which provides for the application of AI-related trade restrictions at the zone or compartment level when appropriate surveillance, control, and biosecurity measures are in place. According to the United States, in its chapter on AI, the Terrestrial Code lays out surveillance requirements for "Members declaring freedom from NAI or HPNAI for [a] country, zone or compartment" and for "[c]ountries, zones or compartments declaring that they have regained freedom from NAI or HPNAI following an outbreak", as well as standards for when a "country, zone or compartment may be considered" HPNAI-free or NAI-free.[1141]

[1133] United States' second written submission, para. 69 (referring to Exhibit US-124).

[1134] United States' first written submission, para. 148; United States' opening statement at the first meeting of the Panel, para. 29; United States' second written submission, para. 71; G/SPS/R/63 (Exhibit US-81), para. 64; G/SPS/R/62 (Exhibit US-82), para. 37; G/SPS/R/61 (Exhibit US-83), para. 26; G/SPS/R/59 (Exhibit US-84), para. 39; G/SPS/R/58 (Exhibit US-85), para. 38; G/SPS/R/56 (Exhibit US-86), para. 40; G/SPS/R/55 (Exhibit US-87), para. 43.

[1135] United States' first written submission, para. 148; United States' opening statement at the first meeting of the Panel, para. 29 (referring to OIE, 80th General Session FR (Exhibit US-88), para. 231).

[1136] United States' second written submission, para. 70 (quoting Exhibit IND-121 [[contains SCI]]); United States' response to Panel question No. 48 (quoting Exhibit IND-121 [[contains SCI]]).

[1137] United States' second written submission, para. 70 (referring to Exhibit IND-121); United States' response to Panel question No. 48.

[1138] United States' second written submission, para. 70 (quoting Exhibit IND-121 [[contains SCI]]); United States' response to Panel question No. 48 (quoting Exhibit IND-121 [[contains SCI]].

[1139] United States' request for the establishment of a panel, p. 3.

[1140] United States' first written submission, para. 150.

[1141] United States' first written submission, para. 151 (referring to Articles 10.4.3, 10.4.4, 10.4.30 and 10.4.31 of the Terrestrial Code (Exhibit US-1)).

7.625. The United States argues that the Terrestrial Code's discussion of AI-related requirements that a country may permissibly impose in connection with the importation of different products also shows that AI is a disease for which it is appropriate to consider the SPS characteristics of a region in establishing SPS measures. For each product, the recommended requirements apply either a) "for importation from an HPNAI-free country, zone, or compartment", b) "for importation from an NAI-free country, zone, or compartment", or c) "[r]egardless of the NAI status of the country of origin". Thus, for the United States, it is clear in the Terrestrial Code that AI-related requirements should be applied on a zone or compartmental basis where possible.[1142] Accordingly, the United States concludes that neither Article 6.1 nor the Terrestrial Code permits India to refuse categorically to apply its AI measures to areas smaller than countries.[1143]

7.626. The United States also claims that India's AI measures are inconsistent with the first sentence of Article 6.2 because they do not recognize the concept of disease-free areas or areas of low disease prevalence.[1144] The United States notes that India's measures explicitly preclude recognition of such areas upon notification of a detection of NAI anywhere in the territory of a Member.[1145]

7.627. The United States contends that by precluding the recognition of disease-free areas with respect to AI, India's measures preclude it from determining AI-free areas based on the factors explicitly mentioned in the second sentence of Article 6.2, which include geography, ecosystems, epidemiological surveillance, and the effectiveness of SPS controls. In the United States' view, by doing so, India violates the second sentence of Article 6.2 of the SPS Agreement.[1146]

7.628. The United States further submits that, contrary to what India posits, Article 6.3 is not applicable to the present dispute. The United States emphasizes that it is not arguing that India needs to recognize specific pest- or disease-free areas, or areas of low pest or disease prevalence in the United States, in the absence of a request and supporting documentation. According to the United States, "[t]he issue here is even more basic" - India needs to ensure that its measures are adapted to the SPS characteristics of an area, and to agree that it will consider individual applications for regional treatment".[1147] The United States argues that 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.[1148]

7.629. Moreover, according to the United States, the texts of Articles 6.1 and 6.2 make clear that these provisions impose obligations that exist independently of any request consistent with Article 6.3 to recognize any specific pest- or disease-free areas.[1149] The United States also notes that at the first meeting of the Panel, and in its responses to the Panel's follow-up questions, India for the first time claimed that its 1898 Livestock Act gives it the power to recognize zones and compartments. In particular, India pointed to broad provisions that delegate to India's Central Government the power to "restrict or prohibit, in such manner and to such extent as it may think fit, the import" into India of livestock and livestock products. For the United States, these provisions do not modify the measures at issue in the dispute so as to enable India to recognize the concept of disease-free areas, nor do they themselves reflect the concepts of pest- or disease-free areas. Rather, they appear to be nothing more than broad grants of authority to the Central Government of India to promulgate import prohibitions or restrictions.[1150]

[1142] United States' first written submission, para. 152; United States' second written submission, para. 81.
[1143] United States' second written submission, paras. 77-80.
[1144] United States' request for the establishment of a panel, p. 3.
[1145] United States' first written submission, para. 153; United States' opening statement at the first meeting of the Panel, para. 28.
[1146] United States' first written submission, para. 154.
[1147] United States' opening statement at the first meeting of the Panel, para. 31; United States' response to Panel question No. 42(b).
[1148] United States' opening statement at the first meeting of the Panel, para. 32.
[1149] United States' second written submission, para. 67.
[1150] United States' second written submission, paras. 73-74.

7.630. Finally, the United States submits that India's failure to comply with the obligations in Article 6 is confirmed not just by the text of India's measures and India's responses to requests from other Members to consider regionalization, but also by India's failure to follow the steps outlined by the SPS Committee for the consideration of applications to recognize specific areas as disease-free in its "Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures" (Guidelines). According to the United States, India has never published any information explaining the basis for recognition of disease-free areas with respect to LPNAI or HPAI, a description of any process that would be used to evaluate a request for recognition of such an area, the information that India would need to evaluate such a request, or a contact point for such requests. Moreover, according to the United States, contrary to the provisions of the Guidelines, "India rather than commencing discussions to clarify its process to recognize the areas and requesting information that it might need to evaluate specific areas, expressed a categorical unwillingness to apply the concepts in Article 6 of the SPS Agreement with respect to AI".[1151]

7.9.1.2 India

7.631. India submits that it "fails to see merit" in the United States' claim of violation of Articles 6.1 and 6.2 of the SPS Agreement.[1152] India acknowledges that guidelines developed by international organizations for recognition of pest- or disease-free areas or areas of low pest or disease prevalence shall be taken into account for the purpose of recognition of such areas pursuant to Article 6.1 of the SPS Agreement. India also agrees with the United States that the relevant guidelines in this respect are the standards provided in the Terrestrial Code.[1153]

7.632. India argues that the language of the Terrestrial Code "clearly does not support the claim that in order to fulfil the obligation under Article 6.1, the importing country must recognize only zones". According to India, to the contrary, the Terrestrial Code as well as Article 6.1 of the SPS Agreement allow importing countries to decide whether to recognize zones or compartments, based on factors such as the level of prevalence of a specific pest or disease, and the relevance of zones and compartments. For India, such a decision is based on the level of protection that a particular importing country deems appropriate.[1154] India submits that it has communicated to the United States its readiness to consider compartments for the purpose of international trade. However, according to India, the United States has neither made a formal request to India for information and for recognition of a specific pest- or disease-free area, nor responded to India's suggestion with a counter proposal to take this process forward.[1155]

7.633. India further argues that Article 6.3 is critical to understanding Members' obligations under Articles 6.1 and 6.2 of the SPS Agreement because these provisions do not operate independently of Article 6.3 and do not impose any obligation upon the importing country in the absence of the triggering steps under Article 6.3.[1156] India argues that Article 6.3 places the burden upon the exporting country to initiate the proposal to recognize zoning or compartmentalization and to provide necessary evidence demonstrating that the proposed pest-/disease-free areas or areas of low pest/disease prevalence exhibit adequate biosecurity measures as may be necessary to achieve the importing country's ALOP.[1157] In support of its argument, India refers to the Terrestrial Code arguing that, according to its recommendations on zoning and compartmentalization, "the onus is firmly placed on the exporting country".[1158] India submits that, in order to gain recognition of a pest-/disease-free area or area of low pest/disease prevalence under Article 6, it is the obligation of the United States "to establish a disease free zone or compartment, document and make public the existence of such zone or compartment, provide adequate and detailed documentation to India that its concerns of [biosecurity] are met (as well as provide a biosecurity plan) and establish through documentation that the zone or compartment

[1151] United States' second written submission, paras. 75-77 (referring to G/SPS/48, paras. 4 and 13); United States' response to Panel question No. 42(a).
[1152] India's first written submission, para. 270.
[1153] India's first written submission, para. 260.
[1154] India's first written submission, para. 262.
[1155] India's first written submission, para. 263 (referring to Exhibits IND-121 and IND-122).
[1156] India's first written submission, paras. 264 and 270; India's opening statement at the first meeting of the Panel, para. 33.
[1157] India's first written submission, para. 265.
[1158] India's first written submission, paras. 266-267 (referring to Articles 4.3.1, 5.3.7.1 and 5.3.7.2 of the Terrestrial Code); India's opening statement at the first meeting of the Panel, paras. 34-35.

involves control and surveillance measures including animal identification and traceability requirements".[1159]

7.634. According to India, the United States has not initiated a bilateral mechanism, i.e. the presentation of a proposal to India for recognition of disease-free zones or compartments. Moreover, India argues that the United States does not maintain publicly available information regarding disease-free zones or compartments within its territory and does not highlight the biosecurity measures undertaken in order to reassure importing countries of the NAI-free status of its products from such zones or compartments.[1160] India therefore submits that, "[s]ince the United States has not fulfilled its obligation under Article 6.3 of the SPS Agreement and Chapter 4.3 of the [Terrestrial] Code, India is under no obligation to unilaterally recognize zones or compartments within the United States".[1161]

7.635. In addition, India asserts that by presenting a claim under Article 6 of the SPS Agreement, the United States implicitly acknowledged that there is a scientific basis or rationale for imposing a prohibition on poultry products listed in S.O. 1663(E) from countries reporting HPNAI or LPNAI.[1162] According to India, by making a claim under Article 6, the United States concedes that in the absence of a recognized zone or compartment, an importing country can continue to seek country-wide freedom on trade in poultry commodities from both HPNAI and LPNAI reporting countries.[1163]

7.636. India submits that "[i]t is abundantly clear that the United States does not maintain either zones or compartments as required under Chapter[s] 4.3 and 4.4 of the [Terrestrial] Code and as required under Article 6.3 of the SPS Agreement". Therefore, according to India, the claim that it is in violation of its obligation to recognize zones or compartments under Article 6 and the Terrestrial Code "is absurd when the United States maintains no zones or compartments which India could have considered".[1164] For India, the United States insists that regionalization requires the importing Member to engage in an information gathering exercise on an exporting Member's disease surveillance and control measures to ensure itself that imports do not pose a level of risk greater than the ALOP established. Thus, it argues, the "United States is reading into the SPS Agreement and the [Terrestrial] Code an obligation upon the exporting country which these Agreements do not impose".[1165]

7.637. With respect to the recognition of the "concept" of the relevant areas under Article 6.2, India submits that nowhere in the text of Article 6 does the SPS Agreement impose on the importing Member an obligation to implement a domestic law which spells out that the country will recognize zones or compartments. India maintains that the obligation is to "recognize the concept" of regionalization and a Member is said to recognize the concept of zones/compartments when it accepts and evaluates proposals that are put forward by the exporting Member. The obligation under Article 6.2 is therefore distinct from the obligation to implement laws or provide for domestic frameworks in order to give effect to a country's obligations under the WTO Agreements. According to India, if the obligation under Article 6.2 were to implement a domestic law, Members could keep their trading partners waiting for several years with the excuse that their law on this subject was being formulated, and surely that is not the intent of Article 6.2. For India, "[a] combined reading of Article[s] 6.3 and 6.2 makes it evident that once an exporting country provides relevant information, it is the obligation of the importing country to give due regard to this proposal and to evaluate it".[1166]

7.638. India submits that the United States cites the SPS Committee Guidelines to suggest that it was first and foremost India's obligation to implement a law informing trading partners about the basis on which India would consider applications for zones or compartments. According to India, "[e]qually the Article 6 Guidelines also recognize the 'sovereign right' of Members 'to determine

[1159] India's first written submission, para. 268; India's opening statement at the first meeting of the Panel, para. 37.
[1160] India's first written submission, para. 269; India's response to Panel question No. 43(b).
[1161] India's first written submission, para. 274; India's opening statement at the first meeting of the Panel, para. 37; India's response to Panel question Nos. 45(b) and 45(c).
[1162] India's first written submission, para. 271.
[1163] India's first written submission, para. 271.
[1164] India's second written submission, para. 55.
[1165] India's second written submission, para. 59.
[1166] India's second written submission, paras. 61-64; India's response to Panel question No. 43(b).

their own processes for the evaluation of requests for recognition of pest or disease free areas or areas of low disease prevalence'".[1167] Moreover, India argues that, "[m]ore importantly, Article 6 of the Guidelines recognizes that the commencement of the recognition of pest disease free areas begins with the exporting Member requesting information about an importing Member's requirements and procedures".[1168] For India, the Guidelines highlight that regardless of whether a law recognizing zones exits, an exporting Member can initiate the process and seek information on how its application may be processed. India posits that it has not received proposals for regionalization; neither has it received enquiries on its laws and procedure that India might adopt to recognize an exporting country's zones or compartments. Had India received proposals or enquiries on its laws and rejected such queries or not evaluated proposals, it could be claimed that India does not recognize the "concept" of zones or compartments.[1169]

7.639. India explains that Sections 3 and 3A of the Livestock Act provide the government with the legislative framework within which to recognize zones or compartments. Should a country make a proposal, "the same would be considered by the Central Government and if approved such zones or compartments would be recognized by the issuance of a notification under [S]ection 3 or 3A as the case may be". According to India, "even if the United States were confused or uncertain about India's legislation it should not have deterred the United States from presenting a proposal highlighting zones or compartments it has maintained and requesting that these zones or compartments be recognized". India submits that it "has not received proposals for regionalization from the United States or for that matter, from any other country".[1170]

7.640. India also submits that the United States cannot allude to other Members' comments regarding regionalization at the SPS Committee meetings as support for its contention regarding India's refusal to accept regionalization. According to India, it maintained at all these meetings that its measure was compliant with the Terrestrial Code and "the same can be bilaterally discussed with the United States and European Union".[1171] India further points out that the statement made by India on zoning at the OIE and relied upon by the United States was only with reference to wildlife and its epidemiological role in spread of the disease.[1172]

7.641. India observes that the evidence does not establish that the United States provided a proposal for recognition of zones. According to India, the correspondence submitted by the United States is inadequate and does not establish that the United States made a substantive request and provided India with any material sufficient for India to commence evaluating its claim for regionalization.[1173] India submits that the United States in all its correspondence has not identified areas for which it sought disease free status from India, and it has failed to provide any technical literature/documentation to substantiate its claims. India notes that, to the contrary, the letters cited contain a comment on India's measure but provide no information on the United States' poultry industry or level of biosecurity maintained against AI. India asserts that "the exhibits relied upon by the United States do not reflect the quality of information or documentary evidence incumbent on a exporting member requesting the recognition of disease free zones/area".[1174]

7.9.2 Analysis by the Panel

7.9.2.1 Introduction

7.642. The issue before the Panel is whether India's AI measures are inconsistent with Articles 6.1 and 6.2 of the SPS Agreement. In particular, the United States claims that India's AI measures are inconsistent with Article 6.1, first sentence, because they are not adapted to the sanitary characteristics of the area from which the United States' imports originated, and with Article 6.1, second sentence, because, in failing to assess the sanitary characteristics of particular US areas

[1167] India's second written submission, para. 65.
[1168] India's second written submission, para. 66.
[1169] India's second written submission, para. 67.
[1170] India's second written submission, para. 68 (referring to Exhibit IND-121); India's response to Panel question Nos. 43(a) and 66(b).
[1171] India's second written submission, para. 73 (referring to Exhibits US-81, US-82, US-83, US-84, US-85, US-86, and US-87).
[1172] India's second written submission, para. 73 (referring to Exhibit US-80).
[1173] India's second written submission, para. 74.
[1174] India's second written submission, para. 79.

from which imports originate, India did not take into account disease-free areas, areas of low disease prevalence, the existence of an eradication or control programme, or the relevant OIE guidelines, in assessing the sanitary characteristics of a region.[1175]

7.643. With respect to Article 6.2, the United States claims that India's AI measures are inconsistent with its first sentence because they do not recognize the concept of disease-free areas or areas of low disease prevalence[1176], and with its second sentence because, by precluding the recognition of disease-free areas with respect to AI, India's measures preclude it from determining AI-free areas based on the factors explicitly mentioned in Article 6.2, second sentence.[1177]

7.644. In response, India relies on Article 6.3 to contend that Articles 6.1 and 6.2 do not operate independently of Article 6.3 and do not impose any obligation upon the importing Member in the absence of the "triggering steps" under Article 6.3.[1178] Accordingly, India argues that since the United States has not undertaken the obligations of an exporting Member prescribed in Article 6.3, India's obligations under Articles 6.1 and 6.2 have not been triggered.[1179]

7.645. We note that this is the first dispute in which claims under Article 6 of the SPS Agreement have been raised. We commence by examining the legal provisions at issue to determine the applicable legal test and decide the order of our analysis.

7.9.2.2 The legal provisions at issue

7.646. The text of Article 6 of the SPS Agreement, entitled "Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence", reads as follows:

> 1. Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area – whether all of a country, part of a country, or all or parts of several countries – from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.
>
> 2. Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.
>
> 3. Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

7.647. We recall that in addressing the United States' claims under Articles 6.1 and 6.2, India relies on Article 6.3 to contend that the United States has not yet undertaken the obligations of exporting Members prescribed therein and, as such, India's obligations under Articles 6.1 and 6.2

[1175] United States' request for the establishment of a panel, p. 3.
[1176] United States' request for the establishment of a panel, p. 3. United States' first written submission, para. 153; United States' opening statement at the first meeting of the Panel, para. 28.
[1177] United States' first written submission, para. 154.
[1178] India's first written submission, para. 270; India's opening statement at the first meeting of the Panel, para. 33.
[1179] India's first written submission, paras. 264-270.

have not yet been triggered.[1180] The United States disagrees with India and argues that Article 6.3 is not applicable to the present dispute.[1181]

7.648. In the light of this disagreement between the parties, our first task is to determine the relationship between the three paragraphs of Article 6 and, in particular, whether the obligations in Articles 6.1 and 6.2 of the SPS Agreement are contingent upon whether an exporting Member has discharged the steps provided for in Article 6.3. The outcome of our assessment in this regard will determine the order of our analysis.

7.9.2.3 The relationship between the paragraphs of Article 6 of the SPS Agreement

7.649. The United States submits that "Article 6.1 lays out a general obligation to account for the [SPS] characteristics of an area", while Article 6.2 addresses a specific aspect of that obligation, i.e. the obligation of Members to recognize the concepts of pest- or disease-free areas or areas of low pest or disease prevalence. According to the United States, "[b]oth provisions, however, require Members to respond to differences in conditions".[1182] The United States asserts that Article 6.3 applies once the importing Member has ensured that it recognizes the concepts of pest- and disease-free areas and areas of low pest and disease prevalence.[1183]

7.650. The United States further argues that "each paragraph [of Article 6] provides context for the other, and Article 6 must be read so that it works as a coherent whole, while the language in each of the three paragraphs is respected".[1184] According to the United States, a breach of Article 6.1 can arise not only from an importing Member's adoption of measures that fail to take into account relevant differences in the SPS characteristics of different areas, but also from a failure to recognize particular disease-free areas where an exporting Member has made the necessary demonstration that an area is disease-free. For the United States, Article 6.2 requires recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence and "[a] breach occurs when the importing Member does not recognize the concept". Once the importing Member recognizes these concepts, as applied to the relevant pest or disease, the burden falls on the exporting Member that is seeking recognition of its pest- or disease-free areas. According to the United States, the obligations in Article 6.3 can be relevant in the context of Article 6.1, but in general they will be relevant only for those instances where a complaining party is claiming that the importing Member failed to recognize a particular area as having the requisite disease-free or pest-free or low prevalence characteristics.[1185]

7.651. By contrast, India posits that Article 6.1 "lays down broad principles which must be evaluated before an importing country implements SPS measures".[1186] For India, Article 6.2 is only one aspect of this principle and "pertains to a scenario where a specific area is to be recognized as disease free or as an area or low disease prevalence". India submits that Article 6.3 clarifies that when an exporting country requires an area to be recognized, it shall provide evidence and objectively demonstrate to the importing country that the claimed area is likely to remain pest- or disease-free or an area of low pest or disease prevalence. In the event that the exporting country is able to objectively demonstrate that the area is, and is likely to remain, disease- or pest-free, or is likely to remain as an area of low pest or disease prevalence, and the importing country has had an opportunity to "inspect and test the bio-security claims made by the exporting country and found it to be sufficient"[1187], then the importing Member modifies its measure and recognizes such pest- or disease-free area or area of low pest or disease prevalence. India thus argues that any adaptation of a SPS measure to recognize another country's pest- or disease-free area "is contingent on such other country providing information and evidence to this effect".[1188]

7.652. In India's understanding, the requirements of Articles 6.1 and 6.2 are triggered only when an exporting Member complies with Article 6.3. India argues that in light of the explicit obligation

[1180] India's first written submission, paras. 269-279.
[1181] United States' opening statement at the first meeting of the Panel, para. 31; United States' response to Panel question No. 42(b).
[1182] United States' response to Panel question No. 45(a).
[1183] United States' response to Panel question Nos. 45(b) and 45(c).
[1184] United States' response to Panel question Nos. 45(b) and 45(c).
[1185] United States' response to Panel question Nos. 45(b) and 45(c).
[1186] India's response to Panel question No. 45(a).
[1187] India's response to Panel question No. 45(a).
[1188] India's response to Panel question No. 45(b).

on the exporting country to provide evidence and objectively demonstrate to the importing country that the area for which recognition is sought is pest- or disease-free or is an area of low pest or disease prevalence, "the importing country [carries] no obligation to modify its measure unilaterally based merely on a claim being made to this effect by the exporting country".[1189]

7.653. We turn now to consider the subparagraphs of Article 6 in order to determine the relationship between them.

7.654. We begin with Article 6.1, first sentence, which reads:

> Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area – whether all of a country, part of a country, or all or parts of several countries – from which the product originated and to which the product is destined.

7.655. We note that this provision refers to the term "area" generically and does not specify the types of areas to which it applies.

7.656. Article 6.1, second sentence, reads:

> In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, *inter alia*, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations.

7.657. Article 6.1, second sentence, presupposes that Members undertake an assessment of the SPS characteristics of a region and enumerates a list of factors that shall be taken into account by Members in undertaking such assessment. The use of the words "*inter alia*" indicates that this is a non-exhaustive list. We note that, unlike the first sentence of Article 6.1, this second sentence uses the term "region" instead of "area".

7.658. Next, Article 6.2, first sentence, provides that:

> Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

7.659. This provision refers to the *recognition* of the *concepts* of two specific types of areas, i.e. "pest- or disease-free areas and areas of low pest or disease prevalence".

7.660. We find the definition of "pest- or disease-free area" in Annex A(6) of the SPS Agreement as follows:

> An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur.
>
> NOTE: A pest- or disease-free area may surround, be surrounded by, or be adjacent to an area - whether within part of a country or in a geographic region which includes parts of or all of several countries - in which a specific pest or disease is known to occur but is subject to regional control measures such as the establishment of protection, surveillance and buffer zones which will confine or eradicate the pest or disease in question.

7.661. The definition of "area of low pest or disease prevalence" is reflected in Annex A(7) of the SPS Agreement as:

> An area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or

[1189] India's response to Panel question No. 45(b).

> disease occurs at low levels and which is subject to effective surveillance, control or eradication measures.

7.662. Article 6.2, second sentence, provides a list of factors on which to base a determination whether an area is pest- or disease-free or is an area of low pest or disease prevalence as follows:

> Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

7.663. The use of the words "such as" indicates that this is a non-exhaustive list of factors.

7.664. Finally, Article 6.3 stipulates that exporting Members must provide evidence to the importing Member to demonstrate that its areas are pest- or disease-free or are areas of low pest or disease prevalence:

> Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively.

7.665. Article 6 does not provide an explicit indication of the manner in which its subparagraphs interact with one another. We proceed to determine whether Article 6, or the subparagraphs thereof, suggest any kind of hierarchy or sequence to be followed in order to give proper effect to their terms.

7.666. Focussing initially on Articles 6.1 and 6.2, we observe that both paragraphs include two separate sentences. The first sentence of each paragraph stipulates distinct actions required of a Member. The second sentence of each paragraph elaborates the manner in which Members must perform the actions described in the first sentence. We proceed to examine both paragraphs.

7.667. While Article 6.1, first sentence, speaks of the need to "ensure" that SPS measures are "adapted" to the SPS characteristics of the relevant areas, Article 6.2, first sentence, requires that Members "recognize" the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.

7.668. The ordinary meaning of the word "ensure" is "make certain the occurrence of".[1190] The word "adapted" is the adjective form or the past tense of the verb "adapt", which means "[t]o make … suitable or fit for a purpose, or conformable to specified conditions, standards, or requirements; … to make suitable for a new purpose or to a different context or environment".[1191] The ordinary meaning of "recognize", referred to by the Appellate Body in the context of its interpretation of Annex 1.2 of the TBT Agreement, is "[a]cknowledge the existence, legality, or validity of, [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration".[1192]

7.669. In the light of these definitions, we make the preliminary observation that the use of different wording in these subparagraphs suggests that the paragraphs are intended to have distinctive effects. Whereas the obligation to ensure that SPS measures are "adapted" in Article 6.1, first sentence, denotes that a Member must make certain of its measures' *suitability* (in this case, suitable for the SPS characteristics of the area), Article 6.2, first sentence, requires that a Member make a particular acknowledgement (in this case, of the concepts of "pest- or disease-free areas" and "areas of low pest or disease prevalence").

[1190] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. I, p. 840.

[1191] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 23 April 2014, <http://www.oed.com/view/Entry/2110?rskey=4XPehN&result=2&isAdvanced=false#eid>.

[1192] Appellate Body Report, *US – Tuna II (Mexico)*, para. 361 (referring to the definition provided in the *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007)).

7.670. That these respective sentences refer to different subjects ("SPS measures" in Article 6.1, and the "concepts" of "pest- or disease-free areas" and "areas of low pest or disease prevalence" in Article 6.2) is also of significance in terms of their import. Article 6.1, first sentence, requires Members to ensure that its SPS measures are suitable for the SPS characteristics of an area. Notwithstanding the fact that "pest- or disease-free areas" and "areas of low pest or disease prevalence" are defined, respectively, in Annex A(6) and A(7) of the SPS Agreement, the Panel notes that, in the context of the first sentence of Article 6.2, these terms are referred to as concepts for the purpose of that provision. A concept is an "abstract idea"[1193] or "an idea of a class of objects; a general notion or idea".[1194] Hence, Article 6.2, first sentence, requires Members to acknowledge particular abstract ideas. We consider that "recognizing" a "concept" is a less exigent obligation than that of "ensuring" that a measure is "adapted" to the SPS characteristics of an area from which a product originated and to which it is destined.

7.671. We further observe that Article 6.2, first sentence, includes the words "in particular". Reading these words together with the title of Article 6 ("Adaptation to Regional Conditions, *Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence*"), we consider that pest- or disease-free areas, and areas of low pest or disease prevalence, are a *subset* of *all* types of areas covered by Article 6. Article 6.2, first sentence, requires the recognition of the concepts of these types of areas – that this sentence deals specifically with these types of areas indicates to us that the words "in particular" address these "particular" types of areas, but not that Article 6.2 is a particularization of any other part of Article 6.

7.672. We make these observations in the light of what we view as a logical continuum that underpins the manner in which a Member develops and maintains its SPS measures. In other words, we conceive that the "adaptation" of a Member's SPS measures to the SPS characteristics of particular "areas" presupposes that a Member has first "recognized" the concept of such areas. Article 6.2 requires the recognition of certain types of areas, namely, "pest- or disease-free areas" and "areas of low pest or disease prevalence". We have difficulty seeing how a WTO Member could ensure that its SPS measures are adapted to the SPS characteristics of distinct areas within the meaning of Article 6.1, first sentence, if the Member has not "recognized" the "concepts" of specific types of areas identified in Article 6.2 in the first place.

7.673. We recall that India submits that Article 6 places the burden upon the exporting country to initiate the proposal to recognize areas and provide documentary evidence that the proposed disease-free area or area of low disease prevalence exhibits adequate biosecurity measures to achieve the importing country's ALOP.[1195] Under India's interpretation, a Member's duty to adapt its SPS measures would arise only after those measures have entered into force and an exporting Member makes a fully-documented request under Article 6.3.

7.674. Article 6.3 refers to a situation that is distinct from those in Articles 6.1 and 6.2. It is addressed not to Members generally, as are the first two paragraphs of Article 6, but to exporting Members that claim to have areas within their territory that are pest- or disease-free areas or areas of low pest or disease prevalence. Article 6.3 puts the onus on these Members to prove such claims to importing Members. This paragraph is not directly linked to the first two paragraphs of Article 6, or to what WTO Members must do generally with respect to adapting measures to SPS characteristics of certain areas, or in particular to recognizing specific area concepts.

7.675. As we have observed, Article 6.1, first sentence, provides that Members "shall ensure" that their SPS measures "are adapted" to the SPS characteristics of the area from which the product originated and to which it is destined. A plain reading of Article 6.1, first sentence, makes clear that it creates a free-standing obligation. There is no conditional language linking the obligation to Article 6.3, to an extraneous event such as the request of an exporting Member to recognize an area, or to any other event or situation. We further note that the language of Article 6.1, first sentence, is framed in the present tense ("are adapted"), which leads us to consider that the adaptation of the measure to the SPS characteristics of the area is an element of the SPS measure *as such*, which the implementing Member must ensure. Thus our reading is contrary to India's

[1193] The Oxford Dictionaries Online, accessed 10 April 2014, <http://www.oxforddictionaries.com/definition/english/concept?q=concept>.

[1194] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 10 April 2014, <http://www.oed.com/view/Entry/38130?rskey=vaS8sT&result=1#eid>.

[1195] India's first written submission, para. 267.

submission, in which it argues that adaptation involves an *ex post facto* "modification"[1196] of the SPS measure pursuant to an exporting Member's request. We do not see how an SPS measure can be "adapted" to the SPS characteristics of an area where that adaptation occurs only *after* a measure is taken pursuant to a specific request for recognition made by an exporting Member. To us, this wording of Article 6.1, first sentence, negates India's argument.

7.676. We acknowledge that, under certain circumstances, a link may be made between the information required for the assessment of SPS characteristics envisaged by Article 6.1, second sentence, and the obligation of an exporting Member to provide "the necessary evidence" under Article 6.3, first sentence, that an area within its territory is pest- or disease-free or is an area of low pest or disease prevalence. According to Article 6.3, if an importing Member receives a request for the recognition of a particular disease-free area in an exporting Member pursuant to Article 6.3, first sentence, an exporting Member that claims that an area within its territory is a pest- or disease-free area must "provide the necessary evidence" to the importing Member in support of that contention. Article 6.3 does not specify what that "necessary evidence" would be. However, Article 6.1, second sentence, provides a non-exhaustive list of factors that a Member could consider in assessing the SPS characteristics of the area in question. Thus although Article 6.1 may inform the inquiry that an importing Member may conduct in order to determine whether an exporting Member has "objectively demonstrated" that there is an area within its territory that is pest- or disease-free or is an area of low pest or disease prevalence, there is nothing in the language of either provision that requires this particular approach.

7.677. What is also clear is that, logically, the importing Member must have already recognized in its SPS measures the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, as required under Article 6.2, in order for it to receive and consider a request for recognition under Article 6.3. To us, the recognition of the *concepts* of such areas must necessarily precede a request for recognition of a *specific* area within the territory of an exporting Member.

7.678. In sum, we consider that the obligations in Articles 6.1 and 6.2 are not triggered by an exporting Member submitting a claim to an importing Member under Article 6.3. Rather, these provisions establish obligations on all WTO Members with respect to their SPS measures, not just those that have received a request from an exporting Member for recognition of an area under Article 6.3.

7.679. To support our reading of Article 6, we note that other provisions in the SPS Agreement that foresee an interaction between the importing and exporting Members, such as Article 4, explicitly condition the importing Member's actions upon an action by the exporting Member. For example, Article 4.1 requires Members to accept other Members' SPS measures as equivalent to their own under certain circumstances, and Article 4.2 requires Members to enter into consultations "upon request" with the aim of achieving agreements on recognition of such equivalence. Articles 6.1 and 6.2 in contrast create free-standing obligations rather than obligations contingent upon a request from a Member claiming that areas within its territory are pest- or disease-free, pursuant to Article 6.3. Our understanding of the relationship between the paragraphs of Article 6 is further supported by the "Guidelines" adopted by the SPS Committee.[1197] For instance, the Guidelines provide that "[i]mporting Members should publish the basis for recognition of pest- or disease-free areas and areas of low pest or disease prevalence and a description of the general process used, including the information generally required to evaluate such requests and a contact point responsible for requests for recognition of pest- or disease-free

[1196] India's response to Panel question No. 45(b).

[1197] G/SPS/48, 16 May 2008. We note that according to paragraph 2 of the Guidelines, they "do not add to nor detract from the existing rights and obligations of Members under the [SPS] Agreement nor any other WTO Agreement", and "do not provide any legal interpretation or modification to the [SPS] Agreement itself". Nevertheless, we consider the Guidelines to be informative in our consideration of how to approach Article 6 because they expand on the Members' own understanding of how the provisions of Article 6 are to be implemented. This was the approach followed by the panel in *US – Poultry (China)*, which referred to the SPS Committee "Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures" (G/SPS/19/rev. 2, dated 23 July 2004) and considered that this decision "expands on the Members' own understanding of how Article 4 relates to the rest of the *SPS Agreement* and how it is to be implemented". Panel Report, *US – Poultry (China)*, para. 7.136. More recently, the panel in *US – Clove Cigarettes* indicated that it "find[s] further guidance and support for our interpretation in a recommendation from the TBT Committee regarding the timing of notifications". Panel Report, *US – Clove Cigarettes*, para. 7.537.

areas or areas of low pest or disease prevalence".[1198] The Guidelines also envisage that a typical administrative step for recognition of an exporting Member's pest- or disease-free areas or areas of low pest or disease prevalence is that the exporting Member may request information about an importing Member's requirements and procedures *prior to* formally requesting recognition of such an area or *at the time* it requests such recognition. This presumes that the regime regulating the recognition of specific areas already exists.[1199]

7.680. For the reasons explained above, our understanding of the interplay between the three paragraphs of Article 6 is that Members must adapt their SPS measures to the SPS characteristics of an area from which goods originate or to which they are destined and, logically, they must already have recognized as per Article 6.2 the "concepts" of pest- or disease-free areas and areas of low pest or disease prevalence in order to do so. The steps in Article 6.3 are directed at exporting Members and presuppose that an importing Member from which they seek recognition that an area in its territory is pest- or disease-free or is an area of low pest or disease prevalence, is in compliance with its obligations under Articles 6.1 and 6.2. We thus conclude that the obligations in Articles 6.1 and Article 6.2 are not triggered by an invocation of Article 6.3, as argued by India.

7.681. Having determined our approach to interpreting the three provisions of Article 6, we turn now to the United States' argument that India, "by banning products from areas thousands of kilometers from an AI detection" and thereby failing to adapt its AI measures to the SPS characteristics of areas in the United States contrary to Article 6.1, first sentence, also breached Article 6.1 second sentence because it appears "not to have taken account of 'the level of prevalence' (i.e., the lack of prevalence) of AI in those areas", and "does not appear to have accounted for 'the existence of [an AI] eradication or control program' that an exporting country uses to limit the spread of AI once it has been detected".[1200] The Panel understands the United States' submission to indicate that, in its view, India has acted inconsistently with Article 6.1, second sentence, as a result of the fact that its AI measures are inconsistent with Article 6.1, first sentence.

7.682. As we explained above, the two sentences of Article 6.1 use different terminology: while Article 6.1, first sentence, refers to the SPS characteristics of an "area", Article 6.1, second sentence, speaks of the SPS characteristics of a "region".

7.683. The United States submits that the use of the term "area" in Article 6.1, first sentence, and the use of the term "region" in Article 6.1, second sentence, was "intentional", and that the terms have different meanings. For the United States, "an 'area' need not have any particular size or defining features. By contrast, a 'region' would be a larger area that could have distinguishing natural characteristics".[1201] India has not provided views on the difference between the terms.

7.684. The ordinary meaning of the term "area" is "[a] particular extent of surface, [especially] of the earth's surface; a space, region, tract".[1202] The broad scope of the term "area" is also evident from the text of Article 6.1, first sentence, itself, which provides that the "area" may comprise "all of a country, part of a country, or all or parts of several countries". The term "region" means "[a] land; a country; any large portion of the earth's surface considered as defined or distinguished from adjacent areas in some way, as by culture, government, topography, climate, fauna or flora".[1203] Although these terms do not have an identical meaning, we consider that their meaning is sufficiently similar to warrant a conclusion that the assessment of a region envisaged by Article 6.1, second sentence, relates to the adaptation of measures to the area referred to in Article 6.1, first sentence.

7.685. This interpretation leads us to a preliminary conclusion that a failure to ensure that SPS measures are adapted to the SPS characteristics of an area for the purpose of Article 6.1, first

[1198] G/SPS/48, para. 4.
[1199] G/SPS/48, para. 20.
[1200] United States' first written submission, para. 150.
[1201] United States' response to Panel question No. 46.
[1202] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 10 April 2014, <http://www.oed.com/view/Entry/10505?redirectedFrom=area#eid>.
[1203] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 10 April 2014, <http://www.oed.com/view/Entry/161281?redirectedFrom=region#eid>.

sentence, may warrant a concomitant finding that the Member has not taken into account the factors in Article 6.1, second sentence, in assessing the SPS characteristics of a region.

7.686. The United States also argued that India's measures are contrary to Article 6.2, second sentence, because, by precluding recognition of disease-free areas with respect to AI, India's measures preclude it from determining AI-free areas based on the factors listed in Article 6.2, second sentence.[1204]

7.687. Article 6.2, second sentence, refers to "such areas". We interpret this to refer to the types of areas referred to in Article 6.2, first sentence, namely pest- or disease-free areas and areas of low pest or disease prevalence. Article 6.2, second sentence stipulates that the "determination" of these areas shall be "based on" the factors listed therein – namely, factors "such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls". The ordinary meaning of the verb "determine" is "[t]o set bounds to; to bound, limit".[1205] We thus understand Article 6.2, second sentence, to mean that the boundaries or scope of the areas referred to in Article 6.2, first sentence, are to be determined on the basis of the factors mentioned therein.

7.688. We are of the view that a requirement to "determine" the boundaries of the pest- or disease-free areas or areas of low pest or disease prevalence referred to in Article 6.2, first sentence, presupposes the "recognition" of the "concepts" of those areas, as required by Article 6.2, first sentence. We cannot see how a Member could fail or refuse to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, contrary to Article 6.2, first sentence, while also "determining" those areas based on the factors listed in Article 6.2, second sentence. In other words, if a Member is to determine a pest- or disease-free area or area of low pest or disease prevalence based on the factors listed in Article 6.2, second sentence, we are persuaded that such Member must necessarily recognize the concept of those areas.

7.689. We therefore interpret Article 6.2 such that a finding that a Member has failed to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence as required by Article 6.2, first sentence, leads inevitably to a finding that such Member also has failed to determine those areas based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

7.690. Having regard to our approach to the interplay of the three paragraphs of Article 6 explained above, we consider it appropriate to begin our analysis of the consistency of India's AI measures with Article 6 by focusing on Article 6.2, first sentence. As indicated, we do not consider that a Member can, logically, ensure that its SPS measures are adapted to the SPS characteristics of an area without first recognizing the concept of areas (and, in particular for Article 6.2, "pest- or disease-free areas" and "areas of low pest or disease prevalence"). For this reason, we will consider first whether India has "recognized" the "concepts" of "disease-free areas" and "areas of low disease prevalence" in relation to AI. If we determine that India has not recognized these concepts, this will lead to a finding that India has not ensured that its AI measures are adapted to the SPS characteristics of those areas pursuant to Article 6.1, first sentence.

7.691. Conversely, if we find that India has recognized the concepts of disease-free areas and areas of low disease prevalence, we must consider whether India has ensured that its AI measures are adapted to the SPS characteristics of the relevant areas and whether it took into account relevant factors when assessing the SPS characteristics of a region, in a manner consistent with Article 6.1.

7.692. From the outset, we recall that in section 7.3.2.3 above we found that AI is a disease.[1206] When examining the consistency of India's AI measures with Articles 6.1 and 6.2, we will bear in mind that although the definitions in Annex A(6) and Annex A(7) refer both to pests and diseases,

[1204] United States' first written submission, para. 154.

[1205] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 29 April 2014, <http://www.oed.com/view/Entry/51244?redirectedFrom=determine#eid>.

[1206] As we stated in footnote 390 above, the Panel agrees with the parties that the definition in Annex A(1)(d) does not apply in this dispute.

we circumscribe our analysis to focus on disease on the basis that we are not dealing with a pest in this dispute.

7.9.2.4 Whether India's AI measures are inconsistent with Article 6.2 of the SPS Agreement

7.693. The United States claims that India's AI measures are inconsistent with Article 6.2 because they do not recognize disease-free areas or areas of low disease prevalence.[1207] In particular, the United States submits that India's AI measures are inconsistent with Article 6.2, first sentence, which requires Members to recognize the concept of disease-free areas. The United States avers that India's measures explicitly preclude recognition of such areas upon notification of a detection of NAI anywhere in the territory of a Member.[1208] The United States further claims that India's AI measures are inconsistent with Article 6.2, second sentence, because, by precluding the recognition of disease-free areas with respect to AI, India's measures also preclude it from determining AI-free areas based on the factors explicitly mentioned in Article 6.2, second sentence.[1209]

7.694. India responds that "[n]owhere in the text of Article 6 does the SPS Agreement impose on the importing Member an obligation to implement a domestic law which spells out that the country will recognize zones or compartments". India maintains that the obligation is to "recognize the concept" of the areas, and a Member is said to recognize the concept of zones or compartments when it accepts and evaluates proposals that are put forward by the exporting Member. For India therefore, "[t]he obligation under Article 6.2 is distinct from the obligation to implement laws or provide for domestic frameworks in order to give effect to a country's obligations under the WTO Agreements".[1210] India further submits that Sections 3 and 3A of the Livestock Act provide the government with the legislative framework within which to recognize zones or compartments. Should a country make a proposal, it affirms, "the same would be considered by the Central Government and if approved such zones or compartments would be recognized by the issuance of a notification under [S]ection 3 or 3A as the case may be". According to India, "even if the United States were confused or uncertain about India's legislation it should not have deterred the United States from presenting a proposal highlighting zones or compartments it has maintained and requesting that these zones or compartments be recognized". India explains that it "has not received proposals for regionalization from the United States or for that matter, from any other country".[1211]

7.695. We recall that under the first sentence of Article 6.2 WTO Members "shall … recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence". This provision therefore imposes the obligation to recognize the "concepts". As explained in paragraph 7.670 above, the term concept is defined as an "abstract idea"[1212] or "an idea of a class of objects, a general notion or idea".[1213] This means that Members are required to recognize the idea or notion of pest- or disease-free areas and areas of low pest or disease prevalence in the abstract; the obligation under Article 6.2, first sentence, is not linked to specific areas of a given exporting Member.

7.696. We note that the text of Article 6.2 does not explain in which particular way WTO Members are to recognize the concepts of the areas referred to therein. The parties disagree on what the recognition of these concepts entails in practical terms with respect to the importing Member, i.e. what an importing Member must accomplish in order to "recognize" the "concepts" of pest- or disease-free areas and areas of low pest or disease prevalence. The United States contends that Article 6.2 does not refer to "measures" and thus does not require that a Member reflect its

[1207] United States' request for the establishment of a panel, p. 3.
[1208] United States' first written submission, para. 153; United States' opening statement at the first meeting of the Panel, para. 28.
[1209] United States' first written submission, para. 154.
[1210] India's second written submission, paras. 61-62; India's response to Panel question Nos. 43(b) and 66(a).
[1211] India's second written submission, para. 68 (referring to Exhibit IND-121); India's response to Panel question Nos. 43(a) and 66(b).
[1212] The Oxford Dictionaries Online, accessed 10 April 2014, <http://www.oxforddictionaries.com/definition/english/concept?q=concept>.
[1213] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 10 April 2014, <http://www.oed.com/view/Entry/38130?rskey=vaS8sT&result=1#eid>.

recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence through any particular normative basis in its measures. According to the United States, the application of those concepts may depend on the particular SPS risks, appropriate level of protection, and measures involved. However, the United States submits that "in light of the particular facts in this dispute, the Panel does not need to make a finding on the question of whether a Member can comply with Article 6.2 in the absence of an explicit, pre-existing normative basis in its domestic law since India's measures and attendant circumstances demonstrate that India does not recognize the concept of 'disease-free area' in the context of its AI measure despite the evidence that this concept does in fact apply to AI".[1214]

7.697. As noted above, India responds that "[n]owhere in the text of Article 6 does the SPS Agreement impose on the importing Member an obligation to implement a domestic law which spells out that the country will recognize zones or compartments". According to India, the obligation is to "recognize the concept" of the areas; and a Member is said to recognize the concept of zones or compartments when it accepts and evaluates proposals that are put forward by the exporting Member.[1215] According to India, "[t]he obligation under Article 6 is not accomplished by engaging in a procedural formality laying down the normative basis for regionalization but is accomplished by a more substantive engagement with an exporting Member's proposal for regionalization". India argues that "[i]t is through the process of considering and evaluating the proposal [that] a Member [can] be said to be giving full force and effect to the substantive obligations under Article 6".[1216]

7.698. We recall our discussion of the word "recognize" in paragraph 7.668 above, and in particular our conclusion that the word means to "[a]cknowledge the existence, legality, or validity of [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration ". This definition, however, does not clarify whether the recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence must be done explicitly, and if so, whether it should be done in writing through a legislative or administrative act. In our view, the format of such recognition will depend on the circumstances of each particular case. Given the text of Article 6.2, we do not think that it is the prerogative of this Panel to prescribe to India or any other Member the manner in which it should "recognize" the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. However, in our view, to comply with Article 6.2, SPS measures adopted by WTO Members must at a minimum not deny or contradict the recognition of the concepts of such areas when these concepts are relevant with respect to the disease at issue.[1217]

7.699. We will therefore consider whether India's AI measures deny or contradict the recognition of the concepts of disease-free areas and areas of low disease prevalence with respect to the disease at issue. We recall that India's AI measures are those measures that "prohibit the importation of various agricultural products from India from those countries reporting [NAI]"[1218], and that they are maintained through the Livestock Act and S.O. 1663(E). We proceed to examine whether each of these measures denies or contradicts the recognition of the concepts of disease-free areas and areas of low disease prevalence.

7.700. We commence with the Livestock Act. This Act empowers the Central Government of India to regulate, restrict, or prohibit, in such manner as it may think fit, the import into India of any livestock which may be liable to be affected by infectious or contagious disorders. The Livestock Act is silent on the concepts of disease-free areas and areas of low disease prevalence. Indeed, we have found no explicit reference to the possibility of recognising areas, zones, compartments or equivalent in the text of this Act.

[1214] United States' response to Panel question No. 66.

[1215] India's second written submission, paras. 61-62; India's response to Panel question Nos. 43(b) and 66(a).

[1216] India's response to Panel question No. 66(b).

[1217] We note that the concepts of pest- or disease-free areas and areas of low pest or disease prevalence are not relevant with respect to all pests or diseases. Indeed, for certain pests and diseases, the Terrestrial Code does not recommend regionalization. For instance, as noted by the United States, in relation to avian chlamydiosis, Article 10.1.2 of the Terrestrial Code provides "Veterinary Authorities of countries free from avian chlamydiosis may prohibit importation or transit through their territory, from countries considered infected with avian chlamydiosis, of birds of the Psittacidae family". United States' opening statement at the first substantive meeting of the Panel, para. 13.

[1218] Preliminary Ruling of 22 May 2013, para. 3.19.

7.701. India has argued that Sections 3 and 3A of the Livestock Act provide the government with the legislative framework for the recognition of the concepts of pest- or disease-free areas.[1219] We observe that these provisions refer to the general powers of the government to regulate any aspect of the importation of livestock. As is the case with the remainder of the Livestock Act, Sections 3 and 3A are silent on the concepts of disease-free areas and areas of low disease prevalence. We accept that there is broad discretion inherent in the general powers conferred by Sections 3 and 3A; such broad discretion might encompass a very considerable range of activity. Nevertheless, there is no evidence on the record of this dispute that the Indian Central Government has used its discretion to either recognize, or deny or contradict the recognition of, the concept of these areas. These considerations allow us to conclude that the Livestock Act may empower India's authorities to recognize the concepts of disease-free areas and areas of low disease prevalence, notwithstanding the fact that this discretion has not been exercised for this purpose.

7.702. We next examine S.O. 1663(E), which was issued pursuant to Sections 3 and 3A of the Livestock Act. We recall that S.O. 1663(E) prohibits the importation of certain agricultural products from countries reporting NAI. S.O. 1663(E) thus prohibits the importation of the products enumerated therein on a country-wide basis. There is nothing on the face of S.O. 1663(E) that allows for the recognition of disease-free areas and/or areas of low disease prevalence within a country that notifies NAI to the OIE. Hence, we cannot conclude that S.O. 1663(E) recognizes the concept of these areas either explicitly or implicitly. Rather, S.O. 1663(E) reflects the opposite: by imposing a prohibition on a country-wide basis, it contradicts the requirement to recognize the concept of disease-free areas and areas of low disease prevalence.

7.703. We note that, in response to a question from the Panel at its second substantive meeting, India stated that it recognizes the concept of disease-free areas. Although we appreciate India's assertion, we cannot, without more evidence, properly carry out our duty as fact-finder and determine that India recognizes the concept of disease-free areas. In the absence of any substantiating evidence to support that assertion, we are unable to overcome the clear and unequivocal language to the contrary as reflected on the face of a measure at issue (that is, S.O. 1663(E)).

7.704. We also note that India has argued that adaptation within the meaning of Article 6.1, first sentence, involves an *ex post facto* "modification"[1220] of the SPS measure pursuant to an exporting Member's request. India submits that, were an exporting country to propose to India the recognition of zones or compartments within its territory, "such zones or compartments would be recognized by the issuance of a notification under Section 3 and 3A of the Livestock Act, 1898 as may be relevant". According to India, the United States could have, but did not, present a proposal highlighting zones or compartments it has maintained and request that these zones or compartments be recognized. India maintains that it "has not received proposals for regionalization from the United States or for that matter, from any other country".[1221] In line with our reasoning above, we do not see how India's AI measures can be "adapted" to the SPS characteristics of an area as the present tense entails if that adaptation can only occur only *after* the entry into force of the measures and through the issuance of a new separate SPS measure.

7.705. We further note that the United States has submitted a number of documents concerning various exchanges with the Indian authorities wherein India consistently informs the United States that its policy is "country freedom".[1222] While some of these documents refer to exchanges that

[1219] India's second written submission, para. 68 (referring to Exhibit IND-121); India's response to Panel question Nos. 43(a) and 66(b).

[1220] India's response to Panel question No. 45(b).

[1221] India's second written submission, para. 68 (referring to Exhibit IND-121); India's response to Panel question Nos. 43(a) and 66(b).

[1222] In particular, the United States submits that in 2007, India told the United States' Foreign Agricultural Service that it would "insist on country freedom" with respect to AI and that its conditions for import are "uniform". Moreover, the United States avers that in 2007, it complained about India's requirement that an exporting country certify that it is country-free of HPAI for shipments of processed poultry products on the basis that it is not consistent with the Terrestrial Code. The United States submits that India's response was that "[t]he conditions are uniformly applicable for all countries. Other countries exporting to India are complying with this requirement. Hence, no change in the condition is contemplated". The United States also submits that India has been asked by other Members, including the United States, to regionalize its AI-related

occurred before the entry into force of S.O. 1663(E), we note that the United States maintains that, at the May 2012 meeting of the OIE, India criticized Chapter 10.4 of the Terrestrial Code and asserted that, for India, "the concept of zoning looked irrelevant as far as [AI] was concerned".[1223] India has not disputed this evidence in substance, but it asserts that the evidence does not establish that the United States provided a proposal for recognition of its zones or compartments.[1224] India further points out that the statement made by India on zoning at the OIE and relied upon by the United States was only with reference to wild life and its epidemiological role in the spread of the disease.[1225] We take note of these exchanges but we do not consider that we can base our conclusion only on a report of a meeting of the OIE, the context of which the parties do not agree.[1226]

7.706. .As concluded above, although the Livestock Act may empower India's authorities to recognize the concepts of these areas, it is neutral on the subject and there is no evidence that this has ever been done. Furthermore, S.O. 1663(E) rather than recognizing the concept of these areas, reflects the opposite: by imposing a prohibition on a country-wide basis, it contradicts the requirement to recognize the concept of disease-free areas and areas of low disease prevalence. Taken together, we conclude that India's AI measures do not recognize the concept of disease-free areas and areas of low disease prevalence with respect to AI.

7.707. On the basis of the foregoing, we find that, by failing to recognize the concepts of disease-free areas and areas of low disease prevalence, India's AI measures are inconsistent with Article 6.2, first sentence, of the SPS Agreement.

7.708. We turn now to the United States' claim that India's AI measures are inconsistent with Article 6.2, second sentence.[1227] As we discussed in paragraph 7.689 above, we interpret Article 6.2 such that our finding that India's AI measures fail to recognize the concept of disease-free areas and areas of low disease prevalence leads inevitably to a finding that India has also failed to determine those areas based on the factors listed in Article 6.2, second sentence. Consequently, we find that India's AI measures are also inconsistent with Article 6.2, second sentence.

7.9.2.5 Whether India's AI measures are inconsistent with Article 6.1 of the SPS Agreement

7.709. We recall that in paragraph 7.690 above, we explained that if we were to determine that India has not recognized the concepts of disease-free areas and areas of low disease prevalence as required by Article 6.2, first sentence, we would find that India has not ensured that its AI measures are adapted to the SPS characteristics of the area from which products originate or to which they are destined pursuant to Article 6.1, first sentence. Having found that India failed to recognize the concepts of disease-free areas and areas of low disease prevalence, we consequentially find that India's AI measures are not adapted to the SPS characteristics of such areas and thus are inconsistent with Article 6.1, first sentence.

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import restriction at numerous meetings of the WTO SPS Committee. However, it argues, India has explained its refusal to alter its requirement for country-level certification on the grounds that the requirement is "uniform", and that it has a "uniform" policy of requiring country-level certification. United States' first written submission, para. 148; United States' opening statement at the first meeting of the Panel, para. 29 (referring to Exhibit US-120). United States' second written submission, para. 69 (referring to Exhibit US-124), para. 71. G/SPS/R/63 (Exhibit US-81), para. 64; G/SPS/R/62 (Exhibit US-82), para. 37; G/SPS/R/61 (Exhibit US-83), para. 26; G/SPS/R/59 (Exhibit US-84), para. 39; G/SPS/R/58 (Exhibit US-85), para. 38; G/SPS/R/56 (Exhibit US-86), para. 40; G/SPS/R/55 (Exhibit US-87), para. 43.

[1223] United States' first written submission, para. 148; United States' opening statement at the first meeting of the Panel, para. 29 (referring to OIE, 80th General Session FR (Exhibit US-88), para. 231).

[1224] India's second written submission, para. 74.

[1225] India's second written submission, para. 73 (referring to Exhibit US-80). We note that this Exhibit includes the text of S.O. 1663(E).

[1226] We note that the Appellate Body in *US/Canada – Continued Suspension* found that statements by Members at the DSB "are not intended to have legal effects and do not have the legal status of a definitive determination in themselves. Rather, they are views expressed by Members and should not be considered to prejudice Members' position in the context of a dispute". Appellate Body Reports, *US/Canada – Continued Suspension*, paras. 398-399. Considering the Appellate Body's view on statements made at the DSB, a body established under Article 2 of the DSU, we do not think that we can ascribe greater legal value to statements by Members in the context of other international organizations.

[1227] United States' first written submission, para. 154.

7.710. We also explained in paragraph 7.685 above that a Member's failure to ensure that its SPS measures are adapted to the SPS characteristics of an area for the purpose of Article 6.1, first sentence, may warrant a concomitant finding that the Member has not taken into account the factors in Article 6.1, second sentence, in assessing the SPS characteristics of a region.

7.711. To our knowledge, India has not conducted the assessment of the SPS characteristics of a region as envisaged in Article 6.1, second sentence. We acknowledge India's argument that the obligation under Article 6.1 would have been triggered only if the United States had complied with the "steps" in Article 6.3. As discussed in paragraph 7.676 above, under certain circumstances, a link may be made between the information required for the assessment of SPS characteristics envisaged by Article 6.1, second sentence, and the obligation of an exporting Member to provide "the necessary evidence" under Article 6.3, first sentence, that an area within its territory is pest- or disease-free or is an area of low pest or disease prevalence. Although Article 6.1 may inform the inquiry that an importing Member may conduct in order to determine whether an exporting Member has "objectively demonstrated" that there is an area within its territory that is pest- or disease-free or is an area of low pest or disease prevalence, there is nothing in the language of either provision that requires this particular approach.

7.712. Accordingly, having found that India's AI measures are inconsistent with Article 6.1, first sentence, and that India has not undertaken the assessment envisaged by Article 6.1, second sentence, we find that India's AI measures are also inconsistent with Article 6.1, second sentence, because India has not taken into account factors including those specified in Article 6.1, second sentence.

7.9.2.6 Conclusion on the United States' claims pursuant to Articles 6.1 and 6.2 of the SPS Agreement

7.713. The Panel therefore finds that by failing to recognize the concepts of disease-free areas and areas of low disease prevalence, India's AI measures are inconsistent with Article 6.2, first sentence, of the SPS Agreement. Consequentially, we find that India's AI measures are also inconsistent with Article 6.2, second sentence, because the failure to recognize the concepts of disease-free areas and areas of low disease prevalence renders impossible a determination of such areas based on the factors enumerated in Article 6.2, second sentence.

7.714. Having found that India's AI measures fail to recognize the concepts of disease-free areas and areas of low disease prevalence, we consequentially find that India's AI measures are therefore not adapted to the SPS characteristics of the areas from which products originate and to which they are destined and thus are inconsistent with Article 6.1, first sentence.

7.715. Furthermore, having found that India's AI measures are inconsistent with Article 6.1, first sentence, and that India has not undertaken the assessment envisaged by Article 6.1, second sentence, we find that India's AI measures are also inconsistent with Article 6.1, second sentence, because India has not taken into account factors including those specified in Article 6.1, second sentence.

7.10 Whether India has acted inconsistently with Article 7 and Annex B of the SPS Agreement

7.10.1 Arguments of the parties

7.10.1.1 United States

7.716. The United States claims that India has acted inconsistently with Article 7 of the SPS Agreement, Annex B(2) and Annex B(5)(a) through (d)[1228] because it has not provided the information on its AI measures in accordance with the provisions of Annex B. In particular, the United States claims that India did not notify its AI measures until well after these measures had entered into force, to the extent any notification was made whatsoever, despite the fact that India's avian influenza measures are "not substantially the same as the content of an international

[1228] As we discuss in para. 7.791 below, the United States has not made any arguments concerning its claim under Annex B(5)(c) in its written or oral submissions.

standard, guideline, or recommendation" and "have a significant effect on trade of other Members." The United States further claims that India failed to notify other Members, through the Secretariat, of the products to be covered by the measures along with the "objective and rationale" of the measures, "at an early stage" where amendments could be introduced and comments taken into account. In addition, the United States claims that India failed to identify the parts of its AI measures "which in substance deviate from international standards, guidelines, or recommendations." The United States also claims that India failed to publish its AI measures "at an early stage in such manner to enable interested Members to become acquainted with the proposal." Finally, the United States claims that India also failed to "allow a reasonable interval" between the publication of its measures and their entry into force. For the United States, India's failure to comply with Annex B(5) is not justified by any "urgent problem of health protection" that has arisen or threatened to arise for India, and India has in any event failed to comply with the requirements of Annex B(6) related to such urgent situations.[1229]

7.717. According to the United States, India did not notify its AI measures until well after these measures had entered into force. The United States contends that India's failure to abide by the notification and publication-related requirements of the SPS Agreement has made it more difficult for WTO Members to understand and assess India's measures.[1230] The United States explains that the conditions of Annex B(5) of the SPS Agreement are met in the present case because "India's measures do not correspond to the OIE guidelines"; and "by imposing a ban that precludes members from shipping covered products to India, the measures clearly have a significant impact on international trade".[1231]

7.718. The United States points out that Annex B(5)(b) requires that notifications occur "when amendments can still be introduced". Moreover, for the United States, the reference in Annex B(5)(b) to the provision of information about the "proposed regulation" and use of the future tense in requiring notification of the products "to be covered" make it clear that the notification must occur before the measure takes effect.[1232] The United States avers that India has habitually notified its AI measures "after they have gone into effect and without any indication of their objective or rationale"[1233] and, in some instances, India appears to have failed entirely to notify its AI measures.[1234]

7.719. According to the United States, by failing to notify properly measures changing the scope of and extending the term of its AI restrictions before they go into effect, and by failing to include in its notices information on the objective and rationale of the measures, India has "again-and-again" acted inconsistently with Article 7 and Annex B(5)(b) of the SPS Agreement.[1235]

7.720. The United States further contends that "India's failure to publish its measures properly, if at all, has resulted in additional breaches of Article 7 and Annex B". First, India has acted inconsistently with Annex B(5)(a) because all of India's AI measures took effect on the date of publication, thereby preventing other Members from becoming acquainted with the proposal to introduce a particular regulation.[1236] Second, according to the United States, because India did not publish a notice of any proposed regulation for any of its AI measures, India did not allow a reasonable time for comments and thus acted inconsistently with Annex B(5)(d) – a provision closely related to Annex B(5)(a).[1237]

[1229] United States' request for the establishment of a panel, p.3.
[1230] United States' first written submission, para. 190.
[1231] United States' first written submission, para. 191. United States' second written submission, paras. 122-123.
[1232] United States' first written submission, para. 192.
[1233] United States' first written submission, para. 194. The documents which, according to the United States, have been notified after their entry into force are: S.O. 102(E) (Exhibit US-73), S.O. 1311(E), S.O. 228(E) (Exhibit US-74), S.O. 1892(E) (Exhibit US-75), S.O. 419(E) (Exhibit US-76) and S.O. 1663(E) (Exhibit US-80).
[1234] United States' first written submission, para. 194. The documents which, according to the United States, have not been notified are: S.O. 2208(E) (Exhibit US-77), S.O. 616(E) (Exhibit US-78) and S.O. 2976(E) (Exhibit US-79).
[1235] United States' first written submission, para. 194.
[1236] United States' first written submission, para. 195.
[1237] United States' first written submission, para. 196.

7.721. Likewise, in the United States' view, India failed to comply with Annex B(2) because it "has never provided for any interval of time between publication of the Notifications at issue and their entry into force".[1238]

7.722. In addition, the United States points out that India's notifications imposing a ban for a period of six months were not always renewed within six months of when India issued its previous notification. For the United States, this means that, during the "gap periods", India's import restrictions constituted an unpublished SPS measure and, by maintaining an unpublished LPAI-based import ban, India breached the provisions of Article 7, Annex B(2) and Annex B(5)(a), (b) and (d).[1239] The United States claims that, by maintaining an unpublished LPAI-based import ban, India breached Annex B(2) because it did not allow a reasonable interval between the publication of its extension of the import ban and its entry into force. For the United States, this is evident because during the "gap periods", "India entirely failed to publish the fact that the ban would be continuing". The United States also claims that Annex B(5)(a) has been breached because "India did not publish notice at an early stage or even after these unwritten extensions took effect, thereby preventing producers from taking the extension of the measures into account when making production decisions".[1240] The United States further submits that India has also breached the notification requirement in Article 7 and Annex B(5)(b) by failing to provide an "early stage" notification that the ban on imports from countries notifying LPAI would be extended beyond the previously scheduled expiration date. Ultimately, according to the United States, India's unpublished LPAI-based import ban breached Annex B(5)(d) as well because India failed to "allow reasonable time for other Members to make comments in writing".[1241]

7.723. The United States further argues that India's failure to comply with Annex B(5) is not justified by Annex B(6)(a) because no urgent problem of health protection has arisen or threatened to arise for India in relation to AI. In any event, the United States argues, India has not complied with the requirement of Annex B(6)(a) to "immediately notif[y] other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s)". This is because "India frequently provided either no notification to the WTO or delayed notification of its Notifications—including S.O. 1663(E), which India did not notify to the WTO for almost three months after it was issued".[1242]

7.724. The United States also points out that at no point in this proceeding has India attempted to argue that S.O. 1663(E) or any predecessor instrument implementing India's AI measures meets the requirements set out in Annex B(6) to exempt a Member from the requirements of Annex B(5).[1243]

7.725. The United States observes that India's only response to the claims under Article 7 and Annex B is that its measures conform to international standards. The United States reiterates that India's measures do not conform to international standards[1244] and points out that, in any event, compliance with Annex B(2) does not hinge on conformity with international standards.[1245]

7.10.1.2 India

7.726. India responds to these allegations by asserting that the United States' claim is "misplaced".[1246] According to India, pursuant to the *chapeau* of Annex B(5), the obligations under that paragraph arise only when there are no international standards or the content of the measure is not the same as the content of the standard. India argues that since S.O. 1663(E) conforms to

[1238] United States' first written submission, para. 197.
[1239] United States' first written submission, para. 198.
[1240] United States' first written submission, para. 199.
[1241] United States' first written submission, para. 200.
[1242] United States' first written submission, para. 201.
[1243] United States' second written submission, para. 124.
[1244] United States' opening statement at the first meeting of the Panel, para. 34.
[1245] United States' opening statement at the first meeting of the Panel, para. 34; United States' second written submission, para. 121.
[1246] India's first written submission, para. 276.

the Terrestrial Code, which constitutes the relevant international standard in this case, the obligations under Annex B(5)(a), (b) and (d) are not applicable to India.[1247]

7.727. In addition, India asserts that it notified S.O. 1663(E) as an emergency measure pursuant to Annex B(6), which was promulgated in response to concerns of human and animal health security from NAI reporting countries.[1248]

7.10.2 Analysis by the Panel

7.10.2.1 Introduction

7.728. The issue before the Panel is whether India has acted inconsistently with Article 7, Annex B(2) and Annex B(5)(a) through (d) of the SPS Agreement because it did not provide information on its AI measures in accordance with the provisions of Annex B. This claim covers a number of obligations allegedly violated by India. In particular, we need to establish whether, as the United States claims, India has acted inconsistently with:

a. Annex B(5)(a), because it failed to publish its AI measures at an early stage in such manner to enable interested Members to become acquainted with the proposal;

b. Annex B(5)(b), because it failed to notify other Members, through the Secretariat, of the products to be covered by the measures along with the objective and rationale of the measures, at an early stage where amendments could be introduced and comments taken in to account;

c. Annex B(5)(c), because it failed to identify the parts of its AI measures which in substance deviate from international standards, guidelines, or recommendations[1249];

d. Annex B(5)(d), because India did not allow a reasonable time for comments[1250]; and

e. Annex B(2), because it failed to allow a reasonable interval between the publication of its measures and their entry into force.[1251]

7.729. India responds that the United States' claims are "misplaced" because, pursuant to the *chapeau* of Annex B(5), the obligations under that paragraph arise only when there are no international standards or the content of the measure is not the same as the content of the standard. For India, the obligations under Annex B(5) of the SPS Agreement are not applicable to India because S.O. 1663(E) conforms to the Terrestrial Code, which constitutes the relevant international standard in this case.[1252] In addition, India contends that it has notified S.O. 1663(E) as an emergency measure pursuant to Annex B(6), which was promulgated in response to concerns of human and animal health security from NAI reporting countries.[1253]

7.730. Hence we must determine whether India's interpretation of Annex B(5) is correct, and if it is, whether its measures conform to the relevant international standard. We must also decide whether India was entitled to rely on Annex B(6) in the circumstances of this case.

7.731. Regarding India's interpretation of Annex B(5), we recall our findings in sections 7.4.2.2.5 and 7.4.2.2.6 above that India's AI measures are not based on the Terrestrial Code and that, as explained in section 7.4.2.3 above, they do not conform to the Terrestrial Code. Therefore, India cannot rely on the alleged conformity of its AI measures to the Terrestrial Code in order to justify a presumption of consistency of those measures with the remainder of the SPS Agreement, including Article 7 and Annex B.

[1247] India's first written submission, para. 276; India's response to Panel question Nos. 51-53.
[1248] India's response to Panel question Nos. 50 and 68.
[1249] United States' request for the establishment of a panel, p.3.
[1250] United States' first written submission, para. 196.
[1251] United States' request for the establishment of a panel, p.3.
[1252] India's first written submission, para. 276.
[1253] India's response to Panel question Nos. 50 and 68.

7.732. Another preliminary issue regards our terms of reference and the scope of the measures concerned by the United States' claim under Article 7 and Annex B of the SPS Agreement. In its panel request, the United States claims that India's AI measures are inconsistent with Article 7 and Annex B for a number of reasons. Later, in its submissions to this Panel, the United States outlines a number of instances in which India has "habitually" notified certain AI measures after they have gone into effect, as well as some instances where "India appears to have failed entirely to notify the measures".[1254] When describing these instances, the United States refers to several measures adopted by India prior to S.O. 1663(E) and imposing an LPAI-based import ban on a temporary basis or amending the ban.[1255] The United States thus refers to measures *other than* the Livestock Act and S.O. 1663(E). We understand that these other measures pre-date S.O. 1663(E) and were not in force at the time of the United States' panel request, i.e. 11 May 2012.

7.733. We recall our preliminary ruling of 22 May 2013 which, as explained in paragraph 7.4 above, forms an integral part of the present findings. In particular, we found that India's AI measures are those measures that "prohibit the importation of various agricultural products into India from those countries reporting [NAI]", which are maintained through the Livestock Act and S.O. 1663(E).[1256] We also found that the United States is challenging only the measures that were *in force* as of the date of the panel request, i.e. 11 May 2012.[1257] Accordingly, those measures referred to by the United States when arguing its claim under Article 7 and Annex B, which were not in force at the time of the panel request, do not constitute India's AI measures for the purpose of the present dispute. We shall therefore refrain from examining the arguments of the United States which relate to those other measures because they fall outside our terms of reference.

7.734. Having made these preliminary observations, we now proceed to examine the legal provisions at issue to ascertain the applicable legal test.

7.10.2.2 The legal provisions at issue

7.735. Article 7 of the SPS Agreement, entitled "Transparency", reads as follows:

> Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.

7.736. Article 7 refers to Annex B of the SPS Agreement, entitled "Transparency of Sanitary and Phytosanitary Regulations", which reads in relevant part:

> *Publication of regulations*
>
> ...
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> 2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.
>
> ...

[1254] United States' first written submission, para. 194.
[1255] These are S.O. 102(E) dated February 2, 2007 (Exhibit US-73); S.O. 1311(E) dated August 1, 2007; S.O. 1859(E) dated November 1, 2007 (Exhibit US-113); S.O. 228(E) dated January 31, 2008 (Exhibit US-74); S.O. 1892(E) dated July 30, 2008 (Exhibit US-75); S.O. 419(E) dated February 9, 2009 (Exhibit US-76); S.O. 2208(E) dated August 28, 2009 (Exhibit US-77); S.O. 616(E) dated March 18, 2010 (Exhibit US-78); S.O. 2976(E) dated December 10, 2010 (Exhibit US-79). United States' first written submission, para. 194.
[1256] Preliminary ruling of 22 May 2013, paras. 3.33-3.34, and 4.1a.
[1257] Preliminary ruling of 22 May 2013, paras. 3.64-3.65, 3.66f and 4.1d.

Notification procedures

5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

(a) publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;

(b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;

(c) provide upon request to other Members copies of the proposed regulation and, whenever possible, identify the parts which in substance deviate from international standards, guidelines or recommendations;

(d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:

(a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);

(b) provides, upon request, copies of the regulation to other Members;

(c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

7.737. We observe that Article 7 and Annex B are entitled "Transparency" and "Transparency of Sanitary and Phytosanitary Regulations", respectively. This means that the transparency provisions of Annex B apply only to measures that qualify as "SPS regulations". A threshold issue before us therefore is whether India's AI measures are "SPS regulations" within the scope of Annex B of the SPS Agreement.

7.738. The term "SPS regulations" is defined in the footnote to Annex B(1) as "[SPS] measures such as laws, decrees or ordinances which are applicable generally". The Appellate Body in *Japan – Agricultural Products II* clarified that the footnote to Annex B(1) includes an illustrative list of instruments, as indicated by the words "such as". This list is therefore not exhaustive. The Appellate Body explained that the scope of the term "SPS regulation" also includes, in addition to "laws, decrees or ordinances", other instruments which are "applicable generally" and are "similar in character" to the instruments explicitly referred to in the illustrative list of the footnote to Annex B(1).[1258]

[1258] Appellate Body Report, *Japan – Agricultural Products II*, para. 105. The Appellate Body further explained that:

> The object and purpose of paragraph 1 of Annex B is "to enable interested Members to become acquainted with" the sanitary and phytosanitary regulations adopted or maintained by other Members and thus to enhance transparency regarding these measures. In our opinion, the scope

7.739. We recall that India's AI measures are maintained through the Livestock Act and S.O. 1663(E).[1259] We also recall that, when considering whether India's measures are SPS measures subject to the disciplines set out in the SPS Agreement, we found that both legal instruments qualify as either "laws", "decrees" or "regulations" within the terms of the second sentence of Annex A(1).[1260] In our view, irrespective of the actual designation of the legal instruments through which India's AI measures are maintained, both instruments qualify as "laws, decrees or ordinances" or, at the very least, legal instruments of general application within the terms of the footnote to Annex B(1). Accordingly, we conclude that India's AI measures constitute "SPS regulations" for the purpose of Annex B of the SPS Agreement.

7.740. Given the number of provisions under which the United States pursues this claim, we consider it pertinent to address the relationship between Article 7 and Annex B in order to consider the bearing this may have on the order of our analysis.

7.10.2.3 Relationship between Article 7 and Annex B of the SPS Agreement

7.741. Article 7 of the SPS Agreement requires Members to notify changes in their SPS measures and to provide information on their SPS measures "in accordance with the provisions of Annex B". Therefore, Article 7 must be read together with the provisions of Annex B of the SPS Agreement. The intertwined nature of the relationship between Article 7 and Annex B has led prior panels and the Appellate Body to find that an inconsistency with the provisions of Annex B results in an inconsistency with Article 7[1261], and that a failure to prove a violation of Annex B results in the same failure regarding Article 7.[1262] Accordingly, in line with prior jurisprudence, we proceed with our examination by looking into the United States' claims under Annex B of the SPS Agreement.

7.742. In this respect, the United States suggests that we follow a particular order of analysis. The United States advises us to commence by considering its claims pursuant to Annex B(5)(a) and (b) prior to considering its claim under Annex B(5)(d), on the grounds that this path would likely be the most efficient because India's failure to allow reasonable time for comments as required by Annex B(5)(d) follows from India's failure to publish any advance notice of its regulations or to provide any advance notice to other Members of covered products. The United States proposes that we then consider its claim under Annex B(2) because, if we were to establish that India published no notice of S.O. 1663(E) before its entry into force in breach of Annex (5)(a), "little further analysis will be required" to conclude that India breached its obligation to allow a reasonable interval between the publication of the SPS regulation and its entry into force pursuant to Annex B(2).[1263]

7.743. India refrains from suggesting any particular order of analysis; rather, India argues that it had notified S.O. 1663(E) as an emergency measure pursuant to Annex B(6) and therefore, "the obligations under paragraph[s] 5(a), 5(b) and 5(d) are inapplicable to India".[1264]

7.744. We thus turn to consider the relationship between Annex B(2), Annex B(5) and Annex B(6) of the SPS Agreement.

7.745. Annex B(2) obliges Members to "allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force". We consider that this obligation should be understood in the context of the immediately preceding Annex B(1), which obliges Members to "ensure that all sanitary and phytosanitary regulations which have been adopted are published promptly in such a manner as to enable interested Members to become acquainted with them". We therefore understand that those measures that are the subject of the obligation to

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of application of the publication requirement of paragraph 1 of Annex B should be interpreted in the light of the object and purpose of this provision.
Appellate Body Report, *Japan – Agricultural Products II*, para. 106.

[1259] Preliminary ruling of 22 May 2013, paras. 3.33-3.34, and 4.1a.

[1260] Paras. 7.140-7.141 above.

[1261] Panel Report, *Japan – Agricultural Products II*, para. 8.116; and Appellate Body Report, *Japan – Agricultural Products II*, para. 108.

[1262] Panel Reports, *Japan – Apples*, para. 8.327; and *EC – Approval and Marketing of Biotech Products*, para. 7.1777.

[1263] United States' response to Panel question No. 51.

[1264] India's response to Panel question No. 51.

publish in Annex B(2) are those measures that have been "adopted", but have not yet entered into force.

7.746. Annex B(5), in contrast, explicitly refers to "proposed" SPS regulations. We observe that Annex B(6) allows Members to omit such of the steps enumerated in Annex B(5) in the event of "urgent problems of health protection" or a threat thereof, provided certain conditions are met. Specifically, Annex B(6)(c) speaks of "allow[ing] … Members to make comments in writing, discuss[] these comments upon request, and tak[e] the comments and the results of the discussions into account". The actions described in Annex B(6)(c) would take place while the SPS regulation is still in draft form such that amendments can be introduced and comments taken into account.[1265] Put differently, we understand that Annex B(5) and Annex B(6) apply while an SPS regulation remains a "proposal", but prior to it being "adopted", at which point Annex B(2) would apply.

7.747. We further observe that the language in Annex B(5) and Annex B(6) is similar to that in Articles 2.9[1266] and 2.10[1267] of the TBT Agreement. Under the circumstances, we consider it appropriate to develop our understanding of the relationship between Annex B(5) and Annex B(6) of the SPS Agreement with the relationship between Articles 2.9 and 2.10 of the TBT Agreement in mind. We note that the panel in *US – Clove Cigarettes* examined the relationship between Articles 2.9 and 2.10 of the TBT Agreement and was of the view that "the fact that Article 2.10 of the TBT Agreement only applies when a Member is departing from the general obligations established in Article 2.9 of the TBT Agreement entails that these two provisions have two distinct and separate scopes".[1268] The panel thus decided to commence its analysis with Article 2.10 (the

[1265] This was also the understanding of the panel in *US – Clove Cigarettes* when interpreting Articles 2.9.2 and 2.9.3 of the TBT Agreement, which provide for similar obligations in respect of technical regulations. The panel concluded that these provisions were only applicable to "'proposed technical regulations', i.e., technical regulations which are still in draft form and thus … amendments can still be introduced and comments taken into account". Panel Report, *US – Clove Cigarettes*, para. 7.545.

[1266] Article 2.9 of the TBT Agreement reads as follows:

Whenever a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation may have a significant effect on trade of other Members, Members shall:

> 2.9.1 publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation;
>
> 2.9.2 notify other Members through the Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account;
>
> 2.9.3 upon request, provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, identify the parts which in substance deviate from relevant international standards;
>
> 2.9.4 without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

[1267] Article 2.10 of the TBT Agreement reads as follows:

Subject to the provisions in the lead-in to paragraph 9, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 9 as it finds necessary, provided that the Member, upon adoption of a technical regulation, shall:

> 2.10.1 notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems;
>
> 2.10.2 upon request, provide other Members with copies of the technical regulation;
>
> 2.10.3 without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

[1268] The panel in *US – Clove Cigarettes* said:

equivalent provision to Annex B(6)) and, provided the conditions of urgency described in this provision were not fulfilled, it would then proceed with the examination of the claims under Article 2.9 (the equivalent provision to Annex B(5)).[1269] Given the similarity of the language of the provisions examined by that panel and those before us now, we believe this approach also makes sense for the conduct of our analysis of Annex B(5) and Annex B(6).

7.748. On the basis of foregoing, the Panel decides to commence with the first paragraph of Annex B at issue in these proceedings, i.e. Annex B(2). The next paragraph at issue is Annex B(5). Nonetheless, given that Annex B(6) allows Members to omit such of the steps enumerated in Annex B(5) in the event of "urgent problems of health protection" or a threat thereof, and our decision to follow the analytical approach adopted by the panel in *US – Clove Cigarettes*, we will move next to examine whether those circumstances referred to in Annex B(6) exist in this dispute. The outcome of our examination under Annex B(6) will determine whether India was permitted to omit steps enumerated in Annex B(5). If we find that there are no urgent problems of health protection or a threat thereof, we will then proceed with our assessment under Annex B(5).

7.10.2.4 Whether India has acted inconsistently with Annex B(2) of the SPS Agreement

7.749. The United States claims that India acted inconsistently with Annex B(2) on two grounds: first, India failed to comply with Annex B(2) because it "has never provided for any interval of time between publication of the Notifications at issue and their entry into force"[1270]; and, second, India's notifications imposing a ban for a period of six months were not always renewed within six months of when India issued its previous notification. For the United States, this means that, during the "gap periods", India's import restrictions constituted an unpublished SPS measure, and by maintaining an unpublished LPAI-based import ban, India breached, *inter alia*, Annex B(2).[1271]

7.750. We refer to our conclusion in paragraph 7.733 above that, when examining the United States' claims under Article 7 and Annex B of the SPS Agreement, we will consider only those of India's measures that are part of our terms of reference. For the purpose of this claim, the relevant measure is S.O. 1663(E), which was published in the Gazette of India on 19 July 2011 and came into effect on that same date.[1272] Hence, the United States' argumentation concerning unpublished SPS measures (which are not within our terms of reference) is not part of our analysis with respect to the United States' claim pursuant to Annex B(2). We thus proceed to examine whether India acted inconsistently with Annex B(2) because it failed to allow a reasonable interval between the publication of S.O. 1663(E) and its entry into force.

7.751. We recall that Annex B(2) reads as follows:

> 2. Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

7.752. Consequently, except in urgent circumstances, Annex B(2) obliges Members to allow a "reasonable interval" between the publication of an SPS regulation and its entry into force. Annex B(2) also specifies the reason such an interval is needed: "to allow time for producers in

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We note that the obligations under Article 2.10 of the TBT Agreement are only applicable when a Member omitted the steps enumerated in Article 2.9 of the TBT Agreement because "urgent problems of safety, health, environmental protection or national security arise or threaten to arise". In our view, the fact that Article 2.10 of the TBT Agreement only applies when a Member is departing from the general obligations established in Article 2.9 of the TBT Agreement entails that these two provisions have two distinct and separate scopes. Indeed, we see no situation in which a WTO Member's actions would fall within the scope of both obligations at the same time. Either the Member in question follows the general requirements under Article 2.9 of the TBT Agreement, or it decides to omit those requirements owing to any of the listed "urgent problems" described in Article 2.10 of the TBT Agreement.
Panel Report, *US – Clove Cigarettes*, para. 7.502.

[1269] Panel Report, *US – Clove Cigarettes*, para. 7.503

[1270] United States' first written submission, para. 197.

[1271] United States' first written submission, paras. 198-199.

[1272] Section 2.3.2 above.

exporting Members to adapt their products or methods of production to the requirements of the importing Member".

7.753. We observe that the opening words of Annex B(2) indicate that the obligation to allow a reasonable interval between publication and entry into force applies "except in urgent circumstances". A preliminary question therefore is whether the obligation in Annex B(2) is inapplicable to the circumstances of this case due to the existence of urgent circumstances with respect to S.O. 1663(E).

7.754. The United States argues that the "urgent circumstances" foreseen in Annex B(2) did not exist in this case. It maintains that, from 2007 up to and including the promulgation of S.O. 1663(E), India was issuing notifications that, with or without slight modification, merely renewed similar or identical notifications with set expiration dates. In its view, because these expiration dates were known from the time that the expiring notification was promulgated, the need for a new notification can hardly be considered an "urgent circumstance" that would justify the lack of any interval between the dates of publication and entry into force.[1273]

7.755. India has not alleged any urgent circumstances in this respect. Indeed, although India argued that S.O. 1663(E) was notified as an emergency measure, it did so in respect of Annex B(6) which, as explained in paragraph 7.746 above, is concerned with the publication obligations of Members in respect of "proposed" regulations (in this case, the *draft* S.O. 1663(E)). As explained in paragraph 7.745 above, the "urgent circumstances" in Annex B(2) concern *adopted* regulations (in this case, the already *adopted* S.O. 1663(E)).

7.756. We observe that India's notification of S.O. 1663(E) was circulated by the WTO Secretariat to Members on 11 October 2011, after being notified by India to the Secretariat on 7 October 2011.[1274] This notification occurred well after S.O. 1663(E) entered into force on 19 July 2011. Moreover, the evidence on the record shows that, from 2007 up to and including the promulgation of S.O. 1663(E), India submitted several successive notifications to the WTO concerning similar AI-related import regulations.[1275] We find it difficult to accept that, given the evidence on the record, there were "urgent circumstances" of the kind foreseen in Annex B(2). India has not made any arguments to the contrary.

7.757. Accordingly, given the evidence on the record and in the absence of a rebuttal by India, the Panel concludes that there were no "urgent circumstances" within the meaning of Annex B(2) that would have permitted India to bypass the obligation to allow a reasonable interval between publication and the entry into force of S.O. 1663(E).

7.758. Our next step is to establish whether India "allow[ed] a reasonable interval" between the publication of S.O. 1663(E) and its entry into force. It is undisputed by the parties that S.O. 1663(E) was published in the Gazette of India on 19 July 2011 and came into effect on that same date. Clearly, India did not allow any interval at all between publication and entry into force.

7.759. On the basis of the foregoing, we find that India acted inconsistently with Annex B(2) of the SPS Agreement because it failed to allow a reasonable interval between the publication of S.O. 1663(E) and its entry into force and no urgent circumstances existed that would have permitted India to bypass such obligation.

7.10.2.5 Whether India can rely upon Annex B(6) of the SPS Agreement to omit steps in Annex B(5)

7.760. India asserts that it notified S.O. 1663(E) as an emergency measure pursuant to Annex B(6), which was promulgated in response to concerns of human and animal health security from NAI reporting countries.[1276] According to the United States, however, "[a]t no point in this proceeding … has India attempted to argue that S.O. 1663(E) [–] or any predecessor instrument

[1273] United States' response to Panel question No. 52.
[1274] G/SPS/N/IND/73.
[1275] United States' response to Panel question No. 52.
[1276] India's response to Panel question Nos. 50 and 68.

implementing India's AI measures [–] in fact meets the requirements set out in [Annex B(6)] to exempt a Member from the requirements of paragraph 5".[1277]

7.761. We commence by recalling the text of Annex B(6), which reads as follows:

> 6. However, where urgent problems of health protection arise or threaten to arise for a Member, that Member may omit such of the steps enumerated in paragraph 5 of this Annex as it finds necessary, provided that the Member:
>
> (a) immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);
>
> (b) provides, upon request, copies of the regulation to other Members;
>
> (c) allows other Members to make comments in writing, discusses these comments upon request, and takes the comments and the results of the discussions into account.

7.762. The *chapeau* of Annex B(6) allows a Member to omit steps prescribed in Annex B(5) in respect of a proposed SPS regulation "where urgent problems of health protection arise or threaten to arise for a Member". Annex B(6) imposes three additional conditions that must be met for a Member to take advantage of this exceptional approach, namely: (a) to notify immediately other Members, through the Secretariat, of that particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s); (b) to provide, upon request, copies of the regulation to other Members; and (c) to allow other Members to make comments in writing, and to discuss these comments upon request and take the comments and the results of the discussions into account. A plain reading of Annex B(6) makes it clear that the condition in the *chapeau* and the three additional conditions set forth in paragraphs (a), (b) and (c) are cumulative, such that all four conditions must be met before a Member may take advantage of Annex B(6).

7.763. India asserts that it notified S.O. 1663(E) as an emergency measure pursuant to Annex B(6) of the SPS Agreement. However, India has not adduced any evidence to support its assertion that S.O. 1663(E) was adopted under the circumstances foreseen in the *chapeau* of Annex B(6), namely the presence of "urgent problems of health protection" or a threat thereof. As we said in paragraph 7.756 above, India's notification of S.O. 1663(E) was circulated by the WTO Secretariat to WTO Members on 11 October 2011, after being notified to the Secretariat by India on 7 October 2011.[1278] This notification occurred well after S.O. 1663(E) entered into force on 19 July 2011. We note that the Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement (Article 7) ("SPS Committee's Transparency Procedures") adopted by the SPS Committee provides that "[t]he late notification of a measure already in force does not in and of itself constitute sufficient reason for the use of the emergency format".[1279] Moreover, as we have explained, the evidence on the record shows that, from 2007 up to and including the promulgation of S.O. 1663(E), India submitted several successive notifications to the WTO concerning similar AI-related import regulations.[1280] Under such circumstances, the notification in 2011 could not have been made "where urgent problems of health protection [arose] or threaten[ed] to arise," as required in the *chapeau* of Annex B(6). Nor has India made any compelling arguments to persuade us otherwise. Accordingly, the Panel concludes that the condition prescribed in the *chapeau* of Annex B(6) was not present with respect to S.O. 1663(E) at the time of its proposal.

7.764. Since the condition in the *chapeau* has not been met, we do not need to inquire into the three additional conditions of Annex B(6). In any event, India has not provided any evidence to the Panel with a view to proving that the three additional conditions in Annex B(6) had been met.

[1277] United States' second written submission, para. 124.
[1278] G/SPS/N/IND/73.
[1279] G/SPS/7/Rev.3, para. 15.
[1280] United States' response to Panel question No. 52.

7.765. Accordingly, we find that India cannot rely upon Annex B(6) of the SPS Agreement to justify omitting the steps enumerated in Annex B(5). We therefore proceed to examine whether, as claimed by the United States, India acted inconsistently with Annex B(5)(a) through (d) of the SPS Agreement.

7.10.2.6 Whether India acted inconsistently with Annex B(5)(a) through (d) of the SPS Agreement

7.10.2.6.1 Introduction

7.766. The United States claims that India acted inconsistently with Annex B(5)(a) through (d) of the SPS Agreement. According to the United States, India's AI measures are not substantially the same as the content of an international standard, guideline, or recommendation and they have a significant effect on the trade of other Members.[1281] Consequently, India is required to provide information on its AI measures in accordance with the requirements of Annex B. India did not provide this information and, therefore, it has acted inconsistently with its SPS obligations in Annex B(5)(a) though (d).

7.767. India argues that the obligations in the relevant paragraphs of Annex B(5) do not apply to India because, pursuant to the *chapeau* of Annex B(5), the obligations under that paragraph arise only when there are no international standards or the content of the measure is not the same as the content of the standard. India maintains that S.O. 1663(E) conforms to the Terrestrial Code, which constitutes the relevant international standard in this case, with the result that the obligations under Annex B(5)(a) through (d) do not apply to India.[1282]

7.768. We observe that India's defence under Annex B(5) hinges entirely on its contention that the conditions specified in the *chapeau* of Annex B(5) are not fulfilled. We thus shall commence our analysis under Annex B(5) by examining whether the conditions specified in the *chapeau* of Annex B(5) are satisfied in the present dispute. We recall that, as explained in paragraph 7.746 above, Annex B(5) explicitly refers to "proposed" regulations. Accordingly, given our terms of reference, we examine the United States' claims under Annex B(5)(a) through (d) with respect to the *draft* S.O. 1663(E).

7.10.2.6.2 Whether the conditions specified in the *chapeau* of Annex B(5) are satisfied

7.769. The United States submits that, according to its *chapeau*, Annex B(5) applies (i) where a relevant international standard does not exist or the content of the proposed SPS regulation is not substantially the same as the content of an international standard, guideline or recommendation; and (ii) if the regulation may have a significant effect on trade of other Members. For the United States, both these conditions are met in the present case because "India's measures do not correspond to the OIE guidelines" and "by imposing a ban that precludes members from shipping covered products to India, the measures clearly have a significant impact on international trade".[1283]

7.770. India responds that the conditions of the *chapeau* of Annex B(5) are not fulfilled because international standards and guidelines do exist in the present case in the form of the Terrestrial Code, and S.O. 1663(E) conforms to the Code.[1284]

7.771. We recall that the text of the *chapeau* of Annex B(5) reads as follows:

> 5. Whenever an international standard, guideline or recommendation does not exist or the content of a proposed sanitary or phytosanitary regulation is not substantially the same as the content of an international standard, guideline or recommendation, and if the regulation may have a significant effect on trade of other Members, Members shall:

[1281] United States' request for the establishment of a panel, p. 3; United States' first written submission, para. 20.
[1282] India's first written submission, para. 276; India's response to Panel question Nos. 51-53.
[1283] United States' first written submission, para. 191; United States' second written submission, paras. 122-123.
[1284] India's first written submission, para. 276.

7.772. The panel in *Japan – Apples* noted with respect to Annex B(5) of the SPS Agreement that it "foresees the notification of SPS regulations if a number of conditions are cumulatively met", i.e.:

> (a) where a relevant international standard does not exist or the content of the proposed measure is not substantially the same as the content of an international standard, guideline or recommendation, *and*
>
> (b) if the regulation may have a significant effect on trade of other Members.[1285]

7.773. In the present case, the second condition, i.e. whether the regulation may have a significant effect on trade of other Members, is not disputed. We recall that, when examining whether India's AI measures are SPS measures within the disciplines set out in the SPS Agreement, we concluded that they affect international trade. The *chapeau* of Annex B(5) qualifies the effect on trade as "significant". We note that the ordinary meaning of the term significant is "sufficiently great or important to be worthy of attention; noteworthy; consequential, influential".[1286] In our view, S.O. 1663(E), an outright prohibition on the importation of the listed agricultural products into India from countries reporting NAI constitutes the most restrictive measure a Member could take with respect to trade. Under the circumstances, we conclude that S.O. 1663(E) has an effect on trade that is "significant".

7.774. Concerning the first condition – "a relevant international standard … does not exist or the content of the proposed measure is not substantially the same as the content of an international standard" – we found in section 7.4.2.2.1.2 above that there is a relevant international standard for most of the products covered by S.O. 1663(E), which is the Terrestrial Code and, in particular Chapter 10.4 thereof. We further found that India's AI measures are not "based on", nor do they "conform to", the relevant international standard. For the purpose of the *chapeau* of Annex B(5), however, the analysis is different – the inquiry is whether the content of the proposed SPS regulation "is not substantially the same" as the content of the relevant international standard.[1287] We must therefore assess whether the content of S.O. 1663(E) "is not substantially the same" as the content of the Terrestrial Code.

7.775. The United States submits that the dictionary defines "substantially" as "[e]ssentially, intrinsically," and "[i]n essentials, to all intents and purposes, in the main."[1288] The United States also points out that when interpreting the phrase "substantially the same" as used in Article XXIV of the GATT 1994, the Appellate Body has explained that "something closely approximating 'sameness' is required".[1289] Accordingly, in the United States' view, the requirements of Annex B(5) apply when a Member's regulation is "not essentially the same as an international standard".[1290]

7.776. The United States contends that, in the present case, there is no need for the Panel to elucidate criteria for evaluating whether measures are "substantially the same" as international standards for the purposes of Annex B(5).[1291] For the United States, India's measures provide for trade bans following detections of LPNAI, while the relevant international standards do not provide for trade bans following LPNAI detections. Accordingly, in the United States' view, India's measures are "fundamentally in contradiction to, and not at all the same as, the relevant international standards".[1292] Moreover, the United States adds that with respect to live pigs

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[1285] Panel Report, *Japan – Apples*, para. 8.310.

[1286] The Oxford English Dictionary, OED Online, Oxford University Press, accessed 16 April 2014, <http://www.oed.com/view/Entry/179569?redirectedFrom=significant#eid>.

[1287] The SPS Committee's Transparency Procedures encourage Members to notify all regulations that are based on, conform to, or are substantially the same as an international standard, guideline or recommendation if they are expected to have a significant effect on trade of other Members. G/SPS/7/Rev.3, para. 8.

[1288] United States' response to Panel question No. 53 (referring to *Shorter Oxford English Dictionary*, p. 3124 (Exhibit US-140)).

[1289] United States' response to Panel question No. 53 (referring to Appellate Body Report, *Turkey – Textiles*, para. 50).

[1290] United States' response to Panel question No. 53; United States' second written submission, para. 123.

[1291] United States' response to Panel question No. 53.

[1292] United States' response to Panel question No. 53; United States' second written submission, para. 123.

covered by S.O. 1663(E), there is no international standard for AI to which India's measures could be compared.[1293]

7.777. India notes that Annex B(5) does not use the word "conform to" but requires that the content of a measure be "substantially the same" as an international standard. According to India, this in any case "covers a situation such as the present one where S.O. 1663(E) contains measures concerning products for which international guidelines exist as well as products for which there are no international guidelines".[1294] Since its measures concerning poultry products contained in S.O. 1663(E) conform to the Terrestrial Code, S.O. 1663(E) is also "substantially the same" as the relevant international standard.[1295]

7.778. There is no jurisprudence that addresses the meaning of "substantially the same" in the context of the *chapeau* of Annex B(5). In *Turkey – Textiles*, the Appellate Body agreed with the panel in that the terms "substantially the same" used in Article XXIV:8(a)(ii) of the GATT 1994 offer a certain degree of "flexibility".[1296] However, the Appellate Body cautioned that this "flexibility" is limited and that "[i]t must not be forgotten that the word 'substantially' qualifies the words 'the same'. Therefore, in our view, something closely approximating 'sameness' is required by Article XXIV:8(a)(ii)."[1297]

7.779. We think it appropriate to follow the guidance of the Appellate Body in its interpretation of the terms "substantially the same". Although the Appellate Body was considering the meaning of those terms as they appear in Article XXIV:8(a)(ii) of the GATT 1994 and not as used in the provision before us, its analysis is nevertheless apt for our purposes. The focus of the Appellate Body's inquiry was on the word "substantially" and its qualification of the word "same". We, too, must determine how "substantially" modifies the word "same". Therefore, we adopt the Appellate Body's approach and consider for our purposes that "substantially the same" means that "something closely approximating 'sameness' is required".

7.780. In the circumstances of the present case, it is not necessary for us to develop criteria for evaluating whether the content of S.O. 1663(E) is "substantially the same" as the content of the Terrestrial Code, and, in particular, Chapter 10.4 thereof, within the meaning of Annex B(5) of the SPS Agreement. It appears to us that, for the content of an SPS regulation to be "substantially the same" as the content of an international standard, the former must be at least "based on" the latter according to Article 3.1 of the SPS Agreement.

7.781. In this regard, we recall our findings in sections 7.4.2.2.5 and 7.4.2.2.6 above that India's AI measures are not based on the Terrestrial Code and, in particular, Chapter 10.4 thereof, and that, as explained in section 7.4.2.3 above, they do not conform to the Terrestrial Code and, in particular, Chapter 10.4 thereof. Moreover, as we have found in section 7.4.2.2.2 above, live pigs are not covered by the recommendations in Chapter 10.4 of the Terrestrial Code and, to our knowledge, there is no other relevant international standard for AI applicable to live pigs. We also refer to our findings in section 7.4.2.2.2 above that there is no product-specific recommendation in Chapter 10.4 of the Terrestrial Code for "pathological material and biological products from birds", and that we do not have sufficient evidence on record to determine whether India's AI measures in respect of these products are based on the recommendations of Chapter 5.8 of the Terrestrial Code. In the light of these findings, it is not possible to conclude that there is "something closely approximating'sameness' is required" between S.O. 1663(E) and the Terrestrial Code and, in particular, Chapter 10.4 thereof.

7.782. Accordingly, we conclude that the content of S.O. 1663(E) is not "substantially the same" as the content of the Terrestrial Code, and in particular, Chapter 10.4 thereof, within the meaning of Annex B(5) of the SPS Agreement. As the conditions specified in the *chapeau* of Annex B(5) are satisfied, we proceed to examine whether India has acted inconsistently with Annex B(5)(a) through (d).

[1293] United States' second written submission, para. 123.
[1294] India's response to Panel question No. 53.
[1295] India's response to Panel question No. 53.
[1296] Appellate Body Report, *Turkey – Textiles*, para. 50.
[1297] Appellate Body Report, *Turkey – Textiles*, para. 50.

7.10.2.6.3 Whether India acted inconsistently with Annex B(5)(a)

7.783. The United States claims that India acted inconsistently with Annex B(5)(a) of the SPS Agreement because India failed to publish a notice of a proposed regulation at an early stage so as to enable Members to become acquainted with the proposal.[1298]

7.784. India does not contest that it has not published a notice about S.O. 1663(E) "at an early stage", when it was proposed, contrary to the requirement of Annex B(5)(a). Accordingly, in the absence of the evidence to the contrary from India, the Panel finds that India acted inconsistently with Annex B(5)(a) of the SPS Agreement because it failed to publish a notice "at an early stage" about the "proposed" S.O. 1663(E).

7.10.2.6.4 Whether India acted inconsistently with Annex B(5)(b)

7.785. The United States claims that India acted inconsistently with Annex B(5)(b) because it has "habitually" notified its AI measures "after they have gone into effect and without any indication of their objective or rationale".[1299]

7.786. Annex B(5)(b) of the SPS Agreement requires WTO Members to notify other Members, through the WTO Secretariat, "of the products to be covered by the measures together with a brief indication of the objective and rationale of the proposed regulation". Annex B(5)(b) further provides that "[s]uch notification shall take place at an early stage, when amendments can still be introduced and comments taken into account".

7.787. The United States argues that the language of Annex B(5)(b), namely the requirement that notifications occur "when amendments can still be introduced", as well as the reference to provision of information about the "proposed regulation", and use of the future tense in requiring notification of the products "to be covered", clearly indicates that the notification must occur before the measure takes effect.[1300]

7.788. As discussed in paragraph 7.746 above, we agree with the United States that Annex B(5)(b) concerns the notification of a "proposed" regulation and thus notification must occur at least before that regulation enters into force, so that amendments can still be introduced and comments taken into account. We note that the SPS Committee's Transparency Procedures[1301] support our understanding that the notification obligation in Annex B(5)(b) concerns proposed regulations, as it recommends that the notification takes place once a draft of the complete text of a regulation is available. These procedures also recommend allowing a 60-day comment period that starts on the date the notification is circulated to Members.[1302]

7.789. We observe that India did notify S.O. 1663(E) to the WTO Secretariat on 7 October 2011.[1303] India's notification was circulated by the Secretariat to WTO Members on 11 October 2011.[1304] This notification occurred well after S.O. 1663(E) entered into force on 19 July 2011. Therefore, the notification did not concern a "proposed" SPS regulation; rather, it concerned a regulation already in force.

7.790. Accordingly, in the absence of evidence to the contrary provided by India, the Panel finds that India acted inconsistently with Annex B(5)(b) of the SPS Agreement because it failed to notify other Members through the WTO Secretariat, "at an early stage", of the "proposed" S.O. 1663(E).

[1298] United States' first written submission, para. 199.
[1299] United States' first written submission, para. 194.
[1300] United States' first written submission, para. 192.
[1301] G/SPS/7/Rev.3, para. 2.
[1302] G/SPS/7/Rev.3, para. 13. The WTO Secretariat's Annual Overview of the Implementation of the Transparency Provisions of the SPS Agreement from 20 October 2013 contains an analysis of the notifications issued during the period from 15 September 2012 until 15 September 2013. During this period, 76% of regular (i.e. non-emergency) notifications provided a comment period. G/SPS/GEN/804/Rev.6, para. 3.26.
[1303] Section 2.4.1 above.
[1304] G/SPS/N/IND/73.

7.10.2.6.5 Whether India acted inconsistently with Annex B(5)(c)

7.791. In its panel request, the United States claimed that India acted inconsistently with Annex B(5)(a) to (5)(d) because it failed to, inter alia, identify the parts of its AI measures which, in substance, deviate from international standards, guidelines or recommendations.[1305] We note, however, that the United States has not submitted any arguments on its claim under Annex B(5)(c) in any of its written or oral submissions. When asked by the Panel whether it was pursuing this claim, the United States responded that it has not separately articulated a breach by India of Annex B(5)(c) in its submissions because India's breaches of Annex B(5)(a) and (b) left the United States unaware of India's AI measures until they became final, thereby preventing the United States from requesting copies of them when they remained in non-final form.[1306] India responded that its AI measures conform to the Terrestrial Code.[1307]

7.792. In the absence of argumentation, the Panel concludes that the United States failed to make a *prima facie* case of violation of Annex B(5)(c) by India. Accordingly, the Panel declines to make a finding with respect to the Unites States' claim pursuant to Annex B(5)(c).

7.10.2.6.6 Whether India acted inconsistently with Annex B(5)(d)

7.793. The United States claims that, because India did not publish a notice of any proposed regulation for any of its AI measures, India did not allow a reasonable time for comments and thus acted inconsistently with Annex B(5)(d).[1308] The United States also points out that provisions of Annex B(5)(d) appear to be closely related to Annex B(5)(a), as the requirement concerning the early stage of publication serves to enable Members to offer the comments envisioned in Annex B(5)(d).[1309]

7.794. Pursuant to Annex B(5)(d) of the SPS Agreement, Members, with respect to their proposed SPS regulations, shall "without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account".[1310]

7.795. We note that the panel in *EC – Approval and Marketing of Biotech Products* considered that the requirements of paragraph (d) of Annex B(5) are closely related to other paragraphs of Annex B(5). In particular, the panel reasoned that when a proposed regulation has not been published at an early stage, as required in Annex B(5)(a) and brought to the attention of other Members through the notification required in Annex B(5)(b), and copies provided upon request as established in Annex B(5)(c), "it is difficult to imagine how an interested Member would gain sufficient knowledge of the content of the proposed regulation to be able to avail itself of the opportunity to submit comments as foreseen in [Annex B(5)(d)]".[1311] We concur with this understanding. Indeed, as we have found above, India did not publish a notice "at an early stage" about S.O. 1663(E) when this measure was at the proposal stage. Furthermore, India did not notify other Members through the WTO Secretariat, "at an early stage", of S.O. 1663(E) when this measure was at the proposal stage. Accordingly, we find it difficult to imagine how the United States would gain sufficient knowledge of the content of the proposed S.O. 1663(E) to be able to avail itself of the opportunity to submit comments as foreseen in Annex B(5)(d).

7.796. Accordingly, and in the absence of evidence to the contrary provided by India, the Panel finds that India acted inconsistently with Annex B(5)(d) of the SPS Agreement because it has not allowed "reasonable time" for other Members to make comments on the "proposed" S.O. 1663(E).

[1305] United States' request for the establishment of a panel, p. 3.
[1306] United States' response to Panel question No. 49.
[1307] India's first written submission, para. 276.
[1308] United States' first written submission, para. 196.
[1309] United States' first written submission, para. 196.
[1310] The SPS Committee's Transparency Procedures recommend that Members should normally allow a period of at least 60 calendar days for comments, except proposed measures that facilitate trade and those which are substantially the same as an international standard, guideline or recommendation. G/SPS/7/Rev.3, para. 13.
[1311] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47.

7.10.2.7 Whether India acted inconsistently with Article 7

7.797. We recall that, in paragraph 7.741 above, we concluded that an inconsistency with the provisions of Annex B results in an inconsistency with Article 7. Having found that India acted inconsistently with the provisions of Annex B(2) and Annex B(5)(a), (b) and (d), we also find that India acted inconsistently with Article 7.

7.10.3 Conclusions on the United States' claims pursuant to Article 7 and Annex B

7.798. The Panel therefore finds that:

a. India acted inconsistently with Annex B(2) of the SPS Agreement because it failed to allow a reasonable interval between the publication of S.O. 1663(E) and its entry into force;

b. India acted inconsistently with Annex B(5)(a) of the SPS Agreement because it failed to publish a notice "at an early stage" about the "proposed" S.O. 1663(E);

c. India acted inconsistently with Annex B(5)(b) of the SPS Agreement because it failed to notify other Members through the WTO Secretariat, "at an early stage", of the "proposed" S.O. 1663(E);

d. India acted inconsistently with Annex B(5)(d) of the SPS Agreement because it did not allow "reasonable time" for other Members to make comments on the "proposed" S.O. 1663(E).

7.799. The Panel also finds that India cannot rely upon Annex B(6) of the SPS Agreement to justify omitting steps enumerated in Annex B(5). The Panel further declines to rule on the Unites States' claim pursuant to Annex B(5)(c).

7.800. Finally, having found that India acted inconsistently with Annex B(2) and Annex B(5)(a), (b) and (d), we also find that India acted inconsistently with Article 7 of the SPS Agreement.

7.11 Whether India's measures are inconsistent with Article XI of the GATT 1994

7.11.1 Arguments of the parties

7.11.1.1 United States

7.801. The United States argues that India has breached Article XI of the GATT 1994 because its measures constitute import prohibitions or restrictions other than duties, taxes, or other charges.[1312] According to the United States, India's measures are clearly import prohibitions and, because they are not justified under the SPS Agreement, they are inconsistent with Article XI of the GATT 1994.[1313]

7.11.1.2 India

7.802. India responds that the conformity of a measure with international standards lends a presumption of consistency of that measure with the SPS Agreement and the GATT 1994. India thus contends that because it has established that its measure conforms to the Terrestrial Code, the measure is presumed to be consistent with the SPS Agreement and the GATT 1994. Hence, it argues, the United States' claim under Article XI of the GATT 1994 "is not sustainable".[1314]

[1312] United States' first written submission, para. 21.
[1313] United States' first written submission, para. 203; United States' second written submission, para. 126.
[1314] India's first written submission, para. 141.

7.11.2 Analysis by the Panel

7.803. We recall our findings above that India's AI measures are inconsistent with Articles 3.1, 5.1, 5.2, 2.2, 2.3, 5.6, 6.1, 6.2, and 7, as well as Annex B(2) and Annex B(5)(a), (b) and (d) of the SPS Agreement. In the light of these findings of inconsistency, we consider it appropriate to exercise judicial economy over the United States' claim under Article XI of the GATT 1994.[1315]

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. As described in greater detail above, the Panel *finds* that:

a. In respect of India's first request for a preliminary ruling:

i. the panel request is sufficiently precise in identifying S.O. 1663(E) as a specific measure at issue as required by Article 6.2 of the DSU, insofar as S.O. 1663(E) prohibits the importation of various agricultural products into India from those countries reporting NAI (both HPNAI and LPNAI);

ii. the listing of the products prohibited by S.O. 1663(E) in paragraph 3 of the panel request together with the reference to "these products" immediately following that listing do not suggest that the United States intended to limit its challenge to those products;

iii. the word "orders" included in the panel request does not render the panel request inconsistent with the specificity requirement of Article 6.2 of the DSU, and it does not prejudice the ability of India to defend itself;

iv. under the circumstances, there can be no uncertainty on India's part as to whether the United States is challenging measures that were not in force as of the date of the panel request. The United States is challenging only the measures that were in force as of the date of the panel request, namely 11 May 2012; and

v. the panel request did not fail to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the claims under Articles 2.3, 5.5 and 5.6 of the SPS Agreement.

b. In respect of India's second request for a preliminary ruling:

i. the NAP 2012, being a measure that applies only to India's domestic agricultural products, falls outside the previously delimited scope of "India's [AI] measures [that] prohibit the importation of various agricultural products into India from those countries reporting NAI", and, therefore, is not a measure at issue in this dispute within the meaning of Article 6.2 of the DSU;

ii. the health certificates that accompany a SIP and that are issued pursuant to S.O. 655(E) are not "related to" or "implementing" the import prohibition reflected in S.O. 1663(E) and, therefore, are not measures at issue in this dispute;

iii. the health certificates that accompany a SIP and that are issued pursuant to S.O. 655(E) do not qualify as "orders issued by [the DAHD] pursuant to the Livestock Act" within the meaning of the panel request and, therefore, are not measures at issue in this dispute;

iv. having plainly connected Article 2.3 and India's AI measures, the United States was not under an additional obligation to identify the NAP 2012 in its panel request and

[1315] We note that this approach has also been adopted by previous panels when addressing a claim under the GATT 1994, having already made a finding of inconsistency with provisions of the SPS Agreement. For example, Panel Reports, *EC – Hormones (US)*, para. 8.272; *EC – Hormones (Canada)*, para. 8.275; *Australia – Salmon*, para. 8.185; *Japan – Apples*, para. 8.328; and *EC – Approval and Marketing of Biotech Products*, paras. 7.3422 and 7.3429.

thus India's request that the United States' claim under Article 2.3 of the SPS Agreement be set aside as outside the jurisdiction of the Panel is denied.

c. In respect of the United States' claims pursuant to the SPS Agreement:

i. India's AI measures are SPS measures subject to the disciplines of the SPS Agreement;

ii. India's AI measures are inconsistent with Article 3.1 of the SPS Agreement because they are not "based on" the relevant international standard, the Terrestrial Code, and, in particular, Chapter 10.4 thereof. India is not entitled to benefit from the presumption of consistency of its AI measures with the other relevant provisions of the SPS Agreement and of the GATT 1994 because India's AI measures do not "conform to" the Terrestrial Code, and, in particular, Chapter 10.4 thereof, within the meaning of Article 3.2 of the SPS Agreement;

iii. India's AI measures are inconsistent with Article 5.1 of the SPS Agreement because they are not based on a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations;

iv. India's AI measures are inconsistent with Article 5.2 of the SPS Agreement because they are not based on a risk assessment that takes into account the factors set forth in Article 5.2;

v. In the light of our findings of inconsistency with Articles 5.1 and 5.2 of the SPS Agreement, India's AI measures are also inconsistent with Article 2.2 of the SPS Agreement because they are not based on scientific principles and are maintained without sufficient scientific evidence;

vi. India's AI measures are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail. India's AI measures are also inconsistent with Article 2.3, second sentence, of the SPS Agreement because they are applied in a manner which constitutes a disguised restriction on international trade;

vii. India's AI measures are inconsistent with Article 5.6 of the SPS Agreement because they are significantly more trade-restrictive than required to achieve India's ALOP, with respect to the products covered by Chapter 10.4 of the Terrestrial Code;

viii. Having found that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement, India's AI measures are consequentially inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect human and animal life or health;

ix. India's AI measures are inconsistent with Article 6.2, first sentence, of the SPS Agreement because they fail to recognize the concepts of disease-free areas and areas of low disease prevalence. Consequentially, India's AI measures are also inconsistent with Article 6.2, second sentence, of the SPS Agreement because the failure to recognize the concepts of disease-free areas and areas of low disease prevalence renders impossible a determination of such areas based on the factors enumerated in Article 6.2, second sentence;

x. Having found that India's AI measures fail to recognize the concepts of disease-free areas and areas of low disease prevalence, India's AI measures are inconsistent with Article 6.1, first sentence, of the SPS Agreement because they are therefore not adapted to the SPS characteristics of the areas from which products originate and to which they are destined. Having found that India's AI measures are inconsistent with Article 6.1, first sentence, and that India has not undertaken the assessment envisaged by Article 6.1, second sentence, India's AI measures are also inconsistent

with Article 6.1, second sentence, of the SPS Agreement because India has not taken into account factors including those specified in Article 6.1, second sentence.

xi. India acted inconsistently with Annex B(2) of the SPS Agreement because it failed to allow a reasonable interval between the publication of S.O. 1663(E) and its entry into force;

xii. India cannot rely upon Annex B(6) of the SPS Agreement to justify omitting steps enumerated in Annex B(5) of the SPS Agreement because the condition prescribed in the *chapeau* of Annex B(6) was not present with respect to S.O. 1663(E) at the time of its proposal;

xiii. India acted inconsistently with Annex B(5)(a) of the SPS Agreement because it failed to publish a notice "at an early stage" about the "proposed" S.O. 1663(E);

xiv. India acted inconsistently with Annex B(5)(b) of the SPS Agreement because it failed to notify other Members through the WTO Secretariat, "at an early stage", of the "proposed" S.O. 1663(E);

xv. India acted inconsistently with Annex B(5)(d) of the SPS Agreement because it did not allow "reasonable time" for other Members to make comments on the "proposed" S.O. 1663(E);

xvi. Having found that India acted inconsistently with Annex B(2) and Annex B(5)(a), (b) and (d), India also acted inconsistently with Article 7 of the SPS Agreement.

8.2. Having found that India's AI measures are inconsistent with Article 2.3 of the SPS Agreement, the Panel *declines to rule* on the United States' alternative claim under Article 5.5 of the SPS Agreement.

8.3. The Panel also *declines to rule* on the Unites States' claim pursuant to Annex B(5)(c) of the SPS Agreement because the United States failed to make a *prima facie* case of violation thereof.

8.4. Having found that India's AI measures are inconsistent with Articles 3.1, 5.1, 5.2, 2.2, 2.3, 5.6, 6.1, 6.2, and 7 as well as Annex B(2) and Annex B(5)(a), (b) and (d) of the SPS Agreement, the Panel further *declines to rule* on the United States' claim under Article XI of the GATT 1994.

8.5. Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that India has acted inconsistently with the specified provisions of the SPS Agreement, it has nullified or impaired benefits accruing to the United States under that agreement.

8.6. Pursuant to Article 19.1 of the DSU, having found that India acted inconsistently with its obligations under Articles 3.1, 5.1, 5.2, 2.2, 2.3, 5.6, 6.1, 6.2 and 7, as well as Annex B(2) and Annex B(5)(a), (b) and (d) of the SPS Agreement, we recommend that the DSB request India to bring its measures into conformity with its obligations under the SPS Agreement.

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WORLD TRADE ORGANIZATION

WT/DS430/R/Add.1

14 October 2014

(14-5753)

Original: English

INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS430/R.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES FOR THE PANEL

Adopted on 15 March 2013

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Upon indication from any party, at the latest on the first substantive meeting, that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel shall, after consultation with the parties, decide whether to adopt appropriate additional procedures. Exceptions to this procedure shall be granted upon a showing of good cause.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, India shall submit its response to the request in its first written submission. If India requests such a ruling, the United States shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel

shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised in writing as promptly as possible. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.30 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite India to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall have an opportunity to orally answer these questions. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask India if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite India to present its opening statement, followed by the United States. If India chooses not to avail itself of that right, the Panel shall invite the

United States to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall have an opportunity to answer orally these questions. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.30 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies to the interpreters. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.30 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions within a deadline to be determined by the Panel.

d. The Panel may subsequently pose questions either orally or in writing to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Panel consultation with experts

19. In the course of the proceedings, the Panel shall determine if there is a need to seek expert advice. In addressing matters concerning scientific and/or technical advice from experts[1], the Panel shall have regard to the provisions of the DSU and may have regard, *inter alia*, to the objective of conducting these proceedings in an efficient and timely manner and at a reasonable cost. In such a case, the procedures described below shall apply.

20. Consistent with Article 13 of the DSU and Article 11.2 of the SPS Agreement, the Panel may seek expert advice from experts and from international organizations, as appropriate.

21. The Panel may ask any relevant institutions, as well as the parties, for suggestions of possible experts. Parties shall not engage in direct contact with the individuals suggested, for the purpose of this dispute.

22. The Panel shall provide the parties with a list of possible experts, their *curricula vitae* and declarations of potential conflicts of interest. In this declaration, each potential expert will be instructed to disclose information which may include the following:

a. financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;

b. professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);

c. other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);

d. considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);

e. employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members); and

f. any other relevant information.

23. Parties shall have the opportunity to comment and to make known any compelling objections to any particular expert.

24. The Panel shall select the experts on the basis of their qualifications and the need for specialized scientific expertise, and shall not select experts who have declared a conflict of interest. The Panel shall decide the number of experts in light of the number and type of issues on which advice shall be sought, as well as of the different areas on which each expert can provide expertise.

25. The Panel shall inform the parties of the experts and international organizations it has decided to consult, in accordance with the timetable adopted by the Panel. Experts shall act in their personal capacities and not as representatives of any entity. However, should the Panel seek advice from an international organization, the advice received shall be deemed to be received from the international organization and not the individual staff members or representatives of the international organization. Moreover, any staff members of such international organization that attend a meeting with the Panel, shall be deemed to do so in a representative capacity, on behalf of the respective international organization.

[1] For the purpose of these Working Procedures, the term "expert" may be used to refer to individuals, institutions, research bodies, or international organizations.

26. The experts shall be subject to the DSB's Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1), a copy of which shall be provided to them by the Panel.

27. The Panel shall prepare written questions for the experts. The experts shall be requested to provide responses in writing within a time-period specified by the Panel. The experts shall be requested to respond only to questions on which they have sufficient knowledge. The responses of experts shall be part of the Panel's record but shall not be attached to the Panel report as annexes. Copies of the responses shall be provided by the Panel to the parties, in accordance with the timetable adopted by the Panel. The parties shall have the opportunity to comment in writing on the responses from the experts and to pose written questions to the experts in advance of the meeting, to be answered orally during such meeting.

28. The Panel may provide the experts, on a confidential basis, with relevant parts of the parties' submissions, including exhibits, as well as with any additional information deemed necessary. The experts shall have the opportunity to request, through the Panel, additional factual information or clarifications from the parties, if it shall aid them in answering the Panel's questions.

29. The Panel may schedule a meeting with the experts, prior to the second substantive meeting with the parties. Prior to the Panel's meeting with the experts, the Panel shall ensure that:

a. the parties' comments on the experts' responses are provided to all experts;

b. each expert is provided with the other experts' responses to the Panel's questions; and

c. each expert is provided with advance questions from the parties to the experts, as described in paragraph 30.b below, if any.

30. The Panel's meeting with the experts would be conducted as follows:

a. The Panel shall invite each expert to make an opening statement. This statement may include, but is not limited to, any clarification of their written responses to the Panel questions requested by the Panel or the parties, or information complementary to these responses. The experts that intend to make an opening statement shall provide the Panel with written versions of their statements, before they take the floor. The Panel shall make available, to the other experts, and to the parties, each expert's written statement, no later than 5.30 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the experts questions or make comments through the Panel. To facilitate this, each party may send in writing in advance of the meeting, within a timeframe to be determined by the Panel, any questions to the experts to which it wishes to receive an oral response at the Panel's meeting with the experts. Each expert shall be invited to respond orally to the parties' questions and to react to the parties' comments.

c. The Panel may subsequently pose questions to the experts. The expert to whom the question is addressed shall be invited to respond orally to the Panel's questions.

d. Once the questioning has concluded, the Panel shall afford each expert an opportunity to present a brief closing statement.

e. The Panel may schedule additional meetings with the experts if necessary.

31. The Secretariat shall prepare a compilation of the experts' written replies to the Panel's questions, as well as a full transcript of any meeting with the experts for inclusion in the record of the Panel proceeding. This transcript shall not be annexed to the Panel report. The experts shall be given an opportunity to verify, before the texts are finalized, the drafts of these texts to ensure that they accurately reflect the information they provided. The parties shall likewise be given an opportunity to verify that the transcript of any meeting with the experts accurately reflects the parties' own interventions.

Descriptive part

32. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

33. Each party shall submit an executive summary of its arguments as presented in its written submissions and oral statements. The parties shall submit the executive summaries of their written submissions at the latest 10 calendar days following the delivery to the Panel of the written submission. The parties shall submit the executive summaries of their oral statements, at the latest 10 calendar days following the deadline for submission of responses to questions from the Panel. The parties may also include their responses to questions in their executive summaries. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions. The total number of pages of the executive summaries, all four parts combined, shall not exceed 30 pages. Parties can request permission to file longer summaries upon showing of good cause.

34. The third parties shall submit executive summaries of their written submissions and oral statements within 7 calendar days from the date of the third-party session. The summary to be provided by each third party shall incorporate its written submissions and oral statement and shall not exceed 5 pages in total.

Interim review

35. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

36. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

37. The interim report shall be kept strictly confidential and shall not be disclosed.

Service of documents

38. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 6 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 4 CD-ROMS/DVDs and 6 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****@wto.org, and cc'd to *****.*****@wto.org, *****.*****@wto.org, *****.*****@wto.org, and*****.*****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance

of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.30 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES FOR THE PROTECTION OF STRICTLY CONFIDENTIAL INFORMATION

1. Pursuant to paragraph 3 of the Panel's Working Procedures adopted on 15 March 2013, the Panel adopts the following additional procedures that shall apply to all strictly confidential information (SCI) submitted in the course of these proceedings. These procedures are intended to supplement but not replace the provisions of Article 18.2 of the DSU and paragraph 2 of the Panel's Working Procedures.

2. These procedures apply to any SCI, defined as information (i) not otherwise available in the public domain, and (ii) clearly designated as SCI by the United States or India in their submissions to the Panel.

3. A party submitting SCI in any written submission (including in any exhibits) shall inform the Panel and the other party (and the third parties where applicable) of precisely which information the party is designating as SCI by enclosing the information in double brackets and including on the cover page and each page of the relevant document the statement: "Contains SCI". In the event that an entire exhibit is designated as SCI, the party submitting such exhibit shall clarify this by including the following statement on the cover page: "This Exhibit is SCI". The Panel will not disclose in its Report any information designated as SCI under these procedures. The Panel may, however, make statements or conclusions based on such information.

4. Before the Panel circulates its Report to Members, the Panel shall give each party an opportunity to ensure that the Report does not contain any information that it has designated as SCI. The removal of any designated SCI by the Panel will be indicated in the Report through the use of double brackets.

5. Each party and third party shall keep confidential SCI submitted by another party or third party and shall use such SCI only for purposes of the current proceeding or future proceedings under the DSU with respect to *India – Measures Concerning the Importation of Certain Agricultural Products* (DS430).

6. Submissions and exhibits containing information designated as SCI under these procedures will be included in the Panel record forwarded to the Appellate Body in the event of an appeal.

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ANNEX B

ARGUMENTS OF THE PARTIES

UNITED STATES

INDIA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. A fundamental requirement of the SPS Agreement is that a Member's SPS measures be based on scientific principles and scientific evidence. A Member generally complies with these obligations by basing its measures either on relevant international standards, guidelines, or recommendations, or on a risk assessment. With respect to the measures at issue here – measures that have been in place for over six years – India has done neither.

2. India's measures prohibit the importation of various agricultural products from countries that report outbreaks in poultry and wild birds of what is known as NAI, including a subset known as LPNAI. The OIE, the organization whose standards, guidelines and recommendations the SPS Agreement designates as the international standards, guidelines and recommendations for animal health and zoonoses, has issued recommendations for reporting NAI and for the safe trade of poultry and poultry products with respect to NAI. Those scientifically based recommendations explicitly disclaim the types of import prohibitions India maintains.

3. Moreover, India treats its *own products* differently from imported products. India does not engage in surveillance activities that are likely to detect LPNAI, a disease, which if found in other countries, triggers application of its import prohibitions. India also does not impose any comparable restrictions on the internal movement of the products that it prohibits for import.

4. In sum, India has failed to comply with the most basic obligations in the SPS Agreement, and no detailed scientific analysis is required to reach this conclusion.

II. SUMMARY OF ARGUMENTS

5. This dispute can be distilled to a few central facts that clearly establish India's breaches of its WTO obligations. Specifically, there are facts that establish that India needed to undertake a risk assessment and failed to do so; that India's measures hold the exports of other Members to severe requirements that India's own products can ignore; and that India was obligated to notify its measures and allow a reasonable interval before putting them in force, but did not do so.

III. BIOLOGY OF AVIAN INFLUENZA

6. AI does not refer to a single or homogenous disease, but rather different diseases caused by an assortment of different viruses. Some variants of AI viruses cause HPAI, a highly contagious disease that can decimate poultry flocks. There is also LPAI, a much milder, often asymptomatic disease in poultry. Most AI strains do not affect humans because they do not readily transmit to humans. Human infection has typically occurred in circumstances involving the close handling and contact of infected birds.

7. With respect to the parties' AI situations, the United States has detected LPNAI – H5 and H7 subtypes of LPAI – in poultry. India, however, has not notified a single outbreak of LPNAI. In contrast, India has detected over 90 outbreaks of HPAI during a period in which the United States has had no HPAI outbreaks.

IV. INTERNATIONAL STANDARDS FOR AVIAN INFLUENZA CONTROL

8. The OIE Code sets forth recommendations for the control of AI. These recommendations recognize distinctions between HPAI and LPAI and that control measures will need to be tailored to the specific product at issue. Of particular note, the OIE Code explicitly provides that most of the products that India prohibits from import, such as poultry meat and eggs, can be safely imported from territories reporting LPNAI through the use of the proper control measures.

9. The OIE Code's system for the control of AI can be roughly divided into five components for the purpose of this dispute: (i) proper reporting; (ii) classifying a territory; (iii) applying the appropriate control measure based on the classification of that territory; (iv) zoning to ensure the impact of restrictions is appropriately tailored; and (v) surveillance. The fifth component is essential to ensuring the prior four mechanisms function properly.

10. When it comes to its own exports, India invokes the OIE Code to justify their safety. First, after it has suffered an outbreak of HPAI, India routinely argues that it has regained NAI freedom. Second, India recognizes compartments within its own territory that it holds out as being entitled to take advantage of the OIE's recommendations regarding zoning.

V. INDIA'S MEASURES

11. In the fall of 2006 – without prior warning – India proceeded to prohibit the import of various U.S. poultry and pork products. On February 2, 2007, months after U.S. imports have been subject to import prohibitions, India finally published a document in the Gazette of India Extraordinary, S.O. 102(E), which reflected the measures prohibiting U.S. imports on account of LPAI. Other notifications subsequently followed. The most recent notification issued by India's DAHD is S.O. 1663(E). Unlike prior DAHD notifications, it has no set expiration date. These notifications are issued pursuant to the India' Livestock Importation Act, 1898 (9 of 1898).

12. Before initiating this dispute, the United States made every reasonable effort to resolve its concerns. In addition to bilateral talks, discussions in the SPS Committee, and offers for technical discussions, the United States also asked India to provide an explanation as the reasoning behind its measures pursuant to SPS Article 5.8. Over 14 months have passed since this request, yet India has not provided the requested explanations.

VI. INDIA'S INTERNAL AVIAN INFLUENZA CONTROL MEASURES

13. India's surveillance and control policies for AI are set forth in DAHD's AI Action Plan. This plan does not mandate surveillance necessary for effective detection of LPNAI, resulting in a failure to apply any controls on the movement of products due to LPNAI in India. Moreover, India's AI Action Plan only imposes control measures that extend a few kilometers from the site of an HPAI outbreak. Accordingly, occurrences of NAI in India will not result in restrictions on the movement of domestic products within India provided the products come from locations outside of the small zone where these control measures are applied.

VII. STANDARD OF REVIEW

14. DSU Article 11 provides that a panel should "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Further, since there is no risk assessment in this dispute, there is also no scientific evidence needing scrutiny with expert assistance.

VIII. LEGAL CLAIMS

A. India's Measures Are Subject To The SPS Agreement

15. Because India's measures are sanitary measures as defined under Annex A of the SPS Agreement (their objectives include those provided for in subparagraphs (a) through (c)), and because the measures affect international trade by imposing import prohibitions, the measures are subject to review for consistency with the SPS Agreement.

B. India Breached Articles 5.1, 5.2, And 2.2 Of The SPS Agreement By Failing To Undertake A Risk Assessment And Failing to Consider The Relevant Scientific Evidence

16. Because India has stated that its measures were adopted to address risks associated with both diseases and food safety, the SPS Agreement obliges India to base its measures on both types of risk assessment – a Pest Risk Assessment and a Food Safety Risk Assessment. India has done neither. The United States has requested for India to provide a risk assessment without any

success. As India's measures are not based on a risk assessment, India is in breach of SPS Article 5.1. Additionally, without a risk assessment, India could not have taken into account the factors noted in SPS Article 5.2, thereby breaching that provision as well.

17. With respect to the document that India provided at the October 2010 meeting of the SPS Committee – which India subsequently disavowed as a risk assessment – it does not constitute a Pest Risk Assessment or a Food Safety Risk Assessment either. That document is deficient with respect to all of the elements required for either assessment.

18. A finding that SPS Article 5.1 or 5.2 has been breached results in a violation of Article 2.2. Therefore, in the absence of *any* risk assessment, and, thus, in the absence of sufficient scientific evidence, supporting India's measures, India also breaches Article 2.2. India's ban on the identified avian products, moreover, is not maintained with sufficient scientific evidence because there is no scientific evidence that these products may not be safely traded under any circumstances. To the contrary, the scientific evidence establishes that LPAI virus is not present in poultry meat or inside eggs and thus LPAI cannot be transmitted through these products.

19. The United States notes that India may not invoke SPS Article 5.7 to avoid its obligations under Articles 5.1 and 5.2. Although it is India's burden to establish such a defense, the facts here are sufficiently defined as to confirm the unavailability of Article 5.7. In particular, relevant scientific evidence exists and it does not support the imposition of import prohibitions.

C. India Breached Article 3.1 By Failing to Base Its Measures on the OIE Code

20. SPS Article 3.1 imposes a positive obligation on a Member to base its measures on international standards unless the Member's measure is justified through another provision of the SPS Agreement. The relevant international standards in this dispute, per Annex A of the SPS Agreement, are those set out in the OIE Code.

21. A defining characteristic of the OIE Code is that it distinguishes between HPNAI and LPNAI with respect to trade. India's measures refuse to make such a distinction and impose a complete ban for certain products regardless of whether the country is reporting HPNAI and LPNAI. In short, the OIE Code allows trade; India's measures do not. Under these circumstances, there can be no dispute that India's measures are not based on the OIE Code.

22. India's failure to abide by Article 3.1 is not excused by Article 3.3. India cannot avail itself of this provision because it lacks a risk assessment. Moreover, India cannot invoke Article 3.3 as a result of its ALOP. Although India has not elucidated its ALOP, it may be possible to infer it from measures India is applying. India does not require surveillance that would effectively detect LPNAI and, even with respect to the more dangerous HPAI, imposes only a simple quarantine zone of a few kilometers. Viewed together with the minimal restrictions on movement of domestic products that India imposes following domestic HPAI outbreaks, it is clear that measures based on the OIE international standard would achieve India's ALOP.

D. India Breached Articles 5.6 and 2.2 By Maintaining Sanitary Measures That Are More Trade Restrictive than Required to Achieve its Appropriate Level of Protection

23. A complainant must establish three cumulative elements for a breach of SPS Article 5.6. First, there must be an alternative measure that "is reasonably available taking into account technical and economic feasibility." Here, the OIE Code provides a reasonably available alternative. Second, the measure must achieve "the Member's appropriate level of sanitary or phytosanitary protection." The OIE Code achieves India's ALOP because some products India prohibits are not vectors for transmission, and in any case, the OIE control measures have proven effective. Also, the OIE Code's provisions for AI containment, and trade in products originating outside the area where AI was detected, through the use of zoning and compartmentalization, is consistent with India's measures with respect to *domestic* products, which impose controls and restrictions on products only within a limited area following an AI outbreak. Third, the measure must be "significantly less restrictive to trade than the SPS measure contested." As the OIE Code allows for trade from countries reporting LPNAI detections and India's measures do not, the OIE Code is less trade restrictive. Thus, all three elements are satisfied.

24. A breach of SPS Article 5.6 may also indicate a breach of Article 2.2. The first component of Article 2.2 is that a measure be "applied only to the extent necessary to protect human, animal or plant life or health …" A finding under Article 5.6 necessitates a determination that a viable alternative measure that achieves a Member's ALOP exists and is less trade restrictive. The existence of such an alternative measure – and the concomitant finding that the Member has declined to adopt it – may lead to the conclusion that a Member has adopted a measure that is applied to a greater extent than necessary and is accordingly inconsistent with Article 2.2.

E. India Has Breached Its Obligations Under Article 6 of the SPS Agreement

25. India's measures ban products from all parts of a country whenever NAI is detected anywhere in the country. This precludes the application of AI restrictions on a regionalized basis, as provided for in the OIE Code, and as required under SPS Article 6.

26. By applying its measures exclusively on a country-basis, India breaches both the first and second sentences of Article 6.1. First, India fails to ensure that its measures are adapted to the sanitary characteristics of the areas from which covered products originate, contrary to the first sentence of Article 6.1. Even if there has been no detection of NAI within thousands of kilometers of the area from which covered products originate, and regardless of how rigorous a country's AI-control mechanisms are, India bans the shipment of those products based on a single detection of NAI anywhere in the country of origin.

27. Second, by applying its measures on a country-basis, India has failed to take into account the considerations specified in the second sentence of Article 6.1. India's measures preclude it from accounting for "the level of prevalence" (*i.e.*, the lack of prevalence) of NAI in areas within a country that are far from a detection. Under its measures, India is also precluded from accounting for "the existence of [disease] eradication or control programmes." Also contrary to the second sentence of Article 6.1, India has not taken into account the relevant international AI guidelines in OIE Code Chapter 10.4, which provide for the application of AI-related trade restrictions at the zone or compartment level when appropriate surveillance, control, and biosecurity measures are in place.

28. India's measures are also contrary to Article 6.2. The first sentence of Article 6.2 requires Members to recognize the concept of disease-free areas. Yet India's measures explicitly preclude recognition of such areas upon notification of a detection of NAI anywhere in the territory of a Member. The second sentence of Article 6.2 requires countries to determine disease-free areas "based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls." By precluding recognition of disease-free areas with respect to AI, India's measures preclude it from determining HPAI-free and LPNAI-free areas based on these factors, contrary to Article 6.2's second sentence.

29. Further, India's country-based application of its measures is contrary to Article 3.1, which provides that "Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3." India's measures are not applied on a zone or compartment basis, as provided for in the OIE Code, and India has no scientific justification for its more-trade-restrictive approach. Further, India's country-based measures cannot be justified by virtue of India's ALOP, which may in the circumstances be inferred from India's measures governing trade in domestic products following domestic AI detections—measures that do not restrict trade in domestic products beyond the ten-kilometer zone surrounding an AI detection.

F. India Has Acted Inconsistently With Its Obligations Under Article 2.3 of the SPS Agreement by Treating Imported Products Differently from Domestic Products Without Justification

30. When it comes to regulating trade in its own products on account of AI, India takes a diametrically different approach from that which it applies to imported products. India's measures therefore serve, not as a buffer against AI, but as a means of arbitrarily or unjustifiably discriminating against imported products and applying a disguised restriction on trade. In so doing, India breaches SPS Article 2.3.

31. India's arbitrary or unjustifiable discrimination against imports, in breach of the first sentence of Article 2.3, takes two key forms. First, India imposes a ban on all imports of covered products from an exporting country whenever there is a notification of AI occurring anywhere in the country. By contrast, when India detects AI within its own borders, it imposes no controls on the movement of these products within its own borders, aside from a ban on the movement of such products to or from a ten kilometer zone surrounding the detection.

32. Second, India bans products from countries that notify detections of LPAI. Yet India has not put in place mechanisms that would provide effective detection of instances of LPNAI within its own territory. As a result, despite having had over ninety outbreaks of the far rarer HPAI since 2006, India has never notified a detection of LPAI. India's reliance on the detection of LPNAI thus only affects imported products. India's measures only serve to block imports from countries that have taken steps necessary to detect LPNAI effectively.

33. India's measures not only run contrary to the anti-discrimination discipline in the first sentence of Article 2.3, but they also constitute a disguised restriction on trade, in breach of the second sentence. Various facts, taken together, establish that India's measures constitute such a disguised restriction, including: India's application of drastically more stringent measures to foreign products than to domestic products; India's shifting position on whether its measures are justified by OIE guidelines or a risk assessment; India's failure to offer either a risk assessment or scientific evidence that would justify LPAI-based import bans or India's application of AI measures to entire countries; and India's aborted attempt to justify its measures by taking analysis from a risk assessment drafted by another country in support of a different conclusion.

G. In the Alternative, India Could be Viewed as Having Breached Its Obligations Under Article 5.5 of the SPS Agreement, with a Resulting Consequential Breach of Article 2.3

34. To the extent that transmission of AI by foreign agricultural products is viewed as a "different situation" than the transmission of AI by India's domestic agricultural products, India is maintaining arbitrary or unjustifiable distinctions in its appropriate levels of sanitary protection in different situations, and these distinctions result in discrimination or a disguised restriction on international trade.

35. As India's AI measures with respect to imported products are far more restrictive than those applied with respect to domestic products, the level of protection that would be inferred from the measures applied to imported products would far exceed that which would be inferred from India's measures for domestic products. Further, the maintenance of different levels of protection based on whether products presenting the same risks are imported or domestic would be unjustifiable. Moreover, in the circumstances here, the measures that India applies to imported products amount to a disguised restriction on trade.

36. Accordingly, if the Panel were to view transmission by way of foreign and domestic products as different situations for purposes of Article 5.5, India's measures would be contrary to Article 5.5. Moreover, as a finding of a breach of Article 5.5 necessarily implies a breach of Article 2.3, first sentence, or Article 2.3, second sentence, then considering transmission by way of foreign and domestic products to be different situations for purposes of Article 5.5 leads to the conclusion that India's measures result in a consequential breach of Article 2.3.

H. India Has Acted Inconsistently With Its Obligations Under SPS Agreement Article 7 and Annex B By Failing to Notify Properly Its AI Restrictions

37. India breached the obligations in SPS Agreement Article 7, and Annex B, paragraphs 2 and 5(a)-(d). India notified S.O. 1663(E) to the WTO almost three months after it took effect, and published S.O. 1663(E) the day it took effect. This prevented other Members from having a meaningful opportunity to provide comments.

I. India Has Breached GATT Article XI

38. India has breached GATT Article XI because India's measures that are inconsistent with the SPS Agreement constitute import prohibitions or restrictions other than duties, taxes, or other changes.

IX. INDIA'S PRELIMINARY RULING REQUEST IS WITHOUT MERIT

39. Contrary to what India argues in its Preliminary Ruling Request, the U.S. Panel Request identifies the measures and claims in accordance with DSU Article 6.2. With respect to measures, it clearly identifies the measures at issue: India's import restrictions imposed on countries because of NAI. It also cites specific legal instruments that reflect these measures, thus providing additional clarification. The United States has done so notwithstanding India's failure to respond to the U.S. request under SPS Article 5.8. With respect to claims, the Panel Request identifies the precise treaty provisions at issue, not simply the parent articles. It also provides a textual explanation after each cited provision as to the nature of the breach. It even previews certain arguments. The Panel Request includes more information about the U.S. claims than is legally required. It provides fair notice to India and other Members of both the specific measures at issue and the legal basis of the complaint.

X. CONCLUSION

40. The United States respectfully requests the Panel to find that India's measures are inconsistent with India's obligations under the GATT 1994 and the SPS Agreement. The United States further requests, pursuant to DSU Article 19.1, that the Panel recommend that India bring its measures into conformity with the GATT 1994 and the SPS Agreement.

ANNEX B-2

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

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. 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.

ANNEX B-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The key issues in this dispute remain straightforward. India prohibits the importation of various agricultural products from countries that report outbreaks of NAI, but has offered no risk assessment in support of its measures. India's response is a contorted and untenable interpretation of the relevant standards in the OIE Code. Contrary to India's arguments, its measures simply ban trade in a situation where the Code provides no basis for a ban. The Panel should thus find India in breach of the WTO obligations at issue in this dispute.

II. LEGAL ARGUMENT

A. India's Measures Do Not Conform To The OIE Code And Therefore Do Not Fall Within Article 3.2 Of The SPS Agreement

2. India's defense is its assertion that its measures conform to the OIE Code. India asserts that the OIE recognizes its prerogative to set its ALOP and has drafted the OIE Code with options that satisfy India's chosen ALOP. But India's measures fundamentally depart from the OIE Code by imposing import prohibitions. With respect to the SPS Agreement, India asserts that it is entitled to a presumption of conformity with its obligations because its measures incorporate those ALOP-consistent aspects of the OIE Code. This assertion is also incorrect.

1. The OIE's Recommendations for Avian Influenza Do Not Reflect Distinct ALOPs

3. The United States notes that India's assertion that the OIE Code seeks to achieve different ALOPs is at odds with the OIE's own guidance regarding the use of the OIE Code contained in the User's Guide. This guidance indicates that (1) the recommendations are designed to prevent the disease from entering into the country and thus to achieve an optimal level of security; (2) the recommendations may take into account the nature of the product, as seen throughout OIE Chapter 10.4 where there are distinct recommendations for different products; and (3) the animal health status of the exporting country may be a factor to be taken into account with respect to the various recommendations, but the exporting country's animal health status is not an ALOP. In short, the recommendations in the OIE Code are designed to achieve a single, consistent ALOP, *i.e.*, *an optimal level of animal health security*.

4. India alleges that the OIE Code (i) recognizes India's prerogative to sets its own ALOP; (ii) that the exporting status of a country is an ALOP; and (iii) the admonition in a particular recommendation, Article 10.4.1.10, *not* to impose import prohibitions in poultry products on account of NAI detections in wild birds somehow also means ban should be undertaken when NAI is detected in poultry. India cannot substantiate any of these allegations.

5. With respect to India's first assertion, the WTO recognizes the rights of Member to set their own ALOP; international organizations do not have that role. Where a Member chooses measures that achieve a higher ALOP than international standards provide, the Member has the obligation to ensure that the measure is supported by scientific evidence. The User's Guide to the OIE Code takes a similar approach. For the second assertion, India does not explain how it can be reconciled with the specific text in the OIE Code. India's so-called condition of entry is not an ALOP, but rather a factor to be taken into account in applying any measure. With respect to India's third assertion, India cannot reconcile its position against the text of Article 10.4.1.10. Moreover, it is also legally untenable for India to pick only certain aspects of OIE recommendations and successfully invoke SPS Article 3.2.

2. India Cannot Conform with the International Standard by Picking and Choosing from Among OIE Recommendations

6. India asserts conformity with the OIE Code on the basis that its measures incorporate some elements of the OIE Code. This argument has no merit. Simply because the Code does not specifically forbid certain aspects of India's measure cannot amount to "conformity": international standards generally recommend control measures, *not* what should be avoided. India – rather than adopting portions of the OIE Code – has measures that explicitly contradict it. Second, the United States does not agree with India's stated legal position regarding the meaning of "conform to international standards" under Article 3.2.

7. India is incorrect in asserting that its measures may "conform" for the purposes of Article 3.2 with the relevant international standard when the measure is not fully consistent with it. The Appellate Body in *EC – Hormones* found that anything less than total adoption precludes the Member from obtaining the rebuttable presumption of consistency under Article 3.2.

8. India's argument that international standards under the SPS Agreement are "recommendatory" and not binding is a *non sequitur*. If a Member chooses not to adopt the international standard, then the Member must comply with all relevant SPS disciplines, including having a risk assessment to justify the measure. Thus, whether or not a measure conforms to the international standard does not determine whether or not the measure may be adopted. Rather, it determines whether a Member must have a scientific basis. India does not argue that its measure is aligned with any particular conduct put forward in the OIE Code, but simply that its measures are not prohibited under the OIE Code. India's position contradicts the Appellate Body's finding in *EC – Hormones*. There are also product specific recommendations for importation in the rest of Chapter 10.4 of the OIE Code that contradict India's measures. India's position erroneously conflates SPS Articles 3.2 and 3.1; a position the Appellate Body has rejected.

9. In claiming consistency with the OIE standard, India also relies on the proposition that India has the sovereign right to decide its ALOP. This is not the issue. The issue is that, where a Member decides to adopt a measure that departs from an international standard (for reason of a higher ALOP or other), it must have a scientific basis. India's position – disparate measures due to differing ALOPs are still in conformity with international standards – finds no support in the SPS Agreement. Indeed, the Appellate Body has found the contrary.

B. India's Measures Breach Article 3.1 Of The SPS Agreement As They Are Not Based On The OIE Code

10. India argues that if the Panel does not find India's measures to conform to international standards under SPS Article 3.2, then it should find that India's measures are based on international standards under SPS Article 3.1. India's assertion that its measures are based on international standards is flawed because India is still not pointing to actual recommendations that its measures embody.

C. India's Failure To Base Its Measures On A Risk Assessment Result In A Breach Of Articles 5.1, 5.2, And 2.2

11. India has urged the Panel to consider two threshold positions in reviewing U.S. claims, neither of which have any merit. First, India urges the Panel to commence its analysis with Article 2.2 and then proceed to Article 5.1 and 5.2. However, any inquiry regarding Article 2.2 will normally examine the obligations in Articles 5.1 and 5.2, because the latter provisions are specific applications of the more general principle elucidated in Article 2.2.

12. Second, India claims it is "apparent" that the United States has limited its challenge under these provisions to fresh meat of poultry and eggs from countries reporting LPNAI. To the contrary, the United States is challenging India's AI measures in their entirety. The Panel has already recognized in its findings on India's First Preliminary Ruling Request that the *measures* at issue are those that constitute and support an import ban of various agricultural products, purportedly on account of NAI. As explained in its response to Panel Question 11(e), India's unsupportable position is premised on the U.S. observation that the Summary Document was inadequate because it only referenced fresh meat and eggs.

13. India's only response to the U.S. claims involving the absence of a risk assessment is that the "non-existence of a risk assessment is of no consequence when India's measure is in conformity with the OIE Code." Accordingly, if – as the record fully supports – the Panel finds that India's measures are not in conformity with the OIE Code, then the United States respectfully request the Panel to find that India's measures are in breach of India's obligations under SPS Articles 5.1, 5.2, and 2.2.

D. India's Failure To Ensure Its Measures Are Maintained With Sufficient Scientific Evidence Results In An Independent Breach Of Article 2.2

14. India's measures breach Article 2.2 because they are maintained without scientific evidence. The measures impose import prohibitions on products that scientific evidence indicates can be safely imported with proper precautions, specifically products from countries reporting only LPNAI.

15. The scientific evidence this U.S. claim draws upon includes the evidence supporting the OIE Code and the studies referenced in the U.S. First Written Submission. In defense, India cites (i) its assertion that its measures conform to international standards; (ii) the purported practice of other countries; (iii) a study by Jacob Post (the "*Post*" Study) (iv) a risk assessment by Australia, (v) a paper by Van den Berg, (vi) a paper by Ziegler, (vii) a paper by Cobb, and (viii) its assertions regarding the import of certain studies submitted by the United States. Not a single one of these authorities even references import prohibitions in connection with LPNAI. To the contrary, some explain that OIE recommendations can mitigate any potential threat. Additionally, the U.S. Article 5.8 Request provides important context. Per the Appellate Body, India's failure to respond creates a presumption that its measures lack scientific support.

E. India's Measures Breach Article 5.6 Because There Are Reasonably Available And Less Trade Restrictive Measures That Satisfy Its ALOP

16. India has breached Article 5.6 because there (1) are reasonably available measures – the OIE Code recommendations – that (2) would achieve India's ALOP since they provides a high level of protection and (3) are less trade restrictive since they allow for trade in instances that India presently prohibits and are applied in a more tailored fashion.

1. India Has Failed to Specify its ALOP – But One Can Be Inferred from its Domestic Measures

17. In evaluating a claim under Article 5.6, the ALOP of the responding Member should be identified. India has not identified a true ALOP. India has described its ALOP alternatively as "to prevent the ingress of LPAI and HPNAI from disease notifying countries through imports of products that are clearly identified as risk factors even by the OIE" or "NAI freedom." Neither are true ALOPs. The first is an objective or characterization of India's measure. The second is the status of an exporting territory under the OIE Code.

18. The United States and the Panel have no option other than to infer an ALOP based on the record evidence in this dispute. India takes exception to examining its domestic measures arguing it, the NAP 2012, is not an SPS measure under the SPS Agreement. The NAP 2012 is a measure that falls squarely within the definition of an SPS measures as set out in paragraph 1 of Annex A and a reliable indicator of India's ALOP with respect to AI. Accordingly, India's ALOP is relatively modest with respect to HPNAI and negligible with respect to LPNAI since surveillance is unlikely to detect it.

2. Measures Based on the OIE Code Would Achieve India's ALOP

19. As explained in the User's Guide to the OIE Code, the OIE's recommendations are "designed to prevent the disease in question being introduced into the importing country" and allow for trade "with an optimal level of animal health security, based on the most up to date scientific information and available techniques." These recommendations accordingly achieve a high ALOP. Indeed, not only would the achieved ALOP be higher than the one inferred from India's domestic measures, it would be high enough to achieve whatever ALOP India could choose from, since it precludes entry of the disease into the importing country.

20. India's response to why the OIE recommendations cannot achieve its ALOP is a *non-sequitur*. Specifically, India claims that the OIE recommends an import ban on a country-wide basis because there are risks such as contamination. To eliminate confusion, the United States has identified the pertinent recommendations in the OIE Code, which show the contrary. India has not asserted that these recommendations would result in entry or establishment of LPNAI.

21. The OIE Code also has recommendations with respect to zoning and compartmentalization. A Member rather than apply its trade measures broadly against a country as a whole can apply them simply to an affected area without unnecessarily disturbing trade elsewhere. India's only response is that it is under no obligation to recognize zones on its own authority. But no one is asking it to do so. India's measures on their face impose country-wide bans rather than considering the possibility of regionalization.

3. The Recommendations in the OIE Code Are Reasonably Available

22. The OIE Code's product specific recommendations are reasonably available. Countries around the world already employ the recommendations to protect themselves from the risks of AI. The OIE Code recommendations present no additional burden upon India. India already requires veterinary certificates for import; the key distinction is what is being attested to.

23. India makes the puzzling assertion that the recommendations in the OIE Code are not reasonably available because it requires India to put its "full faith" on U.S. attestations. As explained in its response to Panel Question 36, the United States is not making such a request. Additionally, India's response to Panel Question 21 notes that India "relies on a country's self-notification to the OIE to ascertain if a country is free of NAI." If India is willing to accept representations from a country that its surveillance has not detected NAI, India cannot contend that attestations in OIE consistent veterinary certificates are somehow less reliable.

24. Zoning and compartmentalization is also reasonably available. Countries around the world practice it. The OIE's recommendations for zoning and compartmentalization recognize that the "exporting country should be able to demonstrate, through detailed documentation provided to the importing country, that it has implemented the recommendations in the Terrestrial Code for establishing and maintaining such a zone or compartment."

4. The Recommendations in the OIE Code Are Less Trade Restrictive

25. India contends that application of the OIE Code's recommendations is not less trade restrictive than India's present measures because the latter may only block trade for 3 months at a time. But prohibiting trade for any period is more trade restrictive than allowing trade. The same principle applies with respect to zoning. It is less trade restrictive to ensure that controls are applied only on the areas where they are necessary rather than on an entire country.

5. India's Breach of Article 5.6 Should Result in a Consequential Breach of Article 2.2

26. India asserts that a breach of Article 5.6 is precluded because it does not reference Article 2.2. This misses the point which is the provisions implicate similar obligations. A measure that is more trade restrictive than necessary to achieve an ALOP under Article 5.6 also implicates the obligation in Article 2.2 to apply measures only to the extent necessary to protect human, animal or plant life or health. Article 5.6 can be a specific application of Article 2.2. The distinction appears to be that Article 2.2's obligation to apply measures to the extent necessary to protect human, animal, or plant life or health may encompass more situations than ALOPs.

27. The facts here support such a finding. Application of the OIE Code will achieve India's ALOP. India does not appear to dispute that its ALOP is with respect to animal health or life. India's measures are thus measures that are applied beyond the extent necessary to protect animal or human health. India's breach of Article 5.6 results in a breach of Article 2.2.

F. India Has Breached Its Obligations Under Article 6 of The SPS Agreement

28. India argues that it had no need to comply with SPS Articles 6.1 and 6.2 because no other Member presented a proposal, and supporting information, for the recognition of specific disease-

free areas. After refusing over many years to apply the principle of regionalization to AI, giving no indication that requests to recognize disease-free areas would be entertained, India cannot rely on the failure of other Members to conclude that "no" really means "yes" and to submit applications that India had made clear it would reject out of hand.

1. Articles 6.1 and 6.2 Impose Obligations that Exist Independently of Any Request to Recognize a Specific Disease-Free Area or Area of Low Disease Prevalence

29. Articles 6.1 and 6.2 impose obligations that exist independently of any request to recognize any specific pest- or disease-free areas. That Article 6.1 requires Members to "ensure that their" SPS measures are adapted to the characteristics of an area, not just to adapt their SPS measures to particular areas, is significant. It requires Members to take measures that account for the fact that different exporting areas may have different characteristics. By failing to "ensure that" a sanitary measure can reflect regional conditions, a Member breaches its obligations independent of whether any Member requested special consideration of the characteristics prevailing in any region or area. The obligation under Article 6.2 likewise applies regardless of whether another Member has ever requested the Member to accept that any particular area is disease-free. Article 6.2 requires recognition of "concepts" – specifically, the "concepts of pest- or disease-free areas and areas of low pest or disease prevalence."

2. India Has Not Been Willing to Adapt Its Measures to the Sanitary Characteristics of Areas From Which Products Originate or to Recognize the Concepts of Disease-Free Areas

30. In this dispute, India has purported to be willing to recognize the "concepts" of disease-free areas with respect to AI, but the statements and conduct of Indian officials over the past seven years belie India's contentions. In 2007, in response to a U.S. proposal for a new veterinary certificate for poultry meat, India informed the United States that the "Indian side would insist on country freedom as the condition is uniform." India's failure to apply its AI measures on a less-than-country-wide basis was raised in meetings of the SPS Committee. India's delegate never indicated that this complaint was ill-founded. At the May 2012 OIE meeting, the Indian delegate criticized the OIE Code's AI chapter, asserting that for India "the concept of zoning looked irrelevant as far as avian influenza was concerned."

31. Despite requests not to apply its measures on a country-wide basis, India repeatedly promulgated new iterations of its measures that on their face applied to products from anywhere in a country reporting NAI. S.O. 1663(E) on its face applies on a country-wide basis. India has continued to require that shipments of products covered by S.O. 1663(E) be accompanied by veterinary certificates with a required attestation about the AI status of the exporting *country*. The text of India's measures thus does not allow for the application of import prohibitions on less than a country-wide basis. And India's responses to requests that it recognize the applicability of the concept of disease-free areas to AI make clear that India is not overlooking the text of its Notifications and applying the concept through some other means.

32. India has claimed that its Livestock Act gives it the power to recognize zones and compartments, pointing to broad provisions that simply delegate to its Central Government the power to "restrict or prohibit … as it may think fit, the import" of livestock and livestock products. These provisions do not modify the measures at issue in the dispute so as to recognize the concept of disease-free areas, nor do they themselves reflect the concept of disease-free areas. The measures at issue here—those found in S.O. 1663(E)—apply on a country basis, and hence are not adapted to the characteristics of the areas from which products originate. The Livestock Act appears to give India the power to promulgate additional measures, and does not undermine the fact that the measures at issue do not meet India's obligations under Article 6.1.

33. That India has not complied with Articles 6.1 and 6.2 is confirmed by its failure to follow the first step outlined by the SPS Committee for consideration of applications to recognize specific areas as disease-free. India has not published information explaining the basis for recognition of disease-free areas with respect to LPNAI or HPAI, a description of any process that would be used to evaluate a request for recognition of such an area, the information that India would need to evaluate such a request, or a contact point for such requests.

34. In combination, the facts that (i) India has never published information explaining the basis for recognition of disease-free areas with respect to LPNAI or HPAI, (ii) in response to requests to regionalize, India has categorically refused, and (iii) India's measures on their face apply to entire countries, make clear that India is in breach of its obligations to "ensure that [its] sanitary … measures are adapted to the sanitary … characteristics of the area … from which [an imported] product originated." Further, India has made clear, including through its responses to trading partners who raised the need for regionalization, that India does not ensure that its measures are adapted to the sanitary characteristics of an area. This is not a situation where a Member has demonstrated that the application of its measures will respond appropriately to any demonstration under Article 6.3.

3. Neither Article 6.1 nor the OIE Code Permits India to Refuse to Apply Its NAI Measures to Areas Smaller Than Countries

35. India suggests that Article 6.1 lets it choose, at its discretion, whether the "area" whose sanitary characteristics a measure is adapted to, will be "all of a country, part of a country, or all or parts of several countries." If Members had unchecked discretion to define the relevant "area" for purposes of determining whether a disease is present, then Article 6 would be meaningless. Rather, Article 6.2 supports the conclusion that an "area" for purposes of Article 6.1 could be defined by a combination of different characteristics, and that to ensure adaptation of measures to the characteristics of the area from which products originate, a Member's measures must allow for the application of requirements or restrictions with respect to areas that are appropriately sized and bounded in light of these characteristics. India's measures do not do so.

36. India also appears to argue that the OIE Code supports requiring that all of an exporting country be free of a disease whenever that disease is not present in the importing country. The OIE Code does not do so. Rather, for each product discussed in the OIE Code Chapter on AI, the recommended import requirements apply either a) "for importation from an HPNAI free country, zone, or compartment," b) "for importation from an NAI free country, zone, or compartment," or c) "[r]egardless of the NAI status of the country of origin." Thus, under the OIE Code, AI-related requirements can be applied on a zone or compartmental basis—and nothing in the Code qualifies this conclusion based on an importing country's disease status.

G. India Has Acted Inconsistently With Its Obligations Under Article 2.3 Of The SPS Agreement By Treating Imported Products Differently From Indian Products Without Justification

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

38. India casts the U.S. discrimination claim as a challenge to its domestic measures. Yet like all claims in this dispute, the claim under Article 2.3 challenges the measures applied to imports. India asserts that the United States suggests "that India apply similar measures in the event of a domestic outbreak of NAI as it does for imports," adding that the U.S. would "essentially require[] India to cull or destroy its entire poultry population and further completely put a stop to poultry trade in the country" in the event of an NAI detection. India thus believes that the domestic measure equivalent to those it applies to imports would be one requiring it "to cull or destroy its entire poultry population and further completely put a stop to poultry trade in the country." India does not do this, and thus by its own account applies less favorable treatment to foreign products than to domestic products.

1. India's LPAI-Based Import Bans are Discriminatory

39. India's measures unjustifiably discriminate against imported products by banning them following detections of LPNAI in the exporting country while India does not even maintain surveillance requirements that would result in reliable detection of LPNAI cases occurring in India's poultry flocks. As one piece of evidence of the deficiency of India's surveillance, the United States highlighted that India has never notified a detection of LPNAI, despite notifying over ninety outbreaks of HPAI in recent years. It is not plausible that, during a period when India had over ninety HPNAI outbreaks, there was no LPNAI in India. India has responded to the U.S. assertions about India's surveillance by arguing that LPNAI is exotic to India. India's evidence does not

demonstrate this. Further, India's imposition of import bans based on LPNAI detections discriminates against imports not because LPNAI has occurred in India, but because India's surveillance for LPNAI is inadequate, resulting in a situation where controls on trade in domestic products due to domestic LPNAI will not be imposed.

40. India advances the hypothesis that South Asia is somehow unique with respect to LPNAI, and that accordingly all HPAI incidents in India resulted from introduction of HPAI into India by migratory birds, not mutations from LPNAI in India. India offered no evidence that this is the case. But, even if it were correct, there is no reason to think the ecology of the region is unique in a way that would lead wild birds to spread HPAI but not H5 or H7 LPAI. As HPAI results from mutations from LPAI, bird migrations that bring into India H5N1 HPAI – the kind of HPAI that India has experienced – are likely to also bring birds exposed to H5 or H7 LPAI. Further, the large number of H5N1 HPAI outbreaks in India's poultry would serve as an indicator of the high level of interaction occurring between wild birds and poultry, and thus of the likelihood of transmission of H5 or H7 LPAI from wild birds to poultry in India—thereby producing LPNAI.

41. The United States has also shown that H5 and H7 AI antigens were detected in domestic ducks in India. The antibodies establish that an infection has at some point been present in the birds. It is unlikely that India would not have detected an H7 HPAI outbreak. It therefore appears that India has experienced H7 LPAI in poultry—a form of LPNAI.

42. India does not dispute that it has no mandatory requirement for the conduct of routine laboratory tests in apparently healthy flocks for LPNAI, even though LPNAI's lack of symptoms makes visual observation inadequate for its detection. India purports to conduct "routine laboratory" surveillance for NAI. But the documents India cites do not demonstrate that India actually conducts routine testing of apparently-healthy flocks for LPNAI, let alone that such testing is conducted nationwide as part of a program or programs under which it is required. Further, India does not dispute that the NAP does not set forth programs under which routine testing of sample birds in apparently healthy flocks is conducted throughout India on a large-scale or systematic basis, let alone required. Indeed, the NAP simply provides that sampling "may" be conducted on flocks, and that routine surveillance should involve virological testing "where possible." The OIE Code supports the inadequacy of India's surveillance. The OIE Code provides that determination of the NAI status of a country, zone, or compartment involves "appropriate surveillance … to demonstrate the presence or absence of infection in the absence of clinical signs in poultry." India has not implemented the kinds of testing necessary for such a demonstration. India's failure to report LPNAI highlights the deficiencies in its surveillance. India, in sum, lacks the ability to reliably detect LPNAI, and this results in a situation where controls on trade in domestic products due to LPNAI are not imposed.

2. India's Unwillingness to Regionalize is Discriminatory

43. India does not dispute that it does not apply movement restrictions on products from more than 10 kilometers from an NAI detection. Rather, India argues that its application of more stringent measures to imports is not discriminatory because India does not know the details of NAI detections in exporting countries or control their disease containment and disinfection methods. Yet India applies import bans categorically to any exporting country when it reports NAI. India's imposition of more restrictive measures to imports is thus unrelated to risk associated with the potential for surveillance or control failures in exporting countries. Lack of knowledge about other countries' response systems and outbreaks cannot logically render non-discriminatory a measure that categorically precludes inquiry into how an exporting country identifies and contains NAI, and whether that identification and containment will be as effective as a response directed by India. India's logic suggests that application of more stringent measures to imported products than to domestic products would never be discriminatory. Underscoring that India's application of AI-based import bans to the entirety of an exporting Member is discriminatory, India believes its trading partners should be willing to apply NAI measures on a less-than-countrywide basis to its exports. India's position is simply that its products are entitled to more advantageous treatment than products from other Members.

3. India Cannot Justify its Discrimination with the Argument that LPNAI is Exotic to India

44. From its contention that LPNAI has not occurred in India, India attempts to argue, not just that its measures are not discriminatory, but also that subjecting imports to AI measures more stringent than those applied to domestic products is justified. This argument lacks merit. As noted, India has had LPNAI. Further, India acknowledges that it has had numerous H5 HPAI outbreaks, and H5 LPNAI and H5 HPAI are the same disease. Moreover, India explains that it worries about LPNAI because it could mutate into HPAI. But India already experiences regular HPAI outbreaks. Additionally, India does not claim that LPNAI is a disease that could not reach its territory in the absence of imports. Rather, India itself believes that it is a country with significant risk for domestic LPNAI incidents and argues that it takes surveillance for LPNAI seriously. In light of that, India cannot plausibly claim that its domestic conditions are so dissimilar from conditions elsewhere that a lack of effective domestic surveillance and application of control measures only within ten kilometers of an outbreak, alongside measures for imports far more stringent than recommended by OIE guidelines, simply reflect differences in disease conditions between India and elsewhere.

45. India has not rebutted the U.S. showing that India's AI measures discriminate against imported products and that the discrimination is arbitrary and unjustified—by differences in conditions between India and elsewhere or by anything else. India's measures accordingly are inconsistent with the first sentence of Article 2.3.

H. India's Measures Constitute A Disguised Restriction On Trade

46. India's measures result in an additional breach of Article 2.3 as they amount to a disguised restriction on trade. Contrary to what India suggests, this claim is about what can be inferred from the totality of the circumstances surrounding India's measures, including the ways that they discriminate against imported products. A variety of considerations surrounding India's measures constitute indicia of a disguised restriction on international trade. These considerations are similar to those that the *Australia – Salmon* panel considered to be "warning signals" and "additional factors" indicating a disguised restriction.

I. If India Were Viewed As Having Different ALOPs For Foreign And Domestic Products, India Would Be In Breach Of Article 5.5 Of The SPS Agreement, With A Resulting Consequential Breach Of Article 2.3

47. If India were considered to have separate ALOPs for imported and domestic products, these would have to be inferred from the measures applied with respect to those products. In its First Written Submission, the United States explained why India's measures with respect to imports are far more trade restrictive than those applied to domestic products as a result of two key contrasts. The reasons why a more stringent ALOP would be inferred from the measures applied to imports than from those applied to domestic products are thus clear.

48. Similarly, the comparability of the different situations at issue in the U.S. claim under Article 5.5 needs no elaboration. They involve trade in the *same* products and control of the *same* diseases. The arbitrariness of application of different ALOPs to different situations based exclusively, as here, on whether the otherwise identical products involved are imported or domestic likewise needs no elaborate proof. Moreover, the United States has established that India's measures cause discrimination and amount to a disguised restriction on international trade, satisfying the third element of a claim under Article 5.5. In sum, to the extent that transmission of NAI through imports and through domestic products are viewed as distinct situations for which India maintains separate ALOPs, then India is in breach of Article 5.5—with a resulting consequential breach of Article 2.3.

J. India Cannot Excuse Its Failure To Comply With Article 7 And Annex B

49. India's only response to the claims under Article 7 and Annex B is that its measures conform to international standards. However, India's measures are fundamentally in contradiction to, and not at all the same as, the relevant international standards.

K. India Has Breached Article XI of the GATT 1994

50. India's measures are not in conformity with the relevant provisions of the SPS Agreement, and India has suggested no other reason why its measures might be consistent with GATT Article XI. India's measures place India in breach of GATT Article XI:1.

III. CONCLUSION

51. The United States respectfully requests the Panel to find that India's measures are inconsistent with India's obligations under the GATT 1994 and the SPS Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with the GATT 1994 and the SPS Agreement.

ANNEX B-4

EXECUTIVE SUMMARY OF THE OPENING STATEMENT
OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

I. INTRODUCTION

1. The United States would recall that in its first written submission, we provided extensive record evidence concerning the proper interpretation of the OIE Terrestrial Animal Health Code ("OIE Code" or "Code"), and the inadequacy of India's domestic surveillance program. This evidence includes:

– *With respect to the OIE Code*: the text of the OIE Code, reports from the OIE Terrestrial Animal Health Standards Commission, the OIE User's Guide, and statements by an OIE representative and other commentators; and

– *With respect to India's surveillance*: India's National Action Plan ("NAP") for avian influenza; and the OIE Code provisions on surveillance and the scientific authorities and methodologies that were compiled and applied by two veterinary epidemiologists.

2. The input from the OIE and the individual experts provides further support that this record evidence establishes the following points:

– *First*, the OIE Code does not recommend import prohibitions in response to a notification of notifiable avian influenza, including low pathogenic notifiable avian influenza ("LPNAI") – instead it provides that products India bans can be safely imported from countries or zones even if they are reporting LPNAI outbreaks;

– *Second*, the recommendations in the OIE Code can be applied on a regional basis – which is another reason why mandatory country-wide prohibitions are not in accord with the OIE Code; and

– *Third,* India does not have an active surveillance program capable of reliably detecting the presence of LPNAI in India.

In short, the expert consultation process provides further confirmation that our proposed understanding of this evidence is indeed the correct one.

II. INDIA'S MEASURES ARE NOT JUSTIFIED BY THE OIE CODE

A. India's Measures Are Not in Conformity with (Art. 3.2) or Based on International Standards (Art. 3.1)

3. The OIE Code notes that the importation of products from countries reporting LPNAI is possible regardless of the exporting country's disease status. India's contrary interpretation is a misstatement of both Article 5.1.2 of the OIE Code and the User's Guide. Article 5.1.2 is an admonition to an importing country not to ban an imported product to protect against a disease already present in that country and not to impose requirements that are stricter than what the country applies to domestic products. Similarly, the User's Guide provides that "[t]he recommendations in … the Terrestrial Code are designed to prevent the disease in question being introduced into the importing country, taking into account the nature of the commodity and the animal health status of the exporting country."

4. In trying to defend its untenable arguments, India describes the responses by the OIE as "evasive, highly ambiguous and contradictory." In particular, India purports not to understand why the OIE said notification helps countries address "diagnostic and management challenges of avian influenza" and why the OIE did not instead explain that notification should result in trade

consequences. This criticism reflects why India's position is so misguided. India fails to recognize that notifications may be used to advance scientific understanding and not just protectionist objectives.

1. The Proper Understanding of the OIE Code

5. India appears to argue that the plain reading of the OIE Code, as explained by the United States, would vitiate (1) Article 10.4.1.10's admonishment not to impose bans in respect to NAI detections in wild birds; (2) the Code's notification provisions; and (3) the language – which India calls "NAI freedom" – at the beginning of various control or mitigation measures.

6. All three provisions serve a clear purpose. First, Article 10.4.1.10 is an affirmative statement not to impose bans on account of wild birds. Second, regarding the Code's notification provisions, they remain significant because notifications are important to further scientific understanding and help lead to the appropriate mitigation measures. The OIE Responses support this understanding. And third, with respect to the control or mitigation measures for particular products in the OIE Code, these provisions address different scenarios and are intended to provide appropriate mitigation measures that allow for safe trade.

7. That India is ignoring significant – indeed most – of the OIE Code is established by contrasting its arguments against its own veterinary certificates. India's veterinary certificates do not actually conform to OIE guidelines the way India says they should.

2. The Purported Positions of Other Members

8. India also seeks support for its reading of the OIE Code by referring to purported positions and measures of the United States and some other Members. India errs with respect to the United States. There is no reason to believe India is any more accurate with respect to other Members. Furthermore, India's argument is misplaced because interpretation of the OIE Code does not, as India suggests, involve an application of the customary rules of treaty interpretation. In any event, India's characterization of a handful of measures adopted by certain WTO members cannot be said as establishing the agreement of the OIE membership regarding the OIE Code.

B. India's Measures Are Not Justified by a Risk Assessment or Otherwise Maintained with Sufficient Scientific Evidence

9. With respect to the question of a risk assessment, the record continues to show that India has no risk assessment within the meaning of the SPS Agreement. When India notified S.O. 1663(E) to the WTO, its notification form stated that the purpose of the measure was: (1) food safety; (2) animal health; and (3) to protect humans from animal pest or disease. Accordingly, India's avian influenza measures require both types of risk assessments provided for in paragraph 4 of Annex A of the SPS Agreement. Thus, India breaches Articles 5.1 and 5.2 of the SPS Agreement because it was required to base its measures on both types of risk assessments provided for in paragraph 4 of Annex A and its measures are based on neither. India has consequentially breached Article 2.2 by failing to base its measures on a risk assessment.

III. INDIA'S MEASURES ARE MORE TRADE RESTRICTIVE THAN NECESSARY TO ACHIEVE ITS ALOP

10. India's second written submission, in contrast to its opening statement at the first meeting of the Panel, acknowledged that the OIE Code product-specific recommendations are different from the measures India presently applies. Nonetheless, India posited three reasons why application of the OIE Code would not result in a less trade-restrictive measure that would achieve its ALOP. Each of these grounds is legally or factually incorrect.

11. First, India submits that reliance on the control measures would not achieve its ALOP. But, India never identifies its ALOP. As previously explained, India is not controlling for LPNAI at home, and its domestic restrictions for HPNAI contain limitations such as zoning. At best, India's ALOP can be described as very modest. Accordingly, while it appears India's ALOP is modest, even a high one would be achieved by application of the OIE Code.

12. The second point India raises is that such measures would be technically infeasible since India cannot trust the veterinary certificates – and that would mean more work for its authorities since there would actually be imports entering India. This is interesting because India claims that it allows imports if countries are free from NAI for three months. If India is willing to accept that a veterinarian can make an attestation regarding the entire LPAI situation in the exporting country, then India should be prepared to rely on a veterinarian attesting to things that might actually be in that person's personal knowledge.

13. The last point India raises is that the OIE Code is more trade restrictive than the import prohibitions it maintains now. India claims that would be the case because it would take it longer to confirm that other countries maintain adequate surveillance systems than to accept imports from a country if it does not report NAI for three months. India's position has no basis in fact or common sense. There would be far less potential disruptions to trade by adopting the OIE Code, rather than leaving it perpetually to the possibility of suspension.

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

14. The parties and the Panel's experts have spent substantial time exchanging views related to the U.S. claims under Article 2.3. These exchanges have confirmed that India's measures discriminate against imported products without justification. The United States recalls that there are in fact two separate ways that India's measures discriminate against imported products. One of these forms of discrimination exists independently of India's surveillance deficiencies. When either HPAI or LPNAI is detected anywhere in an exporting country, India applies an import ban covering the entirety of that exporting country, even where the detection is thousands of kilometers away from the area where the exported product is produced. By contrast, when NAI is detected in India—and in practice that means HPAI, as India does not detect LPNAI—India restricts trade in products only from a limited zone surrounding the detection.

15. Surveillance *is* at the core of the second manner in which India's measures discriminate against imported products. India imposes import bans when an exporting country reports detections of LPNAI, but does not have in place surveillance mechanisms capable of reliably detecting LPNAI when it occurs in India. When LPNAI cannot be detected, it obviously cannot lead to any restrictions on the trade of domestic products.

16. The inadequacy of India's domestic surveillance regime to reliably detect LPNAI is clear from the NAP and from the other evidence reviewed by the Panel's experts, as those experts' answers confirmed. As India has acknowledged, "LPNAI is largely asymptomatic in poultry." The Panel's experts have confirmed that systematic active surveillance involving laboratory testing of samples from apparently-healthy flocks is therefore necessary to reliably detect LPNAI. India does not appear to be disputing this point.

17. The United States has explained that India's NAP sets out a surveillance regime that relies on clinical signs for the detection of avian influenza, and that does not require any routine laboratory testing of samples from apparently healthy flocks for AI. Indeed, apart from "physical/clinical" surveillance, routine surveillance in accordance with the NAP involves only the use "where possible" of *virological* testing. In its instructions on "Guidelines for Collection, Packing and Transportation of Samples," the NAP instructs that samples should be forwarded to a Regional Disease Diagnostic Laboratory or to HSADL Bhopal "[o]nly in case of unusual sickness/ mortality raising suspicion of AI."

18. In response to the U.S. *prima facie* case, India submitted a variety of documents which provide figures on numbers of AI tests conducted by certain laboratories in India, without stating why the tests were conducted, or which relate to surveillance for or response to clinical events. India's documents do not demonstrate that India actually conducts routine testing of apparently-healthy flocks for LPNAI, let alone that such testing is conducted nationwide as part of a program or programs under which it is required. The independent experts reviewed the evidence and agreed.

19. Although India attempted to challenge the experts' conclusion and belatedly add to the record 76 new exhibits, these new exhibits make no difference at all. India's new exhibits simply contain more of the same kinds of evidence that India submitted previously, and that is not illustrative of an active, systematic surveillance regime capable of reliably detecting LPNAI –

reinforcing the fact that India does not have one. Some of India's new exhibits are requests to test small numbers of samples of different types collected in individual Indian states, districts, and localities for unknown reasons. There are similar requests explicitly referencing HPAI surveillance, as well as reports of surveillance following HPAI outbreaks. There are reports of projects to monitor for AI in migratory birds in certain isolated locations. There are four letters from long ago, predating India's NAPs, its AI-based import prohibitions, and even the notifiability of LPNAI, simply requesting that, in light of HPAI, states collect some samples for routine testing, but specifying nothing more about number of samples, number of flocks to sample, or frequency of collection. And there are a handful of documents requesting tests on, or reporting results of tests on, small numbers of samples collected in individual districts or localities as part of routine surveillance performed in them at particular times. These documents evidence nothing more than temporally and geographically sporadic, ad hoc surveillance testing activities.

20. In its Comments on the Expert Responses, India cites the fact that it has submitted a handful of gene sequences for non-reportable AI strains to GenBank—a Genetic sequence database run by the U.S. National Institutes of Health. Contrary to India's arguments, the submission of some gene sequences to GenBank does not indicate the existence of adequate AI surveillance.

21. Lacking reliable surveillance, India has focused on an issue slightly different from surveillance: India's disease status. But it is the adequacy of India's surveillance to reliably detect LPNAI, and not India's disease status, that is the fundamental question for purposes of determining whether India's imposition of LPNAI-based import bans constitutes discrimination in breach of Article 2.3. If India has no means to reliably detect LPNAI, and thus to restrict trade in domestic products in the event that poultry in India becomes infected with LPNAI, it would be discriminatory to restrict the trade in imported products due to detections of LPNAI in exporting countries.

22. Having said this, not only does India have no surveillance basis on which to claim that it has never had cases of LPNAI, but the Pawar study provides strong evidence that domestic ducks in India have been infected with a type of LPNAI known as H7, either at the time of the study or in the past. India's failure to perform virological follow-up testing meant that there was no way to know definitively that the ducks were infected *at the time of testing*, which would trigger an obligation to inform the OIE of an ongoing LPNAI incident. But this failure confirms that India is not taking the surveillance steps that would be necessary to reliably detect and report LPNAI.

23. The Pawar study's strong evidence of LPNAI infections in India is entirely expected: India lies in the flyways of wild birds coming from places with LPAI, including H5 or H7 LPAI; India has a large backyard poultry population, opening an avenue for AI transmission from wild birds to poultry; India had 35 million domestic ducks in 2007, and ducks are a key host species for preservation and perpetuation of LPNAI; and India has experienced non-notifiable LPAI strains, and there is no reason to believe they circulate differently from notifiable LPAI strains. The key point, however, is that India bans imported products due to LPNAI even though it does not have surveillance requirements or plans capable of reliably detecting LPNAI.

V. INDIA'S MEASURES DO NOT PROVIDE FOR REGIONALIZATION

24. India argues that SPS Article 6 obligations can be triggered only by an application for recognition of specific zones or compartments. India's theory would mean that the United States and other exporting Members had an obligation not to accept the plain meaning of the words of India's measure. India's theory, moreover, suggests that the United States had an obligation not to believe the statements of India's own officials, who made clear that regionalization simply was not an option for countries exporting to India the products covered by S.O. 1663(E).

25. India's insistence that Article 6 obligations can be triggered only by an application for recognition of specific zones or compartments ignores the phrasing of that article. Article 6.1 does not provide for Members to "adapt their sanitary or phytosanitary measures" to the sanitary characteristics of an area at some point in the future. Rather, it provides that "Members *shall ensure* that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area … from which the product originated" (emphasis added). This wording would make no sense if the paragraph was not intended to require maintenance of an ability

(existing independently of and antecedent to any regionalization request), to account for the disease conditions of sub-national areas from which traded products originate.

26. Similarly, Article 6.2 requires that "Members shall, in particular, recognize *the concepts* of pest- or disease-free areas and areas of low pest or disease prevalence" (emphasis added). It does not require recognition of specific areas, but rather of concepts: those of pest- or disease-free areas. It would make no sense for an obligation to recognize these *concepts* to be triggered only in the event of a request to recognize specific compartments or zones. The United States has explained how India rebuffed various requests that it accept the possibility of applying its measures not on a countrywide basis. For this reason, India's argument that the United States should have inquired "on its laws and procedure that India might adopt to recognize an exporting country's zones or compartments" is disingenuous at best.

27. As the United States explained, it explicitly asked that India apply its measures on a less-than-country basis with respect to products from the United States. India's response was not to provide information on laws and procedures that could be used to secure the recognition of zones and compartments. Rather, India's response was that its requirement of country-freedom "is uniform." Indeed, India's erroneous assertions in this dispute that it has an ALOP of "NAI country freedom" of the exporting country from NAI, that "India's level of protection as reflected in S.O. 1663(E) is to prevent ingress of LPNAI and HPNAI from disease notifying *countries* through imports of products that are clearly identified as risk factors even by the OIE, and that "India's ALOP is met by maintaining import restrictions against *countries* notifying HPNAI or LPNAI," thoroughly belie its contention that it would consider recognizing zones and compartments if only another country submitted a properly documented request.

28. In its regionalization argument, India urges the Panel to presume that the United States must not have procedures in place that would allow for the limitation of trade restrictions on U.S. products to a limited zone around the outbreak. As the United States has explained, while the United States does have such procedures, U.S. procedures are irrelevant to the question of whether India recognizes "*the concepts* of pest- or disease-free areas and areas of low pest or disease prevalence" (emphasis added), and is "*ennsur[ing]* that [its] sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area … from which [a] product originated" (emphasis added).

VI. THE UNITED STATES HAS NOT LIMITED ITS CLAIMS

29. India alleges that the United States has limited its claims to poultry meat and eggs. The Panel has already heard a variant of this argument – and rejected it in the Preliminary Ruling. India's argument makes no sense – the presentation of certain examples regarding some of the products covered by a measure is no indication of a withdrawal or limitation of a claim. And more generally, India does not – because it cannot – identify any legal basis to require a complaining party to repeat every product covered by a measure at every portion of its submissions in order to maintain a challenge to the entire scope of a measure.

VII. CONCLUSION

30. This dispute can be distilled to a few simple points:

- India's measures are not based on either type of risk assessment prescribed by the SPS Agreement;
- India's measures are maintained without sufficient scientific evidence because the evidence does not support prohibitions on account of LPNAI;
- India's measures are more trade restrictive than necessary to achieve its appropriate level of protection because measures conforming to the OIE Code are reasonably available;
- India's measures unjustifiably discriminate as India does not have a surveillance regime capable of reliably detecting LPNAI yet bans imported products on account of LPNAI and since India restricts trade in domestic products from only a very limited

area following a domestic HPAI outbreak, yet whenever a trading partner reports LPNAI or HPAI, India bans importation from the entire country;

– India's measures do not take into account the possibility of regionalization; and

– India has no justification for its failure to properly notify and publish its measures.

In short, this dispute is about precisely what the SPS Agreement was intended to address: a Member misusing safety concerns in order to fulfill protectionist objectives.

ANNEX B-5

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF INDIA

A: INTRODUCTION

1. The WTO Agreement on Sanitary and Phytosanitary Measures (**the SPS Agreement**) strongly encourages Members to harmonize SPS measures on as wide basis as possible by basing their respective SPS measures on international standards, guidelines and recommendations developed by relevant international organizations as international organizations, in developing these standards are deemed to have taken into account relevant current scientific information concerning the risk to human or animal health arising from international trade in animal or animal products.

2. Thus it was the understanding of India that having adopted an OIE recommendation, it was not required to further conduct a risk assessment. The measure at issue, S.O. 1663(E) implements the *Office International des Epizootics* (**OIE**) standard which 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 High Pathogenic Avian Influenza (**HPAI**) or Low Pathogenic Avian Influenza (**LPAI**) in poultry. Yet United States sought from India a risk assessment as a further justification that its measure is based on science.

3. Therefore in October 2010, India informally and in good faith provided a document to the United States and the European Communities which contained a brief summary of scientific material which India believed formed the basis of the OIE recommendation and hence also the justification behind India's measure. India also categorically stated that this was not India's risk assessment and should not be treated as one. However in spite of India's clarification, United States together with the European Communities specifically sought an opinion from the OIE as to whether the document qualified as a risk assessment, this despite the fact that India had not sought OIE's opinion on the matter and shared the document with the OIE only for information purposes.

4. Even though the OIE does not have a separate mandate to assess, judge or comment on the existence or content of a Member's risk assessment and is only an observer at SPS Committee meetings, the OIE took the floor and proceeded to opine on the document stating that it was severely deficient in many aspects. India took strong objection to the OIE taking the floor as did Chile, Argentina and Peru. Thus it is clear that the OIE has already made known its opinion. This coupled with its inappropriate interjection at the SPS Committee meeting casts serious doubt over the OIE's ability to provide guidance to the Panel and India submits that the Panel should not rely on the OIE as an expert in this case.

A(I): NATURE OF INDIA'S AVIAN INFLUENZA MEASURES

5. S.O. 1663(E) was implemented under Section 3 and 3A of the Livestock Importation Act, 1898 and prohibits import of certain livestock and livestock products from countries reporting High Pathogenic Notifiable Avian Influenza (**HPNAI**) or Low Pathogenic Notifiable Avian Influenza (**LPNAI**) or Notifiable Avian Influenza **(NAI)** in poultry. Hence imports are prohibited upon a notification of NAI, but when a country declares freedom after culling (or slaughter), disinfection and surveillance, which generally takes three months as recommended by the OIE, the country is no longer considered to be *"reporting Notifiable Avian Influenza"* and imports from such countries are permitted. Further the United States assertion that India imposes measures on account of LPNAI in wild birds is incorrect. The measure specifically states that imports will be prohibited from countries reporting HPNAI or LPNAI in poultry.

6. As noted above, once the country is free from avian influenza in poultry, imports from such countries are permitted under permits called sanitary import permits (**SIPs**) which are issued under S.O. 655 (E). This is evident from SIPs granted for imports of products such as unprocessed duck and goose meat, turkey meat and chicken meat from countries such as France, Spain, United Kingdom, United States, Italy, Netherlands, Thailand and Malaysia which did not report any

outbreak of HPAI or LPAI on the date of approval of the SIP. Further India on a number of occasions in the SPS Committee meetings and at bilateral forums has clarified that S.O 1663(E) and its predecessor measures provide for a temporary ban against countries reporting NAI in poultry and that the ban is lifted once the country notifies freedom.

B: INDIA'S DOMESTIC AVIAN INFLUENZA MEASURE FOR CONTROL & SURVEILLANCE

7. The Government of India implements the control and surveillance procedure through the National Action Plan (**NAP**), 2012 which has been issued pursuant to the Prevention and Control of Infectious and Contagious Disease in Animals Act, 2009 (**Prevention of Disease Act).** The schedule of diseases under the Act indicates that highly pathogenic avian influenza and low pathogenic avian influenza in poultry are regulated by the Act and contained in accordance with measures taken in the NAP 2012.

8. With respect to the surveillance, India under NAP 2012 and in accordance with the OIE Code conducts three different types of surveillance system. First among them is the Random clinical surveillance wherein surveillance of population and density of poultry in each block, both in backyard and commercial establishments, flyways of migratory-birds, live-bird markets including wet-markets, existence of wildlife sanctuaries/ national-parks/ water-bodies visited by migratory/ wild birds is carried out and any unusual sickness or mortality in poultry or wild birds is taken into account. Further NAP 2012 also identifies and lays down signs for identifying unusual sickness such as swelling around the eyes, neck, head, nasal discharge, discoloration of the wattles, combs, legs, drop in egg production, sudden weakness, drooping wings and lack of movement among birds. These symptoms are also similar to what has been prescribed by the United States Department of Agriculture.

9. The second type of surveillance being carried out by India is the Random Laboratory Surveillance. Under this, samples including tracheal and cloacal from both poultry and wild birds are regularly/weekly screened for NAI using virological methods. The faecal and/or tracheal swabs from poultry is collected by officials of the State Department of Animal Husbandry, and from wild birds is collected by officials of the State Forests Department and the same are sent to the High Security Animal Disease Laboratory (**HSADL**), Bhopal or Regional Disease Diagnostic Laboratory **(RDDLs)**. Currently India has five RDDLs. Such surveillance for NAI has resulted in the testing of about 8, 49,332 samples by HSADL, Bhopal and the various RDDLs.

10. The third type of surveillance is the targeted surveillance wherein surveillance is undertaken for areas adjacent to international land-borders, especially those affected with avian influenza, interstate borders with the avian influenza affected States and in live bird markets including wet markets. The samples collected from these are sent to either HSADL, Bhopal/RDDLs for testing. The fact that avian influenza is not found in other regions of the country and is localized predominantly within India's eastern states is also an indication that India's control and containment measures are effective.

11. Further the control measures applied by India pursuant to NAP 2012 are also in conformity with the OIE Code. India employs control measures in two situations. Firstly control measures are employed in suspected avian influenza outbreaks wherein upon reporting of unusual sickness and mortality in birds, an officer visits the site to conduct a preliminary investigation. During the pendency of the investigation and the results of the test, an alert zone is created to prevent further ingress or spread, if any, to villages and habitations within a 10 km radius from the affected place.

12. The second type of control measures are employed upon occurrence of confirmed cases of outbreak of NAI. Once an occurrence of NAI is confirmed, the government immediately notifies the same to the OIE and subsequently carries out the control measures as prescribed under Chapter III of NAP 2012 upon occurrence of a NAI and which are also in consonance with the OIE Code. Post operative surveillance is carried out as per the procedure laid down in Chapter IV of NAP 2012 and which is in conformity with the OIE Code. It should also be noted that the control measures maintained by India are similar to control measures maintained by other countries such as Chinese Taipei, China and Canada.

C: RELEVANCE OF THE ARTICLE 5.8 REQUEST BY UNITED STATES

13. The United States made a request under Article 5.8 of the SPS Agreement on 17 January 2012 for certain information. As per the letter, the information was to be provided within 1 month even though Article 5.8 does not provide any time line within which the information is to be provided. India replied on 16 February 2012 requesting for some more time. However India did not receive any further communication from the United States and instead within 2 weeks received a request for consultations from the United States. Based upon these facts, United States alleges that India has refused to provide information under Article 5.8 even after 14 months of the request being made.

14. However argument of the United States is legally and factually incorrect. Firstly India never refused to provide information but instead requested for more time, to which it never received any reply. Secondly, Article 5.8 is a pre dispute measure and is not applicable in a dispute settlement situation. Hence it is inapposite that the United States complains that 14 months have passed since it made its request, when this period includes 12 months under dispute procedure itself. In view of the above, no adverse inference, as alleged by the United States, should be drawn against India.

D: SECOND REQUEST FOR PRELIMINARY RULING UNDER ARTICLE 6.2

15. The United States First Written Submission (FWS) alleges a violation of the national treatment obligation by India under Article 2.3 of the SPS Agreement. Therefore the object of the challenge, i.e. the discrimination, is alleged to be caused by India's domestic measures which do not allegedly apply similar controls with respect to like domestic products. Thus in this situation, United States has to necessarily adduce and impugn such of India's measures which it believes are the cause of this arbitrary or unjustifiable discrimination.

16. However nowhere in the panel request, there is any mention of the NAP, whereas in the FWS, the United States now claims that India does "not apply similar avian influenza related controls with respect to like domestic products and their internal movement within India". The National Action Plan was enacted in 2006 **(NAP 2006)** and later amended in 2012 and is promulgated under the Prevention of Diseases Act. The United States has brought to India's notice its challenge of the NAP 2012 for the first time in its FWS, while making no mention of it in its panel request.

17. Since the NAP is the object of the United States challenge under Article 2.3, it was imperative that the NAP was identified with precision in the panel request. The panel request does not mention the NAP explicitly by name and there is nothing in the description of the measure at issue in the panel request which would have provided notice to India that the United States did in fact intend to challenge the NAP. This is in spite of the fact that attendant circumstances indicate that the United States was well aware of the NAP and yet the panel request is devoid of any reference to it.

18. Further the United States cannot take umbrage under the reference to 'related or implementing measures' to raise claims with respect to NAP as it is not an implementing measure of S.O. 1663(E) or the Livestock Importation Act, 1898 because it does not implement the prohibition on imports of livestock and livestock products from NAI positive countries. The sphere of activity of S.O. 1663 (E) and the NAP is entirely different and it cannot be said that there is a significant degree of overlap between the two measures.

19. In addition to the NAP, United States has also adduced health certificates for livestock products as a new measure for the first time in its FWS on the ground that these health certificates implement the import prohibition laid out in S.O.1663 (E). However the argument of the United States is incorrect. The requirement to provide a health certificate with every consignment of livestock products emerges from SIPs which are issued under a separate notification, namely, S.O. 655 (E). Thus while S.O. 655 (E) governs conditions to be met by exporting consignments, S.O. 1663 (E) prohibits imports of certain livestock products from countries reporting NAI. Thus, though the two notifications are enacted under the same statute they deal with the dissimilar subject matters.

20. S.O. 655 (E) and S.O. 1663 (E) cannot also be said to be related measures merely because both notifications were enacted under the Livestock Act. The objective of the Livestock Act is to regulate, permit or prohibit the trade in livestock products. Hence, while S.O.655 (E) regulates the trade in livestock products, S.O. 1663 (E) prohibits the trade in livestock products under specific conditions. Thus the United States must not be permitted to raise claims concerning the health certificates in its submissions.

E (I): ORDER OF ANALYSIS

21. United States has raised claims under the following provisions of the SPS Agreement and GATT 1994: Articles 5.1, 5.2, 2.2, 3.1, 5.6, 6.1, 6.2, 2.3, 5.5, 7, and Annex B of the SPS Agreement and GATT Article XI. Though the United States has commenced its submission with a claim with Article 5.1 of the SPS Agreement, it is India's submission that the Panel must commence its analysis under Article 3 as India being the party imposing the SPS measure is claiming that its measure conforms to the international standards. In the event, the SPS measure at issue is held to be in conformity with international standards, the Panel need not examine compatibility of the SPS measure at issue with other provisions of the SPS Agreement.

22. The above is equally applicable if the SPS measure is found to be 'based on' international standards and only that aspect of the law which the Panel holds is not 'based on' the international standard will need to be further examined under Article 2.2, 5.1 and 5.2.

23. Further if the Panel were to find that India's measure is not consistent with Article 3, then India submits before the Panel that it should analyze the claim of consistency by India with Article 2.2 as it provides for an overarching principle and is applicable to the entire SPS Agreement. Further Article 2 informs Article 5.1 and Article 2.3 informs Article 5.5 and if the Panel were to find that India's measure is based on scientific principles and not maintained without sufficient scientific evidence pursuant to Article 2.2 of the SPS Agreement, a further analysis under Article 5.1 would be unnecessary. Hence India would submit before the Panel that it should commence its analysis with Article 3 of the SPS Agreement.

E (II) & E (III): INDIA'S MEASURE CONFORMS TO THE OIE CODE

24. The OIE recognizes the prerogative of every Member to set its own level of protection and in view of the same has formulated a code wherein it has provided various situations in which products may be traded. For instance for poultry products mentioned within the chapter, the importing country may condition the entry of a poultry product upon the exporting country being free from both HPNAI and LPNAI. Alternatively the OIE also enables countries to condition the entry of the poultry product only from the specific zone or compartment which has been recognized by the importing country.

25. Hence an importing country is free to choose the 'condition of entry' upon the fulfillment of which it will allow poultry products to be imported. Because the 'condition of entry' for each poultry product stated in the OIE Code provides several options, the condition of entry that an importing country implements will depend on its appropriate level of protection (**ALOP**). The OIE Code does not stipulate what level of freedom a country must seek from the exporting country, it leaves that choice to the importing country but only recommends sanitary conditions which should be fulfilled by the consignment and which should further be attested to by the veterinary authority of the exporting country.

26. The United States has adduced claims starting with Article 5.1 and 5.2 and 2.2 specifically alleging that as far as fresh meat of poultry and eggs are concerned, there is no scientific basis to maintain a temporary import suspension of the type maintained by S.O. 1663(E). Thus India's claim stating that India's measure is in conformity with the OIE Code will be limited to standards pertaining to eggs and fresh meat of poultry as it is evident that the United States claims pertain only to these products. However, if the United States makes substantive submissions in this regard, India reserves the right to respond to such further submissions.

27. Article 10.4.1.10 of the OIE Code stipulates that if a country notifies HPAI or LPAI in poultry, Member countries can impose immediate ban on trade in poultry commodities depending on the condition of entry they have selected based on the level of protection they have deemed appropriate. Further the OIE Code also provides for condition of entry for each poultry product

mentioned therein. Hence if a country has decided based on its ALOP that it will condition entry of eggs and fresh meat of poultry from the exporting country upon NAI country freedom then if the exporting country notifies either HPNAI or LPNAI in poultry, the said products can be banned from the exporting country upon the notification and will be allowed once the country notifies freedom again to the OIE. Likewise if a country has decided based on its ALOP that it will condition entry of eggs and fresh meat of poultry from the exporting country from specified zones which are free of NAI, then if the exporting country notifies either HPNAI or LPNAI in poultry in areas outside a recognized zone, the said products will be banned from the entire exporting country except the recognized zone and will be allowed once the country notifies freedom again to the OIE.

28. India's sanitary regime for imports of poultry products is governed by S.O. 1663(E) as per which the condition of entry for poultry products into India is NAI freedom in poultry. If the exporting country is not free from NAI in poultry, it provides for import restrictions on commodities mentioned therein till the time the exporting country regains NAI freedom. Once the country regains NAI freedom, poultry products can be imported by applying for SIPs which are valid for 6 months. Imports can then be made on the basis of the SIP and every consignment is required to be accompanied by a veterinary certificate attested to by the official veterinarian of the exporting country.

29. The veterinary certificates contain several sanitary conditions which are required to be attested by the veterinary authorities of the exporting country so that every consignment is safe for import. Hence in effect, S.O. 1663(E) implements the 'condition of entry' requirement reflected in each product specific recommendation and in Article 10.4.1.10. On the other hand the veterinary certificates implement the health certificate requirements under each product specific recommendation.

30. Thus S.O. 1663 (E) provides for immediate suspension of import of livestock product from countries reporting NAI and which conforms to Article 10.4.1.10 of the OIE Code. Similarly according to the condition of entry for livestock products under S.O. 1663 (E), NAI freedom is required for imports into India and which conforms to the condition of entry for the same product under the OIE Code. In view of the above, India submits that its measure conforms to the OIE Code. Since India has established that its measure conforms to the OIE Code, the measure is presumed to be consistent with the SPS Agreement and the GATT 1994. Hence the United States claim under GATT Article XI is not sustainable. Further the United States claim that India's measure violated Article 3.1 by not allowing imports from zones or compartments is also not made out as India has clearly established that the OIE Code and the SPS Agreement permit a country to determine its ALOP and the OIE Code permits countries to condition the entry of a poultry product upon the exporting country being free from both HPNAI and LPNAI.

31. Alternatively India also submits that its measure is based on the OIE Code. As per the Appellate Body (AB), a domestic SPS measure can be found to be "based" on the international standard, if it adopts a part of the international standard or is supported by the international standard. In such a scenario, the part of the domestic measure which adopts the international standard should have the presumption of "conforming" to the international standard and be presumed to be consistent with the SPS Agreement and the part of the domestic measure which does not adopt the international standard should be justified under other provisions of the SPS Agreement.

E (IV): THE UNITED STATES CLAIM UNDER ARTICLE 2.2, 5.1 AND 5.2

32. The United States in its claim under Article 2.2 has adduced scientific evidence with respect to eggs and fresh meat of poultry. As per the statement of David Swayne adduced by United States, since LPNAI virus is only present in the respiratory and digestive tract of chicken and not in the meat, bone and inside eggs, fresh meat of poultry does not present any risk. However because HPNAI virus causes a systemic infection and the HPNAI virus is present in various parts of the chicken, therefore a restriction on fresh poultry meat and eggs products (and other products) originating from an HPNAI infected countries is justified. Thus as per the United States except for systemic distribution, in other respects such as efficacy of transmission and modes of transmission, LPNAI and HPNAI viruses are exactly alike

33. However the study adduced by India, i.e. Post et al. clearly rebut the above argument of United States. The study Post et al. clearly establishes that LPAI viruses (H5N2, H7N1, H7N7,

H9N2. H7N7) can cause systemic infection and can spread to internal organs of the bird. Thus the fact that LPNAI virus can spread systemically within various internal organs clearly puts the risk emanating from the LPNAI virus on the same pedestal as the HPNAI virus. Since Post et al., establishes the systemic spread of LPNAI in the bird, keeping Swayne's statement in mind, a restriction on fresh poultry meat, eggs and other products originating from an LPNAI infected country is equally justified.

34. Having established that United States has not been able to present a prima facie claim under Article 2.2, India submits that its measure is based on scientific principles and sufficient scientific evidence on account of the following: a) India's measure conforms to or at based on international standards, which fulfils the requirement of scientific principles and sufficient scientific evidence; b) The fact that a number of other countries maintain similar import restrictions upon occurrence of NAI proves that the risk is well founded; c) existing scientific literature supports measures maintained by India.

35. With respect to the first requirement, India relies on its submission and arguments made under Article 3 which establishes that India's measures conforms to the OIE Code and therefore is consistent with Article 3 of the SPS Agreement and therefore is also based on scientific principles and sufficient scientific evidence as required under Article 2.2 of the SPS Agreement. With respect to the second requirement, India submits that many other countries such as Singapore, Philippines, Japan, Colombia, China etc. are maintaining similar import prohibition on occurrence of HPAI or LPAI virus. Thus the measures being followed by these countries reflect the risk associated from an occurrence of HPNAI or LPNAI virus.

36. Thirdly in light of available scientific evidence which suggests that the LPNAI virus can spread systemically within the bird, the basis for justifying a ban on fresh poultry meat, eggs and other poultry products from HPNAI countries is equally applicable to these products when they originate from LPNAI countries. This alone suffices for purposes of a finding that a temporary import suspension on fresh meat of poultry, eggs and other poultry products originating from a LPNAI country are based on sufficient scientific evidence.

37. Furthermore even assuming that LPNAI virus is only restricted to the respiratory and intestinal tracts, even so, fresh meat of poultry as it is traded still carries a risk of harboring the LPNAI virus. This is because during processing of raw meat of chicken for export, all the internal organs of the chicken are not removed (especially kidney, liver, heart and even pieces of lungs) and are part of the carcass imported as raw meat. Thus there is a very high possibility of contamination of the rest of the meat due to the presence of LPNAI virus in respiratory and intestinal tracts.

38. With respect to Article 5.1 and Article 5.2, the United States has argued that India's measure is not based on Article 5.1 as India has not conducted its own risk assessment. However if the Member conforms to or bases its measure on the international standard, there is no need to conduct a separate risk assessment. In this respect, it is India's position that since its measure conforms to or is based on the OIE Code there is no obligation on India to conduct a risk assessment.

39. Even otherwise the scientific evidence submitted by India to justify an import suspension on fresh meat of poultry and eggs from LPNAI countries clearly establishes the risk in trade from these commodities and fulfils the requirement of not maintaining its measure without sufficient scientific evidence under Article 2.2 and India is under no obligation to conduct a separate risk assessment in this instance.

E (V) & E (VI): THE UNITED STATES CLAIM UNDER ARTICLE 2.3 AND 5.5

40. The object of challenge under Article 2.3 claim of the United States FWS is NAP 2012. However SPS Agreement is only applicable to measures which may directly or indirectly affect international trade as required by Article 1 of the SPS Agreement. Though NAP 2012 can be considered to be an SPS measure as defined under Annex-A, it is not a measure to which the SPS Agreement applies because NAP 2012 or for that matter NAP 2006 does not directly or indirectly affect international trade.

41. Further as per United States, discrimination under first situation of Article 2.3 results due to the fact that India places a countrywide ban on imports from an exporting country that notifies either HPNAI or LPNAI. On the other hand, when faced with an HPNAI outbreak in its own territory, India applies control measures limited to 10 km surrounding the epicenter of the outbreak.

42. Firstly India considers that the OIE Code permits importing countries to demand country freedom from exporting countries and India believes that a suspension of imports for a minimal period of close to three months is necessary to ensure that infected poultry products do not enter India from a country which is experiencing an active outbreak.

43. Secondly, the situation of a country (such as India) when it experiences an outbreak of avian influenza within its territory and hence has to take control measures to prevent spread of the disease, is highly distinct from its situation as an importing country which has to ensure that infected products from countries experiencing active NAI outbreaks do not enter its territory. The risks that the two situations present are entirely different.

44. A country reporting an occurrence of NAI takes all possible measures to prevent to control and to contain the spread of virus as the epicenter of the virus is known. With imports on the other hand, in the absence of control measures, agents of disease transmission could enter a country and could be dispersed over a large area through internal commerce and trade. This amplifies manifold the risk of initiating several NAI outbreaks in different parts of an importing country through imports of potentially infected agents of NAI. Hence, the measures that a country takes in these two situations would quite naturally and logically be different.

45. As per the United States, discrimination under second situation of Article 2.3 results due to the fact that though it bans poultry products from LPNAI reporting countries it takes no control measures to detect and hence to prevent outbreaks of LPNAI. However this is incorrect. As stated above, India carries out various types of control and surveillance measures for NAI and the same has also resulted in the discovery of other strains of LPAI (strains other than H5 or H7). The OIE provides that countries may take trade related measures to prevent ingress of a disease which is exotic to it. Since India has never had an outbreak of LPNAI and the same is exotic to India, it never needed to take any domestic control measure. Thus mere application of differential control measures cannot *ipso facto* amount to discrimination especially when the risks presented by the two situations are entirely different.

46. The United States also alleges that India's measure constitute disguised restriction on trade, though the claim is quite ambiguous. Firstly as India had already clarified, its measures are neither unjustifiable nor discriminatory. Secondly an import prohibition by itself would not amount to disguised restriction in trade especially when India's measure is based on international standards which recommend the same.

47. With respect to the claim of the United States under Article 5.5, India submits that the United States claim does not establish a prima facie case as it has not established the basis of its allegation under each of the three element of Article 5.5 as required. The FWS by the United States simply makes a reference to what it believes are "different situations", which is only the first element of the three part test under Article 5.5. There is no explanation whatsoever on the other two elements. Even on the first element the submission simply notes that different situations exist but does not explain why those situations are comparable in the first place.

48. Thus the United States FWS is highly inadequate for its lack of any substantive arguments establishing in detail and with clarity the alleged violation of Article 5.5 through the three cumulative elements therein. However without prejudice to India's right to provide a rebuttal to further facts or legal submissions adduced by the United States with respect to its Article 5.5 claim, it is India's submission that for the same reasons as explained before in Article 2.3 with respect to the different situations, a violation of Article 5.5 is not made out by the United States.

E (VII): THE UNITED STATES CLAIM UNDER ARTICLE 5.6 AND 2.2

49. The claim of the United States under Article 5.6 appears to be limited to the prohibition on imports of fresh meat of poultry and eggs from countries notifying LPNAI as the United States has not adduced evidence with respect to other products or HPNAI. Further the United States claim under Article 5.6 incorrectly identifies India's ALOP through its domestic measures, i.e. the NAP. As

per Annex A (1) of the SPS Agreement, an ALOP is the level of protection which is sought to be achieved by the SPS measure at issue, which in this case is S.O.1663 (E). The identification of the wrong ALOP leads to a fatal error in the analysis and strikes at the very root of the United States allegation under Article 5.6.

50. Secondly the United States also does not clearly identify an alternative measure which would fulfill India's ALOP. The submission simply refers to the OIE Code as an alternative measure and perfunctorily states that the OIE Code is reasonably available without explaining which specific controls it is referring to. Thus it is clear from the United States submission that by suggesting India should permit unrestricted trade in eggs and meat from LPNAI countries or permit trade in these products from zones or compartments established in the exporting country, the United States is asking the Panel to compare the trade restrictiveness of S.O. 1663(E) with the ALOP it believes should apply, rather than the level of protection which is reflected in S.O. 1663(E).

51. Since LPNAI is exotic to India, S.O. 1663(E) ensures that poultry commodities from LPNAI reporting countries which present a risk of transmitting the infection are not traded during an active outbreak. Thus an alternative measure suggested by the United States would need to be such as would ensure the same level of protection as the import prohibition currently does which is not the case.

52. The United States makes an unsubstantiated claim that a breach of Article 5.6 results in a consequential breach of Article 2.2. However this is based on an incorrect reading of an AB judgment wherein the AB simply stated that there existed similarities between the requirements of the two articles. However it explicitly stated that such similarity cannot lead to the assumption that a violation of Article 5.6 will in all cases lead to a violation of Article 2.2. The United States incorrectly reads the Appellate Body's ruling as a positive statement that in all cases a violation of Article 5.6 will necessarily lead to a violation of Article 2.2.

E (VIII): THE UNITED STATES CLAIM UNDER ARTICLE 6

53. Article 6.1 states that guidelines developed by international organizations for recognition of pest/disease free areas or areas of low pest/disease prevalence shall be taken into account by Members for the purposes of recognition of such areas. However Article 6.3 places this burden upon the exporting country to initiate the proposal to recognize zoning or compartmentalization and to provide documentary evidence that the proposed pest/disease free areas or areas of low pest/disease prevalence exhibit adequate bio-security measures as may be necessary to achieve the importing country's ALOP and the same is also affirmed by the OIE Code. The United States view that Article 6 places a unilateral and *suo moto* obligation on the importing country to recognize and accept, pest/disease free areas without any evidence represents a flawed understanding of Article 6.

54. However the United States has neither made a formal request to India for information and for recognition of a specific pest/disease free area nor responded to India's suggestion with a counter proposal to take this process forward even though India has communicated its willingness to consider compartments.

55. Lastly the United States by making a claim that India is under an obligation to recognize pest/disease free areas or areas of low pest/disease prevalence, acknowledges that international trade in these products presents a valid risk of transmission of the disease, which justifies a country wide ban, but that under provisions of Article 6, those risks can be minimized by establishing zones or compartments which fulfill the bio-security concerns of the importing country.

E (IX): THE UNITED STATES CLAIM UNDER ARTICLE 7 AND ANNEX B OF THE SPS AGREEMENT

56. The United States claims that India violates its notification obligations under Annex B of the SPS Agreement. The argument of the United States is incorrect as the chapeau of paragraph 5 clearly states that the obligations under that paragraph only arise when there are no international standards or the content of the measure is not the same as the content of the standard. Since international guidelines exist and India's measure conforms to or is based upon such standards, the obligation under Annex B is not applicable to India.

ANNEX B-6

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF INDIA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

OPENING STATEMENT

1. India believes that the crux of this dispute is essentially two-fold: (i) whether India's measures on fresh meat of poultry and eggs conform with the OIE Code (ii) whether India has a unilateral obligation to recognize areas of no or low disease prevalence in the territory of the United States.

2. The United States mischaracterizes S.O. 1663 (E) by stating India imposes a permanent ban and that the ban is imposed even when a country reports LPAI in wild birds. Numerous SIPs submitted by India prove that the ban is not permanent and lasts until a country notifies freedom and that it is not imposed pursuant to notifications of LPAI in wild birds.

3. The United States claims that there is "no need" to prohibit eggs and fresh meat of poultry from countries reporting LPNAI. Hence it recognizes that OIE standards allow a country to demand NAI country freedom from exporting countries but insists that India should ignore these standards and should import eggs and fresh meat of poultry even when a country declares LPNAI.

The OIE Code and how it is to be read

4. The OIE Code definition for NAI includes both HPNAI and LPNAI. When a country declares an HPNAI outbreak it cannot be considered to be free from HPNAI or free from NAI. However when a country declares an outbreak of LPNAI, it may be free from HPNAI but because of the LPNAI outbreak it cannot be said to be free from NAI. Hence recommendations in the OIE Code which mention "NAI free country, zone or compartment" encompass a situation where a country is free from both LPNAI and HPNAI.

5. Since the OIE Code recognizes the prerogative of every Member to set its own level of protection, the issue then becomes what level of protection is implicit in the standards recommended by the OIE for trade in products from countries reporting notifiable avian influenza and does S.O. 1663(E) embody this level of protection.

6. As India has explained in its FWS, the recommendations for poultry products are structured in a manner wherein each recommendation contains a 'condition of entry' followed by international veterinary certification requirements which the consignment needs to meet and which is further attested to by the official veterinarian of the exporting country. To illustrate, Articles 10.4.13 and 10.4.14 contain recommendations for imports of eggs for human consumption. Article 10.4.13 states "*Recommendations for importation from an NAI free country, zone or compartment*". Article 10.4.14 states "*Recommendations for importation from an HPNAI free country, zone or compartment*". This is the condition of entry.

7. Once this is satisfied, the recommendation in both cases details the requirements that a veterinary authority must attest to in the international veterinary certificate. These are the health certificate requirements. Thus the health certificate requirements are relevant only once the condition of entry is fulfilled by the consignment. The health certificate requirements cannot override the condition of entry stated for the product. The United States presents an incorrect and flawed understanding of the Code when it requires that India, instead of seeking country freedom, should simply make do with attested health certificates.

Recognition of ALOP in the OIE Code

8. An importing country can condition entry of poultry products from a range of options such as NAI or HPNAI country, zone or compartment freedom. By giving these options, the OIE Code recognizes the right of an importing country to determine the level of freedom it deems appropriate before permitting imports. Article 10.4.1.10 states that an immediate ban should not

be imposed on poultry commodities due to notifications of HPAI or LPAI in wild birds. That is to say a country may prohibit a poultry product in response to a notification of NAI in poultry. Article 10.4.1.10 simply reasserts the condition of entry under the product specific measure which is taken in light of a country's ALOP.

9. Under the interpretation presented by the United States and EU, notifications of LPNAI would be irrelevant. So long as the notifying country is free from HPNAI, no importing country would be able to restrict imports of poultry products from such country on grounds of a notification of LPNAI. In effect it amounts to suggesting that the specific mention of LPNAI as being a notifiable disease is purely an academic exercise having no significance for the regulation of trade from such countries and all standards providing for NAI freedom are redundant and should be read out of the OIE Code.

India's measure is in conformity with the OIE Code

10. The import prohibition under S.O. 1663(E) with respect to eggs for human consumption, hatching eggs, egg products and fresh meat of poultry is in conformity with the 'condition of entry' requirement reflected in the relevant product specific recommendation and in Article 10.4.1.10 of the OIE Code. The relevant product specific standards allow for imports from a NAI free country. A natural corollary of implementing this level of protection is an import prohibition from a country which is not NAI free. Thus the level of protection is NAI freedom and the element implementing the NAI country freedom standard is the resulting prohibition. Thus the specific clauses for eggs, hatching eggs and fresh meat of poultry of S.O. 1663 (E) not only embody the level of protection, i.e. NAI country freedom which is explicitly provided in each of the relevant product specific recommendations but also embody the resulting element implementing the standard, namely the import prohibition from a country which is not free from NAI.

11. Hence Clauses 1(ii) (c), (d), (e), of S.O. 1663(E) pertaining to fresh meat of poultry, hatching eggs, eggs and egg products are in conformity with Article 10.4.19, Article 10.4.10, Article 10.4.13 and Article 10.4.15 respectively and also in conformity with Article 10.4.1.10 of the OIE Code and should be presumed to be consistent with the SPS Agreement and GATT 1994. For the same reason these clauses are also based on the OIE Code in accordance with Article 3.1 of the SPS Agreement.

India will now address the regionalization claim raised by the United States

12. The United States makes its claim purely on the basis of Article 6.1 and 6.2 of the SPS Agreement while ignoring the critical obligation imposed on exporting countries in this respect under Article 6.3 of the SPS Agreement and under the OIE Code. While Article 6.1 provides broad principles that need to be taken into consideration by a Member while formulating its SPS measure, Article 6.2 provides guidelines on the basis of which disease or pest free areas may be recognized. However the onus to prove that the area is infact disease or pest free and hence fulfils the importing country's ALOP is upon the exporting country under Article 6.3.

13. That the onus is firmly placed on the exporting country is also echoed by the recommendations provided by the OIE Code on zoning and compartmentalization. The OIE Code states, *[B]efore trade in animals or their products may occur, an importing country needs to be satisfied that its animal health status will be appropriately protected. In most cases, the import regulations developed will rely in part on judgments made about the effectiveness of sanitary procedures undertaken by the exporting country, both at its borders and within its territory"*. Further, *The Veterinary Services of an exporting country should be able to explain to the Veterinary Services of an importing country the basis for claiming a distinct animal health status for the given zone or compartment under consideration.*

14. Unless the United States establishes a disease free zone or compartment, makes public the existence of such zone or compartment, establishes through documentation that the control and surveillance measures fulfil India's ALOP, India is under no obligation to unilaterally recognize alleged zones within the United States as being pest or disease free. The United States has not initiated a bilateral mechanism, namely the presentation of a proposal to India for recognition of disease free zones or compartments. India fails to see merit in the United States claim of violation of Article 6. Articles 6.1 and 6.2 do not operate independently of Article 6.3 and do not impose any obligation upon the importing country in the absence of the triggering steps under Article 6.3.

India does not arbitrarily or unjustifiably discriminate between its own territory and that of other Members

15. The United States compares India's domestic control measures versus the NAI country freedom from imported products to suggest that India arbitrarily or unjustifiably discriminates between its own territory and that of an exporting Member. This scenario presented by the United States does not present identical or similar conditions such that it can be validly compared under Article 2.3. A country wide ban against Members reporting an active outbreak of NAI is not an identical or similar situation to a control measure applied within the municipal limits of a country during an outbreak of NAI.

16. In domestic outbreaks, the epicenter of the disease is known and identified and the risk is one of further spread beyond the originally infected area. With imports on the other hand, in the absence of control measures, agents of disease transmission could enter a country and could be dispersed over a large area through internal commerce and trade. Further as an importing country, it cannot exercise control over containment and disinfection methods applied by exporting countries and therefore has to necessarily apply border measures to ensure that agents of disease transmission do not enter its territory.

17. The United States also claims that India bans poultry products from LPNAI reporting countries but takes no control measures to detect and hence prevent outbreaks of LPNAI. This conjecturing is solely to divert the Panel's attention from what is fundamentally a distinction between the situation prevailing in the United States which has experienced several outbreaks of LPNAI and India which has only experienced outbreaks of HPNAI. The fact is LPNAI is exotic to India and India has to date neither detected, despite routine surveillance, nor experienced outbreaks of LPNAI.

18. Under Article 2.3 a mere formalistic distinction between measures does not suffice. It is only distinction that is either arbitrary or unjustifiable which leads to a violation of the Article. Any enquiry must accordingly focus on whether there is a legitimate cause or rationale for the alleged distinction. Panels have advised that measures applied must be examined in the *"specific context of the relevant risks"* posed by the two situations to determine if there is any justification for the distinction in sanitary measures. The United States projects a "one size fits all" approach which is clearly disproportionate to the risks presented in both scenarios.

19. United States' arguments on India's measure constituting a disguised restriction on international trade suffer from a severe lack of clarity. Panels have explained that "the key to understanding what is covered by "disguised restriction on international trade" is not so much the word "restriction", but the word "disguised". The United States has not adduced facts which establish that by prohibiting imports from LPNAI notifying countries, the measure was giving effect to an alleged protectionist aim of benefiting the domestic industry.

Claims under Article 5.5 should be rejected on grounds of serious ambiguity

20. The United States claims under Article 5.5 are vague and prejudice India's right of defense. All 6 factors need to be established by a complaining party through positive proof before a prima facie case under Article 5.5 can be made. Mere assertion of a claim does not amount to proof of having actually established a violation therein. The United States claim is identical to the summary provided in the panel request. There is no further analysis.

21. The United States also cannot rely on its arguments under Article 2.3 to establish a *prima facie* case under Article 5.5 without providing anything more. Panels have held, a violation of Article 5.5 may result in violation of first or second sentence of Article 2.3, but the reverse is not true.

The United States has not made out a case under Article 5.6

22. The United States claim under Article 5.6 is severely deficient on many levels. The United States suggests that India's ALOP can be fulfilled by standards provided for in the OIE Code. This is surprising because India does follow the OIE standards when it requires NAI country freedom from exporting countries before trade in eggs and fresh meat of poultry can take place.

23. Another fatal flaw in the United States claim concerns the discussion on the ALOP. Under Article 5.6 the complainant must establish that an alternative measure suggested by it fulfils the level of protection which is achieved by the measure at issue, which in this case is S.O. 1663(E), and not an ALOP it believes the importing country should apply. Instead the United States identifies the NAP 2012 and incorrectly discerns from it the ALOP it believes India seeks from imports. NAP 2012 has no application to imports and the ALOP India seeks from imports cannot be identified from an unrelated legislation. Due to the incorrect identification of the ALOP, the ensuring analysis is also seriously faulty and should be rejected.

24. The two alternative measures suggested by the United States are also unviable. The first option, 'unrestricted trade' requires India to ignore the 'condition of entry' provided in the OIE Code and suggests that India import poultry products from a country during an active outbreak purely on the strength of its veterinary certificates. The second option pertaining to zoning and compartmentalization would also not be a 'reasonably available alternative measure' until zones or compartments are first established by the United States and further shown to ensure the same level of protection as the import prohibition currently does.

CLOSING STATEMENT

25. The OIE Code has to be read as a whole and not in a piecemeal fashion. The United States adopts a reading which results in reading out entire provisions in the OIE Code pertaining to NAI country freedom. It is undisputed that every WTO Member has a right to determine its own appropriate level of protection. India has determined that its ALOP is fulfilled by NAI country freedom as reflected in the recommendations of the OIE Code. Hence a reading which restricts the right of India to seek NAI freedom in favour of only HPNAI freedom is untenable and undermines India's sovereign right to determine its ALOP.

26. The United States insists that SPS measures should always be supported by a risk assessment. As is clear, any measure that reflects the level of protection prescribed by an international standard *ipso facto* reflects the assessment of risk and scientific evidence of the standard setting body. To insist on a risk assessment even when a Member adopts international standards defeats the purpose and objective of harmonization contained in the SPS Agreement.

27. At the substantive meeting the United States did not dispute that there is no unilateral obligation on the importing country to recognize zones or compartments. The only question then is whether the United States as an exporting country fulfilled its burden by providing information on the basis of which India could have made an assessment that such zones meet India's requirements. To date United States has not provided this information and India is under no obligation to unilaterally recognize areas within the United States which it claims are pest or disease free.

Conclusion

28. Panel must note that the United States has raised objections to India's measure as it applies to eggs and fresh meat of poultry when a country reports LPNAI. It has not addressed other products or another disease, namely HPNAI. The Panel's enquiry must be limited to products and the disease specifically addressed. Further, claims under Article 5.5 and 5.6 are severely deficient and the Panel must hold that the United States has not fulfilled its burden of proof and established a prima facie case.

ANNEX B-7

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF INDIA

1. India's rebuttal submission will address the following themes in response to the issues raised by the United States (**US**) in its First Written Submission (**US FWS**), opening statement made at the meeting of the Panel with the Parties (**US Opening Statement**) and in its replies to questions posed by the Panel (**US Replies**):

I. SELECTIVE AND PIECEMEAL READING OF THE OIE CODE BY THE UNITED STATES

2. India pointed that the US does not object to the right of a country to require NAI country freedom from the exporting country before permitting trade in fresh meat of poultry and eggs. It nevertheless insists that India must accept eggs and fresh meat of poultry from the US when it is reporting an outbreak of LPNAI. The US points out that the OIE expressly provides that detections of HPAI and LPAI in birds other than poultry should not give rise to trade bans in the context of Article 10.4.1.10 of the OIE Code. The US did not cite this Article for the proposition that detections of LPNAI in poultry should not give rise to trade bans. It could not, because the OIE Code nowhere proscribes what is the natural outcome of NAI freedom, i.e. a prohibition on imports of poultry products from a country that declares LPNAI or HPNAI. Likewise the EU made it clear that it believes a ban imposed on countries on account of a notification of LPAI in wild birds is not in conformity with Article 10.4.1.10 and like the US, the EU does not take the position that bans following notifications of LPNAI in poultry are not in conformity with the OIE Code.

a. Does the OIE Code envisage a ban?

3. A review of US submissions and evidence reveals that it believes a ban is justified against countries which report HPNAI in poultry. As a matter of policy the US prohibits imports from countries declaring HPNAI (such as India) and the restriction is imposed on a permanent basis. The distinction that the US makes with respect to HPNAI and LPNAI is surprising because the OIE Code nowhere recommends imposing a ban on account of HPNAI either. Yet the US is of the opinion that the very same Code permits a ban on account of HPNAI but does not permit a ban on account of LPNAI.

4. An import prohibition is the natural implication of the 'condition of entry' not being met by an exporting country. When imports originate from countries having outbreaks of HPNAI or LPNAI such countries are not HPNAI or NAI free. Since the standards recommend that imports should take place from HPNAI or NAI free countries, by its very implication, the standard acknowledges that if a country is not free, the import need not take place. The natural outcome of importing countries enforcing NAI or HPNAI freedom from their trading partners is through an import ban.

b. Purpose behind notification of LPNAI

5. A related point raised by the US is that OIE requirements, as far as LPNAI are concerned, are limited to the notification obligation. This is not the case. Article 10.4.1.10 makes it abundantly clear that while countries may restrict imports from trading partners notifying LPNAI in poultry, they should not do so when a country notifies LPAI in wild birds. Likewise the OIE's User Guide states that the recommendations are designed to prevent 'diseases in question' from being introduced into an importing country. As far as the OIE Code is concerned, the 'diseases in question' are both HPNAI as well as LPNAI.

c. Origin of a product is a risk mitigation condition

6. India has submitted that recommendations which provide for 'importation from a NAI free country' cover a situation where a country is free from both LPNAI and HPNAI. Thus if a country is free from HPNAI but not from LPNAI, this condition would not be met. The US insists that eggs and fresh meat of poultry should nonetheless be imported from LPNAI positive countries as other control measures may be applied to mitigate the risk of LPNAI.

7. Firstly, this reading goes against the US' own position that bans are permissible when products originate from HPNAI countries and secondly it ignores the explicit wording of various recommendations for eggs and fresh meat of poultry which provide *'Recommendations for importation from a NAI free country/zone/compartment'*. The Panel must note that the recommendations in question do not recommend importing from a country which is not free. The OIE recommendations contain two risk mitigation conditions. The first recommendation to mitigation risk suggests that the product must originate in a free country. The second form of risk mitigation requires that the export consignment is additionally accompanied by a veterinary certificate certifying that the export consignment has been rendered risk free through the application of additional control measures. Both conditions ensure that trade in animal takes place with "an optimal level of animal health security." India's regime for the import of poultry products ensures that both risk mitigation conditions are applied as recommended by the OIE Code. India enforces the condition of entry with S.O. 1663(E) and the veterinary certificate through S.O. 655(E). This is not akin to the pick and choose approach advocated by the US.

d. Other recommendations in the OIE Code indicate that countries can ban imports on account of LPNAI

8. Article 10.4.5 which pertains to imports of 'live poultry (other than day old live poultry)' provide recommendation from NAI free country only. A log*ical reading of this recommendation suggests that if a country declares LP*NAI it would not be free from NAI and an importing country need not import from such country. It would be immaterial that such country is free from HPNAI and control measures such as showing no clinical signs of NAI and transportation in sanitized containers, are available to mitigate risk against LPNAI. Even the US agrees that Article 10.4.5 recommends that adult poultry should not be imported from a country not free from LPNAI. Thus the issue is not whether products can be safely traded from countries which have notified LPNAI but whether the OIE Code permits countries to import only from NAI free countries.

e. United States conflicting position on 'level of protection' and 'appropriate level of protection'

9. The US first claimed that standards by themselves did not reflect any level of protection but reflect simply the disease status of the exporting country. The US later admits that international standards do indeed reflect and are premised to achieve a certain level of protection. But only the WTO SPS Agreement recognizes this sovereign right of Member countries and not the OIE Code. This is incorrect as OIE's guidance note provides that concepts provided for in the SPS Agreement are recognised in the OIE Code including a member's right to adopt an appropriate level of protection.

10. The OIE Code recognizes that the animal health status of the exporting country must be taken into account. The OIE also recognizes that the standards are *designed to prevent the disease in question being introduced into the importing country*. HPNAI and LPNAI are both notifiable diseases, the assumption is that Chapter 10.4 recommendations are designed to prevent HPNAI and LPNAI being introduced into the importing country. The Code states that, "recommendations in the Codes focus on the animal health situation in the exporting country, and assume that the disease is not present in the importing country or, if present, that the disease is the subject of official control programmes. Importing countries should not impose sanitary measures for diseases or pathogens that occur in the importing country unless they are the subject of official controls and, in this case, the measures applied to imports should be no stricter than the official controls applied to similar animals/animal products in the country." The guidance makes it clear that while the animal health situation in the exporting country is a relevant factor, just as relevant is the disease and control situation in the importing country. The aim of India's AI regime is to eradicate AI from its territory. India is thus entitled to take sanitary measures that prevent both HPNAI as well as LPNAI from being introduced into India. India's ALOP would not be fulfilled by prohibiting imports from HPNAI countries alone. Thus India takes measures to prevent the ingress of both diseases of concern as recommended by the OIE Code.

f. Practice of other WTO/OIE Members

11. India has also provided extensive evidence in the form of laws maintained by other countries which impose a ban on exporting countries which notify LPNAI. The WTO notifications cite the OIE

Code as the relevant international guideline, standards or recommendation on which the ban is based and supported by.

II. CONFORMITY OF INDIA'S MEASURES WITH THE OIE CODE

a. The relevant standard

12. India has provided substantive arguments for its claim that clauses 1 (ii) (c), (d) and (e) of S.O 1663 (E) conform to the product specific recommendations in the OIE Code (i.e. Articles 10.4.19, 10.4.10, 10.4.13 and 10.4.15) and with Article 10.4.1.10. Articles 3.2 and 3.1 do not use the word relevant. However, Article 3.3 elucidates when a sanitary measure may be said to not be 'based' on an international standard. It clarifies that a measure which results in higher level of protection than measures *based on* the *relevant* international standard shall have to comply with Article 3.3. By implication the standards which are referred to in Article 3.1 and Article 3.2 are the very same standards under Article 3.3, i.e. 'relevant' international standards.

13. S.O. 1663 (E) pertains to the first risk mitigation condition in the product specific recommendations, and hence product specific measures applicable to eggs and fresh meat of poultry contained in S.O. 1663 (E) should be evaluated for their conformity with the relevant standard, i.e. the *"condition of entry"* which is contained in each standard. India asserts that the relevant standard is not only one which pertains to the specific products at issue but also one which pertains to the specific subject matter of the law under challenge. The law under challenge in this dispute is S.O 1663 (E) as it applies to eggs and fresh meat of poultry. The same law prohibits entry of these products from countries reporting NAI. The US has specifically challenged the "prohibition" under this notification. The subject matter of S.O. 1663 (E) does not extend to matters beyond the circumstances under which poultry products from avian influenza positive countries may be allowed entry.

b. Measures based on an international standard

14. The EU specifies that a measure *contrary* to OIE standards would not be considered to be "based on" these standards. According to the EU, a ban on poultry products on account of LPNAI in poultry would not be "*contrary to*" Article 10.4.1.10 as opposed to a ban on account of notifications of LPAI in wild birds. That which is not *contrary* to the Code is in fact supported by the OIE Code. As the OIE Code 'allows' a ban on account of LPNAI in poultry, it cannot by necessary implication be "contrary to" the OIE Code and is thus based on the Code. Thus, implementing recommendations which call for importing from an "NAI free country/zone/compartment" results in importing products from countries which are "free" from NAI. By its natural implication, a country which is 'not free' from NAI would not satisfy this condition. In practical terms this is achieved through an import prohibition, which ensures that products are not imported from countries that have declared HPNAI or LPNAI.

III. CONTINUING DEFICIENCIES IN THE UNITED STATES CLAIM UNDER ARTICLE 6

a. The United States does not maintain zones or compartments within its territory

15. It is clear that the US does not maintain either zones or compartments as required under Chapter 4.3 and 4.4 of the OIE Code and as required under Article 6.3 of the SPS Agreement. In order to describe its zoning measures, the US has instead alluded to measures it takes during an outbreak of HPNAI and LPNAI. The OIE Code recommends that the concept or zoning and compartmentalization pertain to measures taken "prior to outbreaks of diseases". It is evident that the US has not implemented any measures for purposes of "putting the recommendations of the Code in place".

b. United States shifting position on the obligation on an exporting country

16. The US agreed that any recognition by India of zones or compartments maintained by the US would be contingent upon the US making a request and providing supporting documentation. It also agrees that *"the question of whether a particular area presents characteristics of one type or another is a different issue – that question may only be able to be resolved based on information supplied by the exporting Member."* However, in the same vein the US insists regionalization requires the importing member to engage in an information gathering exercise on an exporting

member's diseases surveillance and control measures to ensure itself that imports do not pose a level of risk greater than the ALOP established.

c. The recognition of the "concept" of zones or compartments under Article 6.2 of the SPS Agreement

17. Article 6.2 does not concern itself with the existence or the subject matter of the importing country's legislation. It is immaterial under Article 6.2 whether there exists a law which recognizes the concepts of zones/compartments and the details provided in such law. The Article obligates an importing Member to recognize the concept and leaves the manner in which this may be accomplished to the Member in question. A combined reading of Article 6.3 and 6.2 makes it evident that once an exporting country provides relevant information, it is the obligation of the importing country to give due regard to this proposal and to evaluate it. The Article 6 Guidelines highlight that regardless of whether a law recognizing zones exits, an exporting Member can initiate the process and seek information on how its application may be processed. India has not received proposals for regionalization or received any enquiries on its laws and procedure that India might adopt to recognize an exporting country's zones or compartments.

18. The US claim of a breach of Article 6.1 is baseless. Relevant differences in sanitary characteristics of different areas of the exporting country cannot be established unilaterally by the importing country. Article 6.1 does not require an importing Member to go on an information gathering exercise. Such information would be available once submitted by exporting countries to importing countries.

d. Evidence does not establish that US provided a proposal for recognition of zones

19. The United States in all its correspondence has not identified areas for which it sought disease free status from India. The United States has failed to provide any technical literature/documentation to substantiate its claims. To the contrary the letters cited contain a comment on India's measure but provide no information on the US poultry industry or level of bio security maintained against avian influenza. Merely suggesting that India modify its veterinary certificate requirements does not equate with providing information on US zones or compartments sufficient for India to determine if such zones or compartments meet India's ALOP.

IV. UNITED STATES CLAIMS ON DISCRIMINATION AND DISGUISED RESTRICTION ON TRADE NOT MADE OUT

a. Claim concerning arbitrary and unjustifiable discrimination

20. To support its claim, the United States submitted a study which recorded the presence of antibodies to H7 in ducks. The US relies on this only evidence to suggest that India has LPNAI outbreaks which it is not controlling. India has substantiated that nothing in the study indicates that the antibodies to H7 were low pathogenic. According to the OIE Code, virus isolation tests are required to be conducted before an LPNAI or HPNAI infection can be said to have conclusively occurred. LPNAI is exotic to India and India is entitled to take measures to prevent introduction of a disease.

21. It also alleges that imposing country wide bans against imports but limiting trade to the affected zones internally results in discrimination. India has explained that as an importing country India is compelled to apply dissimilar control measures to its import and to domestic outbreaks because it cannot "exercise control over containment and disinfection methods applied by exporting countries and cannot certify the health and safety of imported products. The US insists that India must gather information on an exporting country's surveillance and control mechanisms to satisfy itself that such measures are strong enough to contain outbreaks in those countries. Article 10.4.30 and Article 10.4.31 which the US cites requires "*the exporting country to provide evidence that it maintains an effective surveillance program. This information can confirm that the territory is indeed the status it purports to be."* This reinforces India's position that applying limited territorial bans on exporting countries during an outbreak is not a decision that an importing country can take unilaterally unless the efficacy of the exporting country's surveillance and control program is established by the exporting country.

b. Disguised restriction on international trade

22. The reasoning in *Australia-Salmon* reasoning on the "sudden change in position" is inapplicable to the facts of this case. For one, India has not shifted positions on whether a risk assessment is required of it. It was always India's understanding that having adopted an OIE recommendation, it was not required to further conduct a risk assessment. Further, in *EC-Asbestos*, the key to understanding what is covered by 'disguised restriction on international trade' is not so much the word 'restriction', but the word 'disguised' and none of the facts taken individually or collectively establish that India is disguising its true intent behind the measure.

V. UNITED STATES HAS NOT MADE OUT A PRIMA FACIE CASE UNDER ARTICLE 5.5

VI. CONTINUING DEFICIENCIES IN THE UNITED STATES CLAIM UNDER ARTICLE 5.6

23. The US had in its first written submission suggested that India follow the OIE Code as its reasonably available alternative measure. It has subsequently provided two alternative measures that it believes are reasonably available. Firstly, it proposes control measures or veterinary certificate requirements prescribed under Chapter 10.4 of the OIE Code. India submits that suggesting India apply veterinary certificate requirements does not meet India's ALOP. Rather the US has suggested an alternative ALOP which India ought to apply with respect to imports.

24. As a second alternative measure the US suggests that India need not accept imports carte blanche and can require exporting countries to provide evidence that they maintain effective surveillance programs required under Article 10.4.30 and 10.4.31.

25. The US' suggestion that India gather information on exporting countries' surveillance systems and determine if such systems are adequate, this alternative is not technically and economically feasible alternative given its current veterinary and scientific human resource and is rather significantly more trade restrictive than the measure currently applied.

VII. LIMITATION OF CLAIMS TO EGGS AND FRESH MEAT OF POULTRY

26. The US has provided arguments on apparent violations by India under the SPS Agreement vide Article 3.1, 3.3, 5.1, 5.2, 2.2 and 5.6 only with respect to eggs and meat and hence claims under these articles are limited to eggs and fresh meat of poultry.

VIII CONCLUSION

27. It is submitted that United States' in its challenge to India's avian influenza measure has limited the same to eggs and fresh meat of poultry. Further, India's measure conforms to the OIE Code and India is not required to undertake a risk assessment. Lastly, India maintains that the United States has not made out a violation by India under Article 6. India's law enables the Central Government to recognize zones or compartments but India cannot be expected to unilaterally recognize zones or compartments.

28. The claim of the United States under Article 5.5 should be rejected as the United States has not fulfilled its burden to establish a prima facie case of violation by India. United States has also failed to establish that India's measures arbitrarily or unjustifiably discriminate or are applied in a manner which would constitute a disguised restriction on international trade as required under Article 2.3. Finally the alternative measures proposed by the United States under the Article 5.6 claim neither fulfill India's ALOP and nor are they technically and economically feasible.

ANNEX B-8

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF INDIA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

OPENING STATEMENT

1. The United States first raised the issue of LPNAI being present in India as part of its claim under Article 2.3 of the SPS Agreement. The argument stated that India does not take domestic measures to control LPNAI which occurs in the country and hence its import measures against countries reporting LPNAI are discriminatory. Since India has not detected and hence not reported LPNAI to the OIE, the United States offered several hypotheses why LPNAI should be present in India. The first was that India's 85+ HPNAI outbreaks strongly suggest an underlying LPNAI infection in poultry. Both Prof. Brown and Prof. Honhold have unequivocally refuted such linkage between HPNAI and LPNAI. The second hypothesis was that India's large backyard poultry population significantly increases the chances of LPNAI introductions from wild birds into poultry. Dr. Brown has vehemently refuted this linkage between backyard poultry and LPNAI introductions while Dr. Honhold has noted that exhibits upon which US has relied on for this proposition are simply personal opinion of individual scientists, unsupported by any scientific basis. The third was the suggestion that H7 LPNAI viruses should have travelled from Pakistan to India where there was a H7 HPNAI infection in poultry. Again as Dr. Honhold explained, this is mere conjecture as presence in Pakistan does not imply presence in India. The fourth was a study by Pawar et al which the United States put forth as proof of presence of H7 LPNAI infection in poultry in India. Contrary to US suggestion on the results of the study, expert opinion instead establishes that the study on its own does not support a conclusion that antibodies found were H7 specific or that the results prove a LPNAI infection. Dr. Brown's written opinion had pointed out the possibility of cross reactions due to the testing method employed by Pawar et al, which he reiterated at the meeting and stated that the study did not beyond reasonable doubt show the presence of H7 antibodies. Dr. Guan also clarified that though India had not practiced vaccination, the role of illegal vaccination could not be ruled out. Importantly both Dr. Brown and Dr. Guan stressed that virus isolation and not serological testing as was done in Pawar et al, was the most solid evidence of presence of virus.

INTERPRETATIONS OF THE OIE CODE

2. The core issues in this dispute are now well known. India restricts entry of poultry products from countries which report either HPNAI or LPNAI in poultry until such time as the reporting country notifies freedom from the infection to the OIE. India is not alone in restricting imports from countries notifying LPNAI as several countries regularly apply similar measures. United States takes exception to India's measure on the ground that India's restriction on eggs and fresh meat of poultry from LPNAI notifying countries are unsupported by the OIE Code recommendations. To the United States it is a significant fact that Chapter 10.4 does not recommend that a "ban" may be imposed. It should be noted that the United States equates "to recommend" with "explicitly stated" an argument that the European Union has also proposed.

3. This argument is misleading for two reasons. One, Chapter 10.4 does not "recommend" imposing bans on poultry products from countries notifying HPNAI either. Yet, the United States (and EU) read the recommendations to mean exactly that and go ahead and ban imports from countries notifying HPNAI. With HPNAI, they read OIE recommendations which state 'Recommendations for importation from a HPNAI free country/zone/compartment' as suggesting that if the country from which the product is sought to be imported is not free from HPNAI, such product need not be imported. Yet a similar interpretation is denied to recommendations which state 'Recommendations for importation from a NAI free country/zone/compartment.'

4. Second, the United States has entered into several arrangements with its trading partners all of whom are OIE Members, which restrict poultry exports from the US when it declares LPNAI. The interpretation it is seeking of the OIE Code is difficult to reconcile with its own trading regime unless of course one recognizes that the US would not acquiesce to restricting its own imports in

the absence of sound science and without the framework of international standards which support such restrictions.

5. The selective reading of the OIE Code leads to this absurd result; a ban on poultry products from HPNAI reporting countries conforms to the OIE Code (even in the absence of an explicit recommendation for a ban) since there are recommendations which state 'Recommendations for importation from a HPNAI free country/zone/compartment' but, a ban on poultry products from LPNAI reporting countries is unsupported by the OIE Code since the recommendations state 'Recommendations for importation from a NAI free country/zone/compartment' and an explicit language recommending a ban is absent

LEGITIMACY OF TRADE RESTRICTIONS

6. Before I go into when trade restrictions may be legitimate under the OIE Code, it will be helpful to understand if the OIE agrees that if a country is not free of a disease, its products may not be imported by other countries? The answer is yes. In its introduction OIE states that "where fresh meat is not recommended to be traded from countries, zones or compartments, it may be possible to establish measures for trade in meat products". Likewise in its discussion of Article 10.4.19 it states "If the requirements of Article 10.4.19 cannot be satisfied, because the exporting country is not free from HPNAI, it is still possible to export processed poultry meat". Likewise when commenting on maintaining disease free status it states that not being disease free can lead to potential loss of commercial trading opportunities. This is a clear admission that disease notification and hence disease status has ramifications for market access.

7. More importantly, the issue is (i) do the OIE recommendations provide that products should originate in NAI free countries and if so, (ii) can countries take measures to restrict imports if a country is not free from NAI. The answer concerning the first question is evident in Chapter 10.4 itself. That Chapter provides recommendations for importation from NAI and HPNAI free countries hence it is clear that the OIE has recommended that trade should take place from a NAI or HPNAI free country. The natural conclusion being that trade need not take place if a product is not originating from a NAI or HPNAI free country. However whether a country is "justified" in restricting imports from countries that are not NAI or HPNAI free is an issue for which the necessary guidance is provided under Chapter 5.1 of the OIE Code.

8. Article 5.1.2 makes it clear that Members may take import measures to fulfill their ALOP. In taking such measures the animal health situation of the exporting as well as importing country are relevant factors. It advises Members not to take import measures against countries which have reported a disease which is not an OIE listed disease and finally it cautions Members not to take import measures against diseases which are present in the Member's own territory and for which no control measures are applied.

OTHER INCONSISTENCIES IN OIE'S RESPONSE

9. The OIE was asked to specifically clarify the purpose of reporting LPNAI in poultry. The response provided by the OIE is as good as not providing a response. The OIE does not explicitly state that notification of LPNAI is limited for the purpose of surveillance. It could not have stated that, since only notifications of HPNAI in wild birds are for the limited purpose of surveillance and no language in the OIE Code suggests that notifications of LPNAI likewise have a limited purpose. The question remains unanswered.

10. Likewise when asked to clarify what the TAHSC meant when it referred to reporting of HPNAI and LPNAI in the same vein as being for 'trade purposes', the OIE instead clarifies that reporting of HPNAI in wild birds was for surveillance. There is no relevance of the answer to the question posed and instead undoubtedly establishes that the OIE has gone out of its way to be evasive in its responses.

11. Similarly, when the Panel asked what measures an importing country must take when an exporting country is reporting LPNAI and wants to export live poultry other than day old poultry, (Article 10.4.5) the OIE instead says that countries wishing to import from HPNAI free countries should do a risk assessment. This is another example of OIE's brazen attempt to divert attention from the main issue, which is that if an exporting country notifies LPNAI, it may not be permitted to export live poultry (other than day old poultry) to its trading partners. If Article 10.4.5 is read

to mean that an importing country may not import live poultry (other than day old poultry) from countries reporting LPNAI, there is no reason the same meaning cannot be attributed to other recommendations which provide for "Recommendations for importation from a NAI free country/zone/compartment".

12. In question 17, the Panel sought a very clear answer from the OIE whether products specific recommendations may be applied as alternatives depending on an importing country's ALOP or were they to be applied strictly based on the disease status of the exporting country. This question goes to the root of the issue because India claims that it can apply LPNAI based restrictions since they fulfill India's ALOP and further that the OIE Code recommendations are worded such that flexibility is provided to countries to import poultry products based on the level of protection deemed appropriate by each importing country. The United States on the other hand has claimed that the only relevant consideration is an exporting country's status so that even if a country is not free from LPNAI but is free from HPNAI, it should be allowed to export poultry products.

13. Surprisingly the OIE agrees with the US reference to avian chlamydiosis to suggest that any restrictions recommended are explicitly provided in the Code. The United States has used this reference to avian chlamydiosis presumably to suggest that the OIE Code has not 'recommended' or 'explicitly' provided for a ban on account of LPNAI and hence these are unsupported by the OIE Code. But equally by this logic the OIE Code has not 'explicitly' provided for bans on account of HPNAI either. Yet the United States believes such bans are supported by or based on the OIE Code. Importantly, the reference to the chapter on avian chlamydiosis supports India's position that if a country is free from a disease it may restrict entry of products from countries not free of that disease. The relevant recommendation states as follows:

> "Article 10.1.2: Trade in commodities
>
> Veterinary Authorities <u>of countries free from avian chlamydiosis may prohibit</u> importation or transit through their territory, from countries considered infected with avian chlamydiosis, of birds of the Psittacidae family."

14. If anything, the reference to Article 10.1.2 on avian chlamydiosis supports India's claim that the disease health situation in the importing country is relevant and must be taken into account when imposing measures and further that a country is justified in taking measures against diseases which are not present in its territory.

CLAIM UNDER ARTICLE 5.6 NOT MADE OUT

15. In its First Written Submission and its Opening Statement at the First Substantive Meeting India had highlighted that the claim under Article 5.6 suffered from a fatal legal flaw. The complaining party bears the burden of establishing that an alternative measure suggested by it fulfills the level of protection which is <u>achieved by the measure at issue</u>, i.e. S.O. 1663 (E). The United States instead sought to discern the ALOP from the National Action Plan, (NAP) which is a domestic measure and in any event is not the measure at issue in this dispute. The United States continues this line of argument and suggests that since India has not defined its ALOP, it is constrained to infer it from record evidence and has again gone on to infer the ALOP from the NAP.

16. India finds the US argument unconvincing because even if the United States had to engage in the exercise of inferring an ALOP, it still had to restrict itself to the measure at issue, i.e. S.O. 1663 (E). On the excuse of inferring an ALOP, the United States cannot impugn an unrelated measure and further still infer an ALOP from it. The identification of an ALOP from a measure which is not at issue leads to a fatal legal error and strikes at the very root of the United States allegation under Article 5.6

17. For the same reason its claim under Article 2.2 also fails. India however reiterates that even in the absence of the legal error in the Article 5.6 claim, the claim under Article 2.2 as a consequential breach of Article 5.6 fails, as the United States has failed to provide a cogent reason for linking and reading together two articles which have made no references to one another.

CLAIM UNDER ARTICLE 5.5 NOT MADE OUT

18. India maintains that the United States claim under Article 5.5 continues to remain ambiguous and should be rejected on this ground alone. The United States Second Written Submission contains broad generalizations on the Article 5.5 claim but nothing in that discussion addresses in any detail or with clarity the separate elements of the claim which are required to be fulfilled cumulatively for a valid claim under Article 5.5.

19. The United States presents no facts to explain why situations being compared are different but comparable. As the Panel in *Australia- Salmon* has stated, situations under Article 5.5 can be compared "if these situations involved either a risk of "entry, establishment or spread" of the same or a similar disease or of the same or similar "associated, biological and economic consequences". To this requirement the United States notes, "… the comparability of the different situations at issue in the US claim under Article 5.5 needed no elaboration. They involve trade in the *same* products and control of the *same* diseases. The Appellate Body has explained that for purposes of a claim under Article 5.5, comparable situations are "situations involving the same substance or the same adverse health effect". There is no doubt that the situations at issue here are comparable." Overall the claim under Article 5.5 remains highly deficient and should be rejected outright.

CLOSING STATEMENT

1. At the outset India will place on record the comments it had to the United States Opening Statement. In paragraph 15 the US refers to an SPS meeting of 2008 and the statement made by India at such meeting to suggest that India applies bans on poultry due to reports of avian influenza in wild birds. As India clarified it is clear from the text of the minutes that the ban was imposed on poultry products in response to notifications of NAI. Its stated concern for avian influenza in wild birds should not be taken to mean its application of bans on this account. India refers to a subsequent SPS Committee meeting in 2010, where India clarified in no uncertain manner that its bans are imposed in response to notifications of NAI in poultry only and not in response to information of avian influenza in wild birds.

2. Second, in response to US suggestion in paragraph 30 of its Opening Statement that India requires attestation that an exporting country is free of LPAI, India reiterates that is not the case. India refers to its response to Panel question 25 where it clarified that though veterinary certificates refer to HPAI and LPAI, they are implemented as meaning HPNAI and LPNAI. That answer also makes reference to import permits issued by India permitting imports from countries which had experienced LPAI in wild birds in the same period when import permits were issued. This clearly proves that India does not in fact restrict imports from countries which report LPAI or HPAI in wild birds.

3. Third, India refers to paragraph 17 of the US Opening Statement where it suggests that certain products such as fresh meat of poultry can be traded regardless of the status of the exporting country. India notes that if the status of the exporting country for fresh meat of poultry were indeed irrelevant the standard, i.e. 10.4.19 would have been worded very differently. There are several product recommendations such as Article 10.4.23 concerning feathers and down of birds other than poultry where the exporting country's status is irrelevant and are worded to convey this meaning clearly. Article 10.4.19 on the other hand is worded such that it makes a clear recommendation to import from a NAI or HPNAI free country/zone/compartment.

4. India reiterates that Panel's questions to experts erroneously shifted the burden of proof onto India. It was the United States which doubted India's notifications to the OIE and insisted that LPNAI had to, as a matter of fact be present in India and it was implausible that India did not have LPNAI in its poultry. India notes that the OIE does not verify disease notification, disease freedom or surveillance for avian influenza. These matters are left to the individual OIE Members and the OIE does not have the mandate to undertake these activities. Such as the US claim that HPNAI is not present in its territory is not subject to verification by the OIE, so is India's claim that LPNAI is not present in India. Thus if the US is doubting India's disease status, the burden is on the US to prove through evidence that its claim is made out. Hence the role of experts should have been to evaluate this claim based on the exhibits submitted by the US and not as has happened to shift the burden onto India to disprove the negative.

5. India also reiterates that S.O. 1663 (E) contains several product specific measures. Thus conformity of individual product specific measures must be evaluated with the relevant international standard to determine if the measure pertaining to that product is conforming to or is based on the OIE Code. Similarly it should also be noted that the US challenges the "prohibition" and hence the relevant standards under the OIE against which the prohibition is to be evaluated is the "condition of entry" that each product specific recommendation provides and not against the veterinary certificate requirements under each product specific recommendation.

6. Further India has explained in detail the deficiencies in the opinion provided by the OIE. As India has stated the Panel has an obligation to objectively evaluate the matter before it and towards that end it must evaluate the OIE Code in light of rules of treaty interpretation in the VCLT. The US states that the OIE Code is not a treaty and VCLT does not apply. Attention is drawn to Article 2 (a) of the VCLT under the definition of which the OIE Code clearly qualifies as a treaty to which its rules of interpretation apply. Further the OIE Code is also referred to in Annex A paragraph 3 (b) of the SPS Agreement as the relevant international standard for animal health and zoonoses. Since the SPS Agreement is undoubtedly a treaty and the OIE Code is an integral part of that Agreement, it too must be interpreted in light of customary rules of treaty interpretation.

7. India also refers to the discussion at the meeting today concerning the US regionalization claim. As was evident, apart from requiring India to change its veterinary certificate requirements there is nothing in the US Exhibits about specific zones or compartments that the US requested India to recognize. It is also telling as the US explained in its response to a Panel question that it initiated no constructive engagement with India post 2010. As India has explained, every time US asked India to change its sanitary requirement it said these conditions could not be changed as they applied to all countries. The US has always been well aware of the 'Guidelines to further the practical implementation of Article 6 of the SPS Agreement' and should have initiated good faith negotiations with India on this issue. If India is faulted for not making abundantly clear to the US that it will recognize zones or compartments if the US so furnishes a proposal, the US is equally responsible for not being unequivocal about its request. As the country requiring an exception in India's trading regime it should have made a clear, explicit and unequivocal request to this effect to India.

8. Finally India notes that India had made a second preliminary ruling request that the US claim under Article 2.3 is not maintainable as the NAP was not identified as a specific measure at issue in the US panel request. To this the US claimed that the NAP was not the measure at issue and that the US had not impugned it. However the deliberations and the scrutiny that the NAP has been subjected to are in fact tantamount to examining NAP as the measure at issue. India requests the Panel to examine the maintainability of the US Article 2.3 claim in light of India's second preliminary ruling request.

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ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA*

1. Argentina will refer exclusively to certain issues raised in this case. Specifically, it will comment on the obligation for Members to base their sanitary and phytosanitary measures on scientific principles, that sanitary or phytosanitary measures should not be maintained over time without sufficient scientific evidence, and that they should be based on a risk assessment. It will also underscore the importance of satisfying the principles of Harmonization and Regionalization, respectively set forth in Articles 3 and 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

2. It is important to recall that the objective of the SPS Agreement is to prevent sanitary or phytosanitary measures from being used as disguised restrictions on trade.

3. WTO jurisprudence has identified three separate requirements arising from the text of Article 2.2: "It is apparent from the text of Article 2.2 that this provision contains three separate requirements: (i) the requirement that SPS measures be applied only to the extent necessary to protect human, animal or plant life or health; (ii) the requirement that SPS measures be based on scientific principles; and (iii) the requirement that SPS measures not be maintained without sufficient scientific evidence".[1]

4. The linkage between the sanitary or phytosanitary measure and the corresponding scientific evidence must be well-founded and meet objectiveness criteria. In this connection, it will be recalled that in "Japan – Agricultural Products II" and in respect of the requirements in Article 2.2 of the SPS Agreement, namely that there should be a rational and objective relationship between the sanitary or phytosanitary measure, on the one hand, and the scientific evidence, on the other, the Appellate Body stated that it was a relationship to be determined on a case-by-case basis.[2]

5. Argentina wishes to reaffirm the interpretation according to which all SPS measures are to be based on scientific principles, not only when the measure is adopted but also throughout the period during which it is in effect. It is important to ensure compliance with the requirement that an SPS measure should not be maintained without sufficient scientific evidence; otherwise, the spirit of the Agreement would be undermined by allowing the continued existence of SPS measures that prove to be inconsistent with Article 2.2 of the SPS Agreement.

6. Argentina further emphasizes that although they are entitled to set their own levels of protection, Members may not disregard their obligation under Article 5.1 to provide scientific justification for their measures by carrying out a risk assessment.

7. Argentina underscores the importance of complying with the "Harmonization" criteria. Article 3 of the SPS Agreement encourages Members to harmonize their sanitary and phytosanitary measures with the existing international standards, guidelines and recommendations. The requirement in Article 3.1 that SPS measures be "based on" points to the need for such measures to rely on the relevant international standards.

* This text was originally submitted in Spanish by Argentina.

[1] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Report of the Panel, WT/DS291/R, WT/DS292/R, WT/DS293/R, paragraph 7.1424.

[2] *Japan - Measures Affecting Agricultural Products* ("Japan – Agricultural Products II"), Report of the Appellate Body, WT/DS76/AB/R, paragraph 84.

8. Argentina considers it essential to take into account the standards, guidelines and recommendations of the OIE to the extent that they enable trade, so as to avoid absolute prohibitions on imports. It emphasizes that the international standards are designed to facilitate - not to restrict - the development of international trade. SPS prohibition measures in relation to international trade have the most restrictive impact. In Argentina's view, a Member which has imposed measures that deviate from the international standards is required to ensure, among other things, that such measures are based on a risk assessment. Argentina also believes that sanitary and phytosanitary measures should be based on a risk assessment which confers scientific legitimacy on the measures in question.

9. It should be recognized that an SPS measure may be regarded as not being "based on" international standards when it manifestly runs counter to the standards issued by the competent international organizations, such as the World Organisation for Animal Health (OIE) in the case of this dispute.

10. Article 5 of the SPS Agreement requires Members to carry out a risk assessment. The need for an SPS measure to be "based on" a risk assessment pursuant to Article 5.1 and 5.2 means, in specific terms, that there must be a rational and objective relationship between the SPS measure and the results of a risk assessment.[3] At the same time, Article 5.6 lays down the obligation to ensure that an SPS measure is not more trade-restrictive than required. WTO jurisprudence takes the same line in that there would be a violation of this provision where there are alternative measures available to achieve the adequate level of protection that the Member has duly determined to be acceptable, which would be less restrictive on international trade than the SPS measure at issue.[4]

11. Argentina accordingly concurs with the position reflected in WTO jurisprudence that the application of mitigating measures will always be less restrictive than outright prohibition[5], which imposes the highest possible level of restriction, that is, total interruption of international trade flows. In particular, Argentina agrees with the United States' view that the alternative which satisfies the Article 5.6 requirements is the adoption of the OIE standards.

12. Another principle that Argentina regards as essential is regionalization. It emphasizes that the obligation to adapt SPS measures to the sanitary characteristics of the areas of origin and destination of the products, taking into particular account the level of prevalence of diseases or pests, is critical to guaranteeing the uninterrupted flow of international trade, while ensuring that Members can exercise their right to protect their territory from the risk of entry, establishment and spread of diseases and pests.

13. The paragraphs of Article 6 of the SPS Agreement taken in conjunction clearly show that the process of determining the areas or regions concerned must be based on a series of objective criteria that will ultimately guarantee non-discrimination, taking into account international standards such as those established by the OIE. Insofar as the interested Member provides the importing Member with the documentation necessary to define a region, non-recognition thereof will be a sign that the SPS measures are not based on those international standards. At the same time, it will point to non-compliance with the provisions of Article 6 of the SPS Agreement.

[3] Report of the Appellate Body, *EC - Hormones*.
[4] Report of the Appellate Body, *Australia – Salmon,* paragraph 194.
[5] See, for example, Report of the Panel, *Australia – Salmon,* paragraph 7.111.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

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.[1] Australia also notes that this presumption is rebuttable.[2]

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*[3] and by the Appellate Body in *Australia-Salmon*[4] 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.[5] 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,[6] 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.*

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

[1] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 170.
[2] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 165.
[3] Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report, WT/DS367/AB/R, paragraph 7.1134.
[4] Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, paragraph 206.
[5] European Union, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – Third Party Submission* (26 June 2013) paragraph 109.
[6] European Union, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – Third Party Submission* (26 June 2013) paragraph 113.

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.[7] 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.[8] In this regard Australia notes the Appellate Body's guidance in *EC-Hormones* regarding the distinction between "based on" and "take into account."[9]

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.

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

[7] United States of America, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – First Written Submission* (10 April 2013) paragraph 117.

[8] Japan, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – Third Party Submission* (26 June 2013) paragraph 21.

[9] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 189.

[10] See also Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute,* WT/DS321/AB/R, adopted 16 October 2008, paragraphs 227 – 231.

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.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil hereby presents its integrated executive summary, where it provides a brief description of the main points presented in its Third Party Submission and Oral Statement.

(a) The presumption established by Article 3.2, and reinforced by Article 5.6, of the SCM Agreement, is rebuttable

2. In Brazil's view, the SPS Agreement offers appropriate policy space for Members to determine the necessary sanitary and phytosanitary protection for the protection of human, animal or plant life or health, according to legitimate regulatory concerns. Nonetheless, such discretionary power has to be consistent with the provisions of the Agreement, as stated in Article 2. While article 2.1 and the preamble of the SPS Agreement are the basis for the right of States to establish SPS measures, Articles 2.2 and 2.3 provide a balance between this right and international trade.

3. Following this rationale, and as put forth by Article 3.2, all measures taken in conformity with these standards are "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".

4. In this sense, the presumption of Article 3.2 gives, one may say, an easier approach when establishing and maintaining SPS measures.1 Furthermore, Article 5.6 explicitly rules out SPS measures conforming with international standards from the requirement of not being "more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility. It, however, does not mean an absolute presumption. Brazil would like to recall that, when article 3.2 establishes said presumption, it does not express that such presumption is not subject to questioning, as put forward by the Appellate Body, in *EC – Hormones*.

(b) According to Articles 3.1 and 3.3 of the SPS Agreement, a SPS measure that does not conform to an international standard, guideline or recommendation must be based on the assessment of the risk to life or health of humans, animals or plants.

5. As previously mentioned, only SPS measures that comply with international standards have the benefit of the presumption of conformity to the SPS Agreement and GATT 1994. Conversely, SPS measures diverging from international standards should be based on a risk assessment, as detailed by Article 5 of the SPS Agreement, in order to be consistent with the provisions of this Agreement.

6. In Brazil's view, Members have the right to define the appropriate level of protection required in their territory and, as a consequence, establish and maintain SPS measures with higher level of protection than international standards. For that, it is necessary that the SPS measure have (i) a "scientific justification" as defined by footnote 2 of the SPS Agreement or to be established taking into account (ii) "the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.

(c) The principle of regionalization recognized by an international organization should not unjustifiably encumber the exporting Member.

7. Brazil believes regionalization ensures fairness of treatment among Members and guarantees that SPS measures are not applied in an arbitrary manner. It also strengthens the principle embodied in Article 5.6 of the SPS Agreement, as the specificity of measures to areas or regions with different risks to human, animal and plant life or health also guarantees that such a measure is no more trade-restrictive than necessary.

1 *EC – Hormones* (Appellate Body Report, para. 102)

8. These considerations have special importance in the present case. The World Organization for Animal Health (OIE), more than establishing notification requirements for Avian Influenza, lays down elements that may qualify a country, zone or compartment as pest-free or disease-free area, under the Terrestrial Animal Health Code, Articles 10.4.3 and 10.4.4. Although not mandatory, the provisions should be taken into account by Members so as to ensure that the SPS measures are adapted to the levels of prevalence of Avian Influenza in a specific area, in light of Article 6.1 of the SPS Agreement.

9. Scientific principles guide Members' adoption of SPS measures. It is a cornerstone of the SPS Agreement for measures to be "adapted to the sanitary or phytosanitary characteristics of the area"[2] and that disease-free areas should be characterized according to "factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls."[3]

10. Regionalization helps SPS Measures to be more effective and less trade restrictive and, for that end, international standards can constitute a useful tool. As the Panel in *EC – Hormones*[4] recognized, it is the exporting Member that needs to comply with Article 6.3 as the burden of proof is explicitly conferred on them. However, once it has complied with its obligations or made a good faith effort to grant reasonable access for inspection and other procedures, it is on the importing Member to justify, with the adequate risk assessment, the divergence from the internationally recognized pest-free area. As in *EC Hormones*[5]: "Once such a prima facie case is made, however, we consider that, at least with respect to the obligations imposed by the SPS Agreement that are relevant to this case, the burden of proof shifts to the responding party."

[2] SPS Agreement, Article 6.
[3] SPS Agreement, Article 6.2.
[4] *EC – Hormones* (Panel Report., fn 250)
[5] *EC – Hormones* (Panel Report,.para. 8.51)

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THE PRELIMINARY RULING REQUESTS

1. The European Union recalls that third parties have the right to comment on a request for a preliminary ruling, as their right stems directly from Article 10 of the DSU as a due process requirement.

2. The European Union considers that the references to 'implementing measures' and 'related measures' 'identify the specific measures at issue'. Unlike in the cases of *EC – Selected Customs Matters* and *China – Raw Materials*, where the challenges concerned a broad spectrum of possible measures, the scope of this case is precisely circumscribed only to those NAI measures. In addition, India failed to answer the US request under Article 5.8 of the SPS Agreement and this should be considered an attendant circumstance.

3. The requirement to 'provide a brief summary of the legal basis sufficient to present the problem clearly' should be assessed on a case by case basis. The simple listing of articles may be enough, as found by the Appellate Body in *EC - Bananas III*. The Articles 2.3, 5.5 and 5.6 claims refer to both HPNAI and LPNAI. The sufficiency requirement is met by the Article 2.3 claim because it not only reproduces the text of the provision, but there is an indication of the country and the measures. The use of the words 'for example' does not render the Article 5.5 claim imprecise. Finally, there is no risk of confusion from the formulation of the Articles 2.3 and 5.5 claims.

4. In light of the above, the European Union considers that the standard in Article 6.2 of the DSU is met by the US panel request.

5. With regard to India's second preliminary ruling request, the European Union agrees that the US panel request makes reference to 'similar avian influenza related controls with respect to like domestic products and their internal movement within India'. The measure at issue should not be the import ban or the National Action Plan regarded separately, but rather the difference between the two. The European Union also considers that the health certificate requirements are 'implementing and related measures', given the particular circumstances of this case.[1]

II. PROCEDURAL ASPECTS

6. The European Union considers that the SPS Agreement is applicable in the present case. Some flexibility in approaching issues of burden of proof may be appropriate, given the judgement inherent in weighing evidence.[2] As a preliminary issue, the European Union recalls that the Appellate Body has stated, in the context of Article 5.1 of the SPS Agreement, that the standard of review in SPS cases is rather deferential to WTO Members' assessments.[3]

7. The starting point for a panel in assessing the utility of expert advice should be the possible contribution towards an 'objective assessment of the matter before it'. Four main contentious points are identified by the European Union in the present case.

8. First, expert advice is not needed for the interpretation of the OIE standards, as they are reasonably clear. This point of the dispute seems to be not about science, but about an interpretative exercise. Second, India's Summary Document cannot be characterized as a valid risk assessment as long as India itself dismisses that. In addition, an OIE expert

[1] Appellate Body Report, *EC – Bananas III*, para. 140.
[2] Appellate Body Report, *Australia - Apples*, paras 360-66.
[3] Appellate Body Report, *US - Continued Suspension*, para. 590.

already examined the document and has concluded to the contrary.[4] Third, India's claim that LPNAI is exotic to its territory cannot be elucidated by simple analysis of the existing data. However, there is strong evidence suggesting that LPAI virus (LPAIV) of the H7 serotype might be occurring in India.[5] Finally, while considering the fourth issue, namely the occurrence of LPNAI in internal organs, other than respiratory or digestive systems, one should keep in mind that the studies by Post et al. and Swayne and Beck do not examine the same tissues. In case of any doubts as regards the presence of viable virus in fresh meat, the OIE Scientific Commission would be the best placed to review the matter.

9. In light of the above, while fully acknowledging the utility of expert advice in SPS disputes in general, the European Union is of the view that it is not necessarily needed in the present dispute and it may rather unduly delay the proceedings.

10. With regard to the order of analysis, for effectiveness-related reasons the European Union considers that the Panel should start its analysis with the harmonization claims and then proceed with the claims related to risk assessment. The European Union submits that the Panel should analyse the US risk assessment claims under the more specific provision first, namely Article 5.1 and only afterwards under the more general principle embodied in Article 2.2 of the SPS Agreement.[6]

III. SUBSTANTIVE ISSUES

A. Claims related to harmonization

11. Article 3 encourages Members to harmonize their SPS measures, distinguishing between three different situations: when the measures are 'based on' international standards, when the measures 'conform to' the said standards and when the measures are more stringent than the international standards. The Appellate Body clarified that 'a measure that conforms to an international standard would embody the standard completely and, for practical purposes, converts it into a municipal standard'.[7] The 'base on' requirement is different from 'conform to' and it means that the measures are 'supported' by the international standards.[8]

12. The European Union submits that there is no obligation of Member Countries concerning notification of LPAI in wild birds in the OIE Code.[9] Information voluntarily submitted concerning LPAI virus infections in wild birds should not serve, in any case, as a justification for the imposition of trade bans in poultry commodities by other countries.

13. Comparing product-by-product the Indian measures and the OIE standards, the European Union notices that while the OIE Code contains no recommendation concerning trade in live pigs, S.O. 1663(E) imposes a ban on this product. Several OIE recommendations for unprocessed poultry products provide different alternatives, depending on the NAI or HPNAI free status of a country/region/compartment. The European Union considers that these alternatives depend on objective factors and do not give countries an unfettered discretion to choose the one they prefer. Thus, to that extent, there is a discrepancy between the OIE standards, which distinguish between HPNAI and LPNAI, and India's measures, which treat both situations in the same way.

14. The European Union is of the view that Article 10.4.1.10 is a general provision which should be interpreted in the light of the product-specific provisions. It cannot be interpreted as allowing an immediate ban following HPNAI or LPNAI notifications. Thus, the European Union submits that India's bans on live pigs and unprocessed poultry products do not 'conform to' and are not 'based on' the relevant OIE standards.

[4] US Exhibit 108.

[5] S. Pawar et al., "Avian influenza surveillance reveals presence of low pathogenic avian influenza viruses in poultry during 2009-2011 in the West Bengal State, India", *Virology Journal*, 2012, 9:151.

[6] Panel Report, *Australia-Salmon*, para. 8.48.

[7] Appellate Body Report, *EC – Hormones*, para. 170.

[8] Appellate Body Report, *EC – Hormones*, para. 163.

[9] Article 1.1.3.1., making reference to Article 10.4.1.1 and Article 10.4.1.2 of the OIE Code, read in conjunction with Article 10.4.1.10 of the OIE Code.

B. Claims related to risk assessment

15. To the extent that India's measures do not 'conform to' and are not 'based on' the OIE recommendations, it is necessary to establish whether there is a solid scientific basis for their imposition. The definition of risk assessment is provided in paragraph 4 of Annex A of the SPS Agreement. As a previous panel notes, there are two types of risk assessment, namely a pests risk assessment and a food safety risk assessment.[10] Article 5.1 does not require Members to carry out their own risk assessment, as an 'SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization'.[11]

16. The Summary Document, presented by India at the October 2010 meeting of the SPS Committee, cannot be considered as a valid risk assessment and does not meet the requirements of Article 5.2 of the SPS Agreement. India itself maintains that the Summary Document is not its risk assessment and that it only summarizes what India believed to be the basis of the OIE recommendation. Furthermore, the European Union recalls that an OIE expert already examined the document and that he concluded that it cannot be considered a valid risk assessment within the meaning of the SPS Agreement or of the OIE Code.

17. Article 2.2 contains the general principles of the SPS Agreement related to necessity and scientific disciplines for the use and maintenance of SPS measures. The necessity requirement has not been clarified in the context of this provision but one may find useful guidance in the interpretations provided in the framework of Article XX(b) of the GATT 1994 or of Article 2.2 of the TBT Agreement.

18. The second element of Article 2.2 is the general requirement to base measures on scientific principles and not maintain them without sufficient scientific evidence. Article 5.1 is a more specific provision related to these principles, requiring WTO Members to undertake a risk assessment. A violation of the more specific provision in Article 5.1 constitutes also a violation of the more general requirements in Article 2.2.[12] However, given the more general wording of Article 2.2, the reverse is not necessarily true.[13]

C. Claims related to risk management

19. The SPS Agreement and the corresponding case law recognize that each WTO Member may establish the level of protection it deems appropriate.[14] This includes a 'zero-risk' policy and may cover any ascertainable risk, including small or 'negligible' risks.[15] However, the risk management choices of Members should be reflected in measures applied in a non-discriminatory and reasonable manner, as prescribed by Articles 5.5 and 5.6 of the SPS Agreement.

20. A SPS measure is more trade-restrictive than required if there is an alternative SPS measure meeting the conditions of footnote 3 to Article 5.6.[16] In the present case India has not expressly stated its appropriate level of protection (ALOP). No answer has been provided by India to the US Art 5.8 request.[17] Accordingly, if the level of protection is not specified in writing, a panel should infer it from the SPS measures applied in practice. Assuming that India has a high ALOP, the European Union submits that *regionalization* meets the three cumulative conditions of Article 5.6: it is reasonably available, achieves the Member's ALOP and is significantly less trade restrictive that a country-wide ban.

[10] Panel Report, *Australia-Salmon*, para. 8.68.
[11] Appellate Body Report, *EC - Hormones*, para. 190.
[12] Appellate Body Report, *Australia-Salmon*, paras 137-38.
[13] Appellate Body Report, *Australia-Salmon*, para. 137.
[14] Appellate Body Report, *EC – Hormones*, para. 124.
[15] Appellate Body Report, *Australia-Salmon*, para. 125.
[16] Appellate Body Report, *Australia – Salmon*, para. 194.
[17] Exhibit US-4.

D. National Treatment claims

21. According to a previous panel there are three cumulative requirements to be met before a violation of the first sentence of Article 2.3 can be established[18]. Without taking position at this stage on the prevalence of similar conditions, the European Union reiterates that it sees no contradiction in having a high level of protection and allowing trade according to the regionalization principles. We also see no contradiction in having a high level of protection and taking domestic measures circumscribed to a certain area.

22. The obligation embodied in Article 5.5 of the SPS Agreement is the principle of non-discrimination in risk management. Three cumulative conditions have to be met in order to establish a violation of Article 5.5.[19]

23. The European Union agrees that while not explicitly stated, India's ALOP can be inferred from the SPS measures applied. WTO Members are free to set their ALOP but they are *not* free to adopt different ALOPs in 'different situations'. It has been previously decided that the type of situations envisaged by Article 5.5 are *comparable* situations, such as 'situations involving the same substance or the same adverse health effect'.[20]

24. As to the relationship between Articles 5.5 and 2.3 of the SPS Agreement, the Appellate Body has stated that a violation of Article 5.5 would automatically trigger a violation of Article 2.3, while the reverse is not necessarily true. [21]

E. Claims related to regionalization

25. The European Union recalls that regionalization is an important principle aiming at allowing trade while maintaining a high health status. In the case of Members with large territories an outbreak of NAI in one part of the territory often means no risks in other parts of the country. The European Union considers that Article 6 of the SPS Agreement imposes an obligation to recognize regionalization as a matter of principle.[22] This formal recognition should be followed by the agreement of the Members on the necessary measures *prior* to outbreaks of the disease. Finally, once these arrangements are in place, the authorities of the importing country will be able to take decisions on individual cases.[23]

26. Furthermore, a cumulative reading of Articles 6.2 and 6.3 reveals that the process of determining the areas is not at the absolute discretion of the importing Member. There are a set of *objective* criteria which shall be taken into account, such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls. In addition, it is the view of the European Union that Members are under an obligation to enter with good faith into a proper dialogue. Otherwise there is a breach *per se* of Article 6.[24]

27. The SPS Committee has developed specific guidelines on Article 6. Even if these guidelines cannot be considered a 'subsequent agreement' among the Parties within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT) because of explicit text to the contrary, [25] they may nevertheless provide 'useful guidance' on how the mechanism of Article 6 may articulate.[26]

[18] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.
[19] Appellate Body Report, *EC - Hormones*, para. 214.
[20] Appellate Body Report, *EC - Hormones*, paras 216-17.
[21] Appellate Body Report, *Australia-Salmon*, para. 252.
[22] Article 6.1 of the SPS Agreement provides that 'Members shall recognize the concepts'.
[23] Chapter 4.3. of the OIE Code.
[24] In a different context, the Appellate Body has already sanctioned the lack of engagement in 'serious, across-the-board negotiations'. Appellate Body Report, *US – Shrimp*, para. 166.
[25] G/SPS/48, para. 2.
[26] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 14-5.

F. Transparency claims

28. Members shall allow a reasonable interval between the publication and the entry into force of an SPS measure under Paragraph 2 of Annex B.

29. The European Union considers that the Indian measures do not 'conform to' and are not 'based on' the OIE standards. Accordingly, the content of India's measures is not 'substantially the same' as the content of the relevant international standard. To the extent the regulation has a 'significant effect on trade' of other Members, which a trade ban may very well have,[27] India's measures are in breach of Paragraph 5 of Annex B and Article 7 of the SPS Agreement.

G. Article XI of the GATT 1994

30. The European Union shares the view that a violation of the SPS Agreement may result in a violation of the GATT 1994.

[27] Panel Report, *EC — Hormones (Canada)*, para. 8.26.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF GUATEMALA[*]

1. Guatemala would like to take this opportunity to comment on three issues:

1.1. First, on the legal interpretation of Article 5.8 of the SPS Agreement;

1.2. Second, on the suggested order of analysis of this dispute; and,

1.3. Third, on the second request for preliminary ruling under Article 6.2 of the DSU.

A. LEGAL INTERPRETATION OF ARTICLE 5.8 OF THE SPS AGREEMENT

2. On the legal interpretation of Article 5.8 of the SPS Agreement, Guatemala observes that there is no particular claim under this provision. The concern of India seems to be related to potential adverse inferences that could be drawn from the facts of the case and the legal interpretation of this provision.

3. Guatemala observes that India appears to suggest that Article 5.8 of the SPS Agreement does not deal with a dispute settlement situation and has no role to play once dispute proceedings are initiated, because it has been characterized by the Appellate Body as providing for a pre-dispute procedure.

4. If Guatemala understands correctly, India is apparently claiming that the obligations under Article 5.8 cease to exist once dispute settlement procedures are initiated. Guatemala disagrees with this interpretation.

5. In the view of Guatemala, the Appellate Body characterized Article 5.8 of the SPS Agreement as a pre-dispute proceeding in the context of a discussion on burden of proof. Nothing in the Appellate Body's conclusions appear to suggest that, once a dispute settlement procedure has initiated, the obligations under this provision are terminated.

6. Furthermore, Guatemala observes that the Appellate Body carefully indicated that a Member seeking to exercise its right to receive information under Article 5.8 "would, most likely, be in a pre-dispute situation". This is probably because, Members resorting to dispute settlement procedures may not need an explanation of the measures at issue but are seeking redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements.

7. Guatemala agrees with India that Article 5.8 of the SPS Agreement provides no time limit to provide the answers required. However, the lack of a time limit in this provision cannot support the legal interpretation that there is no continued duty of performance. Guatemala believes that the only way to comply with the obligation contained in Article 5.8 is, precisely, the provision of "an explanation of the reasons" for a sanitary or phytosanitary measure. Guatemala does not find in any part of Article 5.8, or elsewhere, that initiation of dispute settlement procedures would render the obligations contained in this provision meaningless.

B. ORDER OF ANALYSIS

8. With respect to the order of analysis proposed by the parties, the Appellate Body determined that "as a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member. Furthermore, panels may choose to use assumptions in order to facilitate resolution of a particular issue or to enable themselves to make additional and

[*] Guatemala requested that its oral statement serve as the integrated executive summary.

alternative factual findings and thereby assist in the resolution of a dispute should it proceed to the appellate level".[1]

9. In the present case, it is clear that the parties characterize differently the matters at issue. Although the United States did not appear to suggest a particular order of analysis, initiated the presentation of its legal claims with those under Article 5 of the SPS Agreement. India, on the other hand, suggests that the Panel begins with the analysis of the claims under Article 3.

10. Guatemala agrees with India that it might be appropriate to initiate the analysis of the claims under Article 3 of the SPS Agreement, in view of the existence of an international standard and the claim that the measures at issue "conform" or are "based on" such an international standard.

11. However, should the Panel find that India's measures are consistent with Article 3, Guatemala considers that it might be appropriate to make additional and alternative factual findings on the rest of the provisions in order to assist in the resolution of this dispute, should it proceed to the appellate level.

12. Conversely, should the Panel find that India's measures are inconsistent with Article 3, Guatemala does not share the view that the Panel then needs to start the analysis of the claims under the more general provisions of the SPS Agreement rather than under the more specific and detailed provisions of the SPS Agreement.

13. In the view of Guatemala, there is a well-established practice whereby the Panels and the Appellate Body start their analyses under the provisions that specifically addresses in detail the alleged inconsistencies.[2] Guatemala does not see, and India does not explain, why this Panel should depart from this practice. Therefore, Guatemala respectfully suggest the Panel to initiate its analysis under the more specific and detailed provisions. In this case, the claims under Article 5 of the SPS Agreement.

C. SECOND REQUEST FOR PRELIMINARY RULING UNDER ARTICLE 6.2 OF THE DSU

14. Regarding the second request for preliminary ruling under Article 6.2 of the DSU, India claims that two types of measures are outside the terms of reference of this Panel: a) India's National Action Plan; and b) the health certificate requirements for products listed in subparagraphs a) to j) of paragraph 1) (ii) of S.O. 1663(E).

15. As a matter of fact, none of these measures are identified in the Panel request by name.

16. On the National Action Plan, India is of the view that the United States is challenging this Plan. In response, the United States clarified that it has not sought a finding that India's National Action Plan is inconsistent with the SPS Agreement. The United States considers the National Action Plan of India as evidence to make the legal claim of discrimination.

17. Additionally, India appears to suggest that the United States, by making a claim under Article 2.3 of the SPS Agreement, "has to necessarily adduce and impugn such of India's measures which it believes are the cause of this arbitrary or unjustifiable discrimination".[3] In this case, India makes reference to its National Action Plan.

18. Guatemala does not find in Article 2.3 of the SPS Agreement nor in the jurisprudence any basis to oblige the complaining Member to challenge domestic measures that may serve as the basis to demonstrate the existence of a discrimination.

19. The Panel in Australia — Salmon (Article 21.5) identified three elements, "cumulative in nature", necessary to find a violation of the first sentence of Article 2.3:

[1] Appellate Body Report, Canada - Wheat Exports and Grain Imports, para. 126).

[2] For instance, Panel Report, EC – Asbestos, paras. 8.16–8.17; Appellate Body Report, EC - Bananas, para. 204; Panel Report, EC - Hormones, para. 8.45.

[3] FWS of India, paragraph 73.

19.1. (1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;

19.2. (2) the discrimination is arbitrary or unjustifiable; and

19.3. (3) identical or similar conditions prevail in the territory of the Members compared."[4]

20. The first element requires the demonstration of the existence of the claimed discrimination; and, clearly, the initial burden of proof rests on the complaining party. Generally speaking, if the complaining party asserts an affirmative claim of discrimination, it has to demonstrate that the domestic products are being treated more favorably than the imported products. In so doing, the complaining party is free to choose the means to raise a presumption that what is claimed is true.[5] This may include the analysis of pieces of legislation other than the challenged measures.

21. Guatemala considers that Article 2.3 of the SPS Agreement does not address the measures that need to be challenged. Thus, Guatemala finds no basis to support the proposition of India that it was necessary to challenge, in this case, the National Action Plan to demonstrate the alleged discrimination.

22. For these reasons, Guatemala agrees with the United States that India apparently mistakes evidence that can be used to establish an element of a claim with the measure that is the object of the challenge.

23. Finally, regarding the health certificate requirements, Guatemala sees no relevance on the legal source for their issuance. Given the facts of these case, as explained by the Parties, it seems that the health certificate requirements are "implementing and related measures". If Guatemala understands correctly, the health certificate requirements are necessary to implement the avian influenza-based import prohibitions. As acknowledged by India, its veterinary certificates "are required to accompany every export consignment of certain livestock products".[6] Therefore, Guatemala considers that these health certificate requirements are within the terms of reference of this Panel.

24. Guatemala thanks the Panel for this opportunity and would be happy to respond to any follow-up questions you might have.

[4] Panel Report, Australia — Salmon (Article 21.5 — Canada), para. 7.111.

[5] Appellate Body Report on United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India ("US - Wool Shirts and Blouses"), p. 14.

[6] FWS of India, paragraph 96.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Introduction

1. As a third party, Japan has a systemic interest in the interpretation and application of the SPS Agreement, and therefore, would like to provide its views on several important legal issues raised in this proceeding.

II. Necessity of Seeking Opinions from Independent Experts

A. The Role of Experts in a Panel Proceeding

2. As noted by the United States, a WTO panel is charged with making "an objective assessment of the matter before it."[1] To that end, the panel is authorized to utilize resources such as experts in order to further inform its opinion. Specifically, Article 13.1 of the DSU grants panels "the right to seek information and technical advice from any individual or body which it deems appropriate." Article 13.2 further permits panels to "seek information from any relevant source," and to "consult experts to obtain their opinion on certain aspects of the matter." Indeed, it is well-established that panels have the "right" to seek information – including expert opinions – where the panel deems it appropriate.[2]

3. Expert opinions and analyses are even more important in disputes under specialized agreements such as the SPS Agreement, which involve facts of a highly scientific and technical nature. This understanding is reflected in Article 11.2 of the SPS Agreement, which states that "{i}n a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel." The increased importance of scientific and technical advice in the context of the SPS Agreement is demonstrated by the use of the word "should" in Article 11.2, whereas the DSU provides that a panel "may" seek advice in Article 13.2. The SPS Agreement therefore not only permits, but encourages panels to seek the opinion of experts with regard to the scientific or technical issues of a case.

4. Nonetheless, the United States in its First Written Submission claims that the adoption of an expert procedure in these proceedings would not result in any appreciable assistance to this Panel.[3] The United States claims that because there is no risk assessment, there is no scientific evidence that needs scrutiny with the assistance of experts. In Japan's view, this is an incorrect characterization of the role of expert assistance in SPS-related dispute settlement. To the extent that the U.S. claims that the role of experts is contingent upon the respondent setting forth a risk assessment, nothing in the plain text of the SPS Agreement applies such limits to the role of experts. Article 11.2 of the SPS Agreement provides that in a "dispute under this Agreement involving scientific or technical issues," expert opinions may and should be sought. This language does not limit the use of experts to a particular type of review – risk assessments – as long as the dispute involves "scientific or technical issues".

5. Interestingly, the United States relies only on a discussion in *Australia – Apples* about the panel's use of expert testimony to explain risk assessment procedures.[4] However, other WTO decisions do not limit the use of expert panels in such a way. Moreover, the Appellate Body went on to note that "{t}he experts may also be consulted on the relationship between the risk assessment and the SPS measure."[5] Indeed, the Appellate Body in *Japan – Apples* also confirmed that the panel was entitled to take into account views of experts in assessing whether the complaining party had established a *prima facie* case.[6] Similarly, the panel in *EC – Biotech* found

[1] United States' First Written Submission (10 April 2013) ("US FWS"), para. 170 (p. 55).
[2] *US – Continued Suspension* (AB), at para. 439; *US – Shrimp* (AB), at para. 104.
[3] US FWS, at para. 170 (p. 54).
[4] *Id*. (*citing Australia – Apples* (AB), at para. 215.)
[5] *US – Continued Suspension (AB)*, at para. 592.
[6] *Japan – Apples* (AB), at para. 166.

it proper to seek the advice of experts merely when the submissions raised technical and scientific issues. The panel noted that the experts had assisted the panel in "understanding the issues raised by the Parties," again showing that the panel's reliance on experts was not limited to an evaluation of a risk assessment.[7]

B. Validity of a Risk Assessment

6. Even if the Panel were to accept that expert opinions are only useful when evaluating risk assessments, there remain sufficient issues of scientific and technical nature in this dispute that would require the aid of independent experts in determining whether a valid risk assessment has been conducted. For instance, according to the United States, India has reached a different conclusion with respect to adopting import bans on poultry meat different from the import risk analysis conducted by New Zealand (MAF Regulatory Authority 1999) that concluded, subject to the application of appropriate sanitary measures, chicken meat could be imported safely from countries considered infected with HPAI.[8] The panel may wish to review the underling scientific basis of India's measure with the aid of independent experts.

7. Furthermore, while India claims that the Summary Document is not India's risk assessment, the Panel may still seek to examine whether the Summary Document would nonetheless be considered a *de facto* risk assessment, in which case some additional issues of scientific fact may be disputed. For instance, the United States and India present starkly opposing views on the sources used to develop the Summary Document. The Panel may also seek to obtain expert opinions regarding the accuracy of India's understanding that the sources behind the Summary Document formed the basis of the OIE recommendations.[9] Moreover, India claims that it was not required to conduct a risk assessment because its SPS measure was based on the OIE standard (according to India, a Member is not required to conduct a risk assessment under Article 5 if the SPS measure is based on an international standard, as the standard itself fulfills the requirements of Article 2.2, and circumstantially, Article 5.1).[10] This would seem to suggest that the assessment of risk performed by the OIE is what forms the scientific basis for India's SPS measure, and if so, that the Panel's examination of OIE assessment may benefit from review by independent experts as well.

8. In the present dispute, therefore, whether the OIE standard constitutes the elements necessary to satisfy the SPS Agreement's requirement for a risk assessment, and whether the science cited in the Summary Document is relevant today and pertinent to the circumstances of India, these are issues that may and should be determined with the help of independent experts.

C. The Use of OIE Experts

9. The parties to this dispute disagree with the interpretation of the OIE standard. India claims that Members can impose an immediate ban on trade in poultry commodities from a country reporting LPAI under Article 10.4.1.10 of the OIE Code.[11] However by the very same provision, the United States states that notification of HPAI and LPAI in birds other than poultry should not be a basis to impose ban on poultry commodities.[12] A point that the Panel may wish to clarify is whether LPAI is an exotic disease to India. The disease status in regard to LPAI in India is a fundamental factual question for the Panel to consider in light of the legal claims India has put forward. Japan is of the view that OIE experts are in a good position to provide technical knowledge in order for the Panel to determine these contentious issues, especially with respect to the conformity of India's measures on the relevant OIE Codes.

10. In regard to the use of expert, while India does not categorically reject the necessity of experts in this proceeding, India opposes the use of OIE experts to assist the Panel in this proceeding. According to India, the OIE should not be called upon to provide expert opinion

[7] *EC – Biotech* (Panel), at paras. 7.18, 7.30 .
[8] US FWS, at para. 83.
[9] India's First Written Submission (31 May 2013) ("India FWS"), at paras. 7, 9.
[10] *Id.* at paras. 7, 146, 163-64, and 183-84.
[11] India FWS, at para. 123.
[12] US FWS, at para. 51.

because prior OIE "interjection[s] at the SPS Committee meeting cast[ ] serious doubts over the OIE's ability to provide guidance to the Panel…"[13]

11. Experts are subject to Section II (Governing Principle) of the *Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("Rules of Conduct"),[14] which provides that all covered persons, such as panelists and expert advising panels,[15] "shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved." Integrity and impartiality are further required by Section VI.2 of the Rules of Conduct, which provides that experts "disclose any information ... which is likely to affect or give rise to justifiable doubts as to their independence or impartiality."

12. When selecting experts, panels must consider "whether there is an objective basis to conclude that an expert's independence or impartiality is likely to be affected or there are justifiable doubts about that expert's independence or impartiality."[16] This standard ensures the fairness and impartiality of the experts in conformity with due process. And while a party may object to the selection of a particular expert, such objection should be accompanied by an explanation of why the expert's independence or impartiality has been compromised.[17] Certain affiliations with international organizations may provide a basis to exclude such an expert; for instance, in *EC – Hormones*, the Appellate Body found that – in a case of two competing standards – it was improper for the panel to call on an expert who was involved in developing the standard upon which one of the parties relied in its risk assessment, as the expert would be inclined to defend its standard over the other, rather than conduct an objective assessment.[18]

13. As such, it is not clear to Japan that an OIE expert's independence or impartiality, if selected, would be compromised. Rather, such an expert may even be in the best position to provide guidance to the Panel in this dispute, in particular verifying India's reading of its Summary Document, which India argues formed based on the OIE recommendations and the justification for India's measure.[19] As such, it is Japan's view that the Panel should not preclude the consideration of OIE experts to aid the Panel in understanding the claims raised by the Parties in this dispute as long as their independence and impartiality can be ensured.

III. Appropriate Standards for Determining the Existence of a Risk Assessment Under SPS Articles 5.1 and 5.2

14. If the Panel were to determine that the assessment of risks was conducted either through the Summary Document, or through the adoption of the OIE standard, Japan offers the following observations for the Panel's consideration in determining whether India has complied with its obligations under Articles 5.1 and 5.2 of the SPS Agreement.

A. The Meaning of "Take Into Account" is Different from "Based on" or "Comply with"

15. Article 5.1 stipulates that Members shall ensure their SPS measures are based on a risk assessment, "taking into account risk assessment techniques developed by the relevant international organization." The United States specifically notes that the Summary Document "does not even reference the OIE's standards for a risk assessment such as Chapter 2.1 of the OIE Code or the Handbook."[20] Thus, while the United States concludes that India has failed to "at least take into account" the risk assessment techniques of relevant international organizations, it also raises the question to what extent India should have discussed and deferred to the OIE Code or

[13] India FWS, at para. 10.
[14] Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes, WT/DS/RC/1 (adopted 3 December 1996) ("Rules of Conduct").
[15] Rules of Conduct, at Section IV.1.
[16] *US – Continued Suspension (AB)*, at para. 454.
[17] *Australia – Apples (Panel)*, at paras. 7.31-7.32.
[18] *US – Continued Suspension (AB)*, at para. 469.
[19] India FWS, at para. 7.
[20] US FWS, at para. 117.

Handbook in order to fulfill its requirements under Article 5.1, even if it were to ultimately decide to reject the risk assessment techniques contained in those international standards.

16. At the very least, it is clear that the requirement to take into account risk assessment techniques developed by international organizations does not equate to a requirement to *conform* to such international standards. As the United States correctly notes, a Member whose standards conform to the international standards enjoys a presumption of consistency under the SPS Agreement. It is also true, however, that conformity with international standards is neither required, nor does a presumption of consistency mean that Members who decide not to conform their measures to international standards are subject to "a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*."[21]

17. The requirement to take into account certain risk assessment techniques under the second half of Article 5.1 should also be distinguished from the obligation of a Member to base its risk assessment on scientific evidence under the first half of Article 5.1. The Appellate Body in *EC – Hormones* made clear that the obligations implicated by the two terms are distinctly different. Therefore, the requirement for a Member to "base" its risk assessment on scientific evidence refers to an objective situation. The Appellate Body has established the requisite relationship between the scientific evidence and risk assessment to be one of a "rational relationship." As demonstrated through the Appellate Body's guidance in *EC – Hormones*, the requirement to "take into account" certain factors, on the other hand, leaves the Member a degree of discretion to reject the particular factors considered.[22] The discretion of a Member to reject the risk assessment techniques developed by an international organization is especially clear when a Member has decided not to adopt the level of protection set forth by the international organization. This is because the particular techniques developed by an entity will be tailored to the particular level of protection espoused by that entity.

18. Thus, the above analysis demonstrates that the requirement that a Member take into account risk assessment techniques developed by international organizations is clearly differentiated from an obligation to conform to, or base its risk assessment on, the standards set forth by an international organization. The Appellate Body further indicated that should a WTO Member choose a higher level of protection, that Member may adopt "the scope and method" of its risk assessment different from those of risk assessment performed by the international body that underlies the international standard.[23]

19. India does have the prerogative to adopt a level of protection higher than that espoused under the international standard. In this case, while India would not be required to employ the risk assessment methods set forth in the OIE Code, Article 5.1 still would not exempt India from taking into account the risk assessment techniques developed by international organizations. However, a Member has a degree of discretion in taking into account risk assessment techniques developed by international organizations, and when the Member decided to adopt a higher level of protection than that espoused under the international standard that Member may subsequently decline to adopt such techniques.

B. Guidance on Requirements to Express International Standards that have been Taken Into Account

20. In addition to Article 5.1, Article 5.2 of the SPS Agreement uses similar language requiring an implementing Member to "take into account" seven specific factors in conducting its risk assessment. And similar to its assertion that a failure to "reference" the OIE Code suggests a violation of Article 5.1, the United States argues that India failed to comply with Article 5.2, because "{t}he most recent scientific authority cited is over 14 years old," and "there is not even a cursory reference to available scientific evidence explaining that LPAI does not replicate systematically and the corresponding implications for the safety of poultry meat and eggs."[24] In other words, it appears that the United States assumes that India did not take into account the requisite factors expressed in Articles 5.1 and 5.2 of the SPS Agreement because the Summary Document does not "reference" those specific factors. However, it is not clear that a Member's

[21] *EC – Hormones (AB),* at para. 102. Italic Original.
[22] *Id*. at paras. 189, 193-94.
[23] *US – Continued Suspension (AB),* at para. 685.
[24] US FWS, at 118.

failure to expressly reference each factor provided in Articles 5.1 and 5.2 automatically leads to the conclusion that the Member failed to take those factors into account, especially with regard to information that the Member has ultimately decided to reject in its risk assessment after examining factors to be taken into account.

21. As discussed above, a requirement to "base" an SPS measure on scientific evidence is distinguished from a requirement to "take into account" certain factors. The panel in *EC – Biotech* clarified that when a Member has decided to "base" its risk assessment on divergent opinion, the Member is required to express the information that its risk assessment is based on.[25]

22. With regards to factors that should be "taken into account," however, the Appellate Body in *Australia – Apples* only acknowledged that reference by the risk assessor of the risk assessment technique employed "is useful both to the risk assessor, should a dispute arise in relation to the risk assessment, and to the Panel that is called upon to review the consistency of that risk assessment with the provisions of the SPS Agreement."[26] Thus, while the Appellate Body has found it "useful" for a risk assessment to describe the methods employed, it does not appear to go beyond that to suggest that such description is mandatory. This would suggest that express reference to each factor listed in Article 5.2 may not be necessary, especially for these declined; instead whether a particular factor be taken into account by a Member can be discerned from the examination of the risk assessment as a whole.

IV. CONCLUSION

23. The Government of Japan thanks the Panel for this opportunity to comment on important issues in this proceeding, and asks that the Panel consider the observations of Japan in reaching its determinations.

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[25] *EC – Biotech (Panel),* at para. 7.3060; *see also EC – Hormones (AB),* at paras. 193–194.
[26] *Australia – Apples (AB)*, at para. 246.

WORLD TRADE ORGANIZATION

WT/DS430/R/Add.1

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INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS430/R.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES FOR THE PANEL

Adopted on 15 March 2013

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Upon indication from any party, at the latest on the first substantive meeting, that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel shall, after consultation with the parties, decide whether to adopt appropriate additional procedures. Exceptions to this procedure shall be granted upon a showing of good cause.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, India shall submit its response to the request in its first written submission. If India requests such a ruling, the United States shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel

shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised in writing as promptly as possible. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.30 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite India to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall have an opportunity to orally answer these questions. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask India if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite India to present its opening statement, followed by the United States. If India chooses not to avail itself of that right, the Panel shall invite the

United States to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall have an opportunity to answer orally these questions. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.30 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies to the interpreters. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.30 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions within a deadline to be determined by the Panel.

d. The Panel may subsequently pose questions either orally or in writing to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Panel consultation with experts

19. In the course of the proceedings, the Panel shall determine if there is a need to seek expert advice. In addressing matters concerning scientific and/or technical advice from experts[1], the Panel shall have regard to the provisions of the DSU and may have regard, *inter alia*, to the objective of conducting these proceedings in an efficient and timely manner and at a reasonable cost. In such a case, the procedures described below shall apply.

20. Consistent with Article 13 of the DSU and Article 11.2 of the SPS Agreement, the Panel may seek expert advice from experts and from international organizations, as appropriate.

21. The Panel may ask any relevant institutions, as well as the parties, for suggestions of possible experts. Parties shall not engage in direct contact with the individuals suggested, for the purpose of this dispute.

22. The Panel shall provide the parties with a list of possible experts, their *curricula vitae* and declarations of potential conflicts of interest. In this declaration, each potential expert will be instructed to disclose information which may include the following:

a. financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;

b. professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);

c. other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);

d. considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);

e. employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members); and

f. any other relevant information.

23. Parties shall have the opportunity to comment and to make known any compelling objections to any particular expert.

24. The Panel shall select the experts on the basis of their qualifications and the need for specialized scientific expertise, and shall not select experts who have declared a conflict of interest. The Panel shall decide the number of experts in light of the number and type of issues on which advice shall be sought, as well as of the different areas on which each expert can provide expertise.

25. The Panel shall inform the parties of the experts and international organizations it has decided to consult, in accordance with the timetable adopted by the Panel. Experts shall act in their personal capacities and not as representatives of any entity. However, should the Panel seek advice from an international organization, the advice received shall be deemed to be received from the international organization and not the individual staff members or representatives of the international organization. Moreover, any staff members of such international organization that attend a meeting with the Panel, shall be deemed to do so in a representative capacity, on behalf of the respective international organization.

[1] For the purpose of these Working Procedures, the term "expert" may be used to refer to individuals, institutions, research bodies, or international organizations.

26. The experts shall be subject to the DSB's Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1), a copy of which shall be provided to them by the Panel.

27. The Panel shall prepare written questions for the experts. The experts shall be requested to provide responses in writing within a time-period specified by the Panel. The experts shall be requested to respond only to questions on which they have sufficient knowledge. The responses of experts shall be part of the Panel's record but shall not be attached to the Panel report as annexes. Copies of the responses shall be provided by the Panel to the parties, in accordance with the timetable adopted by the Panel. The parties shall have the opportunity to comment in writing on the responses from the experts and to pose written questions to the experts in advance of the meeting, to be answered orally during such meeting.

28. The Panel may provide the experts, on a confidential basis, with relevant parts of the parties' submissions, including exhibits, as well as with any additional information deemed necessary. The experts shall have the opportunity to request, through the Panel, additional factual information or clarifications from the parties, if it shall aid them in answering the Panel's questions.

29. The Panel may schedule a meeting with the experts, prior to the second substantive meeting with the parties. Prior to the Panel's meeting with the experts, the Panel shall ensure that:

a. the parties' comments on the experts' responses are provided to all experts;

b. each expert is provided with the other experts' responses to the Panel's questions; and

c. each expert is provided with advance questions from the parties to the experts, as described in paragraph 30.b below, if any.

30. The Panel's meeting with the experts would be conducted as follows:

a. The Panel shall invite each expert to make an opening statement. This statement may include, but is not limited to, any clarification of their written responses to the Panel questions requested by the Panel or the parties, or information complementary to these responses. The experts that intend to make an opening statement shall provide the Panel with written versions of their statements, before they take the floor. The Panel shall make available, to the other experts, and to the parties, each expert's written statement, no later than 5.30 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the experts questions or make comments through the Panel. To facilitate this, each party may send in writing in advance of the meeting, within a timeframe to be determined by the Panel, any questions to the experts to which it wishes to receive an oral response at the Panel's meeting with the experts. Each expert shall be invited to respond orally to the parties' questions and to react to the parties' comments.

c. The Panel may subsequently pose questions to the experts. The expert to whom the question is addressed shall be invited to respond orally to the Panel's questions.

d. Once the questioning has concluded, the Panel shall afford each expert an opportunity to present a brief closing statement.

e. The Panel may schedule additional meetings with the experts if necessary.

31. The Secretariat shall prepare a compilation of the experts' written replies to the Panel's questions, as well as a full transcript of any meeting with the experts for inclusion in the record of the Panel proceeding. This transcript shall not be annexed to the Panel report. The experts shall be given an opportunity to verify, before the texts are finalized, the drafts of these texts to ensure that they accurately reflect the information they provided. The parties shall likewise be given an opportunity to verify that the transcript of any meeting with the experts accurately reflects the parties' own interventions.

Descriptive part

32. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

33. Each party shall submit an executive summary of its arguments as presented in its written submissions and oral statements. The parties shall submit the executive summaries of their written submissions at the latest 10 calendar days following the delivery to the Panel of the written submission. The parties shall submit the executive summaries of their oral statements, at the latest 10 calendar days following the deadline for submission of responses to questions from the Panel. The parties may also include their responses to questions in their executive summaries. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions. The total number of pages of the executive summaries, all four parts combined, shall not exceed 30 pages. Parties can request permission to file longer summaries upon showing of good cause.

34. The third parties shall submit executive summaries of their written submissions and oral statements within 7 calendar days from the date of the third-party session. The summary to be provided by each third party shall incorporate its written submissions and oral statement and shall not exceed 5 pages in total.

Interim review

35. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

36. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

37. The interim report shall be kept strictly confidential and shall not be disclosed.

Service of documents

38. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 6 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 4 CD-ROMS/DVDs and 6 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****@wto.org, and cc'd to *****.*****@wto.org, *****.*****@wto.org, *****.*****@wto.org, and*****.*****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance

of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.30 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES FOR THE PROTECTION OF STRICTLY CONFIDENTIAL INFORMATION

1. Pursuant to paragraph 3 of the Panel's Working Procedures adopted on 15 March 2013, the Panel adopts the following additional procedures that shall apply to all strictly confidential information (SCI) submitted in the course of these proceedings. These procedures are intended to supplement but not replace the provisions of Article 18.2 of the DSU and paragraph 2 of the Panel's Working Procedures.

2. These procedures apply to any SCI, defined as information (i) not otherwise available in the public domain, and (ii) clearly designated as SCI by the United States or India in their submissions to the Panel.

3. A party submitting SCI in any written submission (including in any exhibits) shall inform the Panel and the other party (and the third parties where applicable) of precisely which information the party is designating as SCI by enclosing the information in double brackets and including on the cover page and each page of the relevant document the statement: "Contains SCI". In the event that an entire exhibit is designated as SCI, the party submitting such exhibit shall clarify this by including the following statement on the cover page: "This Exhibit is SCI". The Panel will not disclose in its Report any information designated as SCI under these procedures. The Panel may, however, make statements or conclusions based on such information.

4. Before the Panel circulates its Report to Members, the Panel shall give each party an opportunity to ensure that the Report does not contain any information that it has designated as SCI. The removal of any designated SCI by the Panel will be indicated in the Report through the use of double brackets.

5. Each party and third party shall keep confidential SCI submitted by another party or third party and shall use such SCI only for purposes of the current proceeding or future proceedings under the DSU with respect to *India – Measures Concerning the Importation of Certain Agricultural Products* (DS430).

6. Submissions and exhibits containing information designated as SCI under these procedures will be included in the Panel record forwarded to the Appellate Body in the event of an appeal.

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ANNEX B

ARGUMENTS OF THE PARTIES

UNITED STATES

INDIA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. A fundamental requirement of the SPS Agreement is that a Member's SPS measures be based on scientific principles and scientific evidence. A Member generally complies with these obligations by basing its measures either on relevant international standards, guidelines, or recommendations, or on a risk assessment. With respect to the measures at issue here – measures that have been in place for over six years – India has done neither.

2. India's measures prohibit the importation of various agricultural products from countries that report outbreaks in poultry and wild birds of what is known as NAI, including a subset known as LPNAI. The OIE, the organization whose standards, guidelines and recommendations the SPS Agreement designates as the international standards, guidelines and recommendations for animal health and zoonoses, has issued recommendations for reporting NAI and for the safe trade of poultry and poultry products with respect to NAI. Those scientifically based recommendations explicitly disclaim the types of import prohibitions India maintains.

3. Moreover, India treats its *own products* differently from imported products. India does not engage in surveillance activities that are likely to detect LPNAI, a disease, which if found in other countries, triggers application of its import prohibitions. India also does not impose any comparable restrictions on the internal movement of the products that it prohibits for import.

4. In sum, India has failed to comply with the most basic obligations in the SPS Agreement, and no detailed scientific analysis is required to reach this conclusion.

II. SUMMARY OF ARGUMENTS

5. This dispute can be distilled to a few central facts that clearly establish India's breaches of its WTO obligations. Specifically, there are facts that establish that India needed to undertake a risk assessment and failed to do so; that India's measures hold the exports of other Members to severe requirements that India's own products can ignore; and that India was obligated to notify its measures and allow a reasonable interval before putting them in force, but did not do so.

III. BIOLOGY OF AVIAN INFLUENZA

6. AI does not refer to a single or homogenous disease, but rather different diseases caused by an assortment of different viruses. Some variants of AI viruses cause HPAI, a highly contagious disease that can decimate poultry flocks. There is also LPAI, a much milder, often asymptomatic disease in poultry. Most AI strains do not affect humans because they do not readily transmit to humans. Human infection has typically occurred in circumstances involving the close handling and contact of infected birds.

7. With respect to the parties' AI situations, the United States has detected LPNAI – H5 and H7 subtypes of LPAI – in poultry. India, however, has not notified a single outbreak of LPNAI. In contrast, India has detected over 90 outbreaks of HPAI during a period in which the United States has had no HPAI outbreaks.

IV. INTERNATIONAL STANDARDS FOR AVIAN INFLUENZA CONTROL

8. The OIE Code sets forth recommendations for the control of AI. These recommendations recognize distinctions between HPAI and LPAI and that control measures will need to be tailored to the specific product at issue. Of particular note, the OIE Code explicitly provides that most of the products that India prohibits from import, such as poultry meat and eggs, can be safely imported from territories reporting LPNAI through the use of the proper control measures.

9. The OIE Code's system for the control of AI can be roughly divided into five components for the purpose of this dispute: (i) proper reporting; (ii) classifying a territory; (iii) applying the appropriate control measure based on the classification of that territory; (iv) zoning to ensure the impact of restrictions is appropriately tailored; and (v) surveillance. The fifth component is essential to ensuring the prior four mechanisms function properly.

10. When it comes to its own exports, India invokes the OIE Code to justify their safety. First, after it has suffered an outbreak of HPAI, India routinely argues that it has regained NAI freedom. Second, India recognizes compartments within its own territory that it holds out as being entitled to take advantage of the OIE's recommendations regarding zoning.

V. INDIA'S MEASURES

11. In the fall of 2006 – without prior warning – India proceeded to prohibit the import of various U.S. poultry and pork products. On February 2, 2007, months after U.S. imports have been subject to import prohibitions, India finally published a document in the Gazette of India Extraordinary, S.O. 102(E), which reflected the measures prohibiting U.S. imports on account of LPAI. Other notifications subsequently followed. The most recent notification issued by India's DAHD is S.O. 1663(E). Unlike prior DAHD notifications, it has no set expiration date. These notifications are issued pursuant to the India' Livestock Importation Act, 1898 (9 of 1898).

12. Before initiating this dispute, the United States made every reasonable effort to resolve its concerns. In addition to bilateral talks, discussions in the SPS Committee, and offers for technical discussions, the United States also asked India to provide an explanation as the reasoning behind its measures pursuant to SPS Article 5.8. Over 14 months have passed since this request, yet India has not provided the requested explanations.

VI. INDIA'S INTERNAL AVIAN INFLUENZA CONTROL MEASURES

13. India's surveillance and control policies for AI are set forth in DAHD's AI Action Plan. This plan does not mandate surveillance necessary for effective detection of LPNAI, resulting in a failure to apply any controls on the movement of products due to LPNAI in India. Moreover, India's AI Action Plan only imposes control measures that extend a few kilometers from the site of an HPAI outbreak. Accordingly, occurrences of NAI in India will not result in restrictions on the movement of domestic products within India provided the products come from locations outside of the small zone where these control measures are applied.

VII. STANDARD OF REVIEW

14. DSU Article 11 provides that a panel should "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Further, since there is no risk assessment in this dispute, there is also no scientific evidence needing scrutiny with expert assistance.

VIII. LEGAL CLAIMS

A. India's Measures Are Subject To The SPS Agreement

15. Because India's measures are sanitary measures as defined under Annex A of the SPS Agreement (their objectives include those provided for in subparagraphs (a) through (c)), and because the measures affect international trade by imposing import prohibitions, the measures are subject to review for consistency with the SPS Agreement.

B. India Breached Articles 5.1, 5.2, And 2.2 Of The SPS Agreement By Failing To Undertake A Risk Assessment And Failing to Consider The Relevant Scientific Evidence

16. Because India has stated that its measures were adopted to address risks associated with both diseases and food safety, the SPS Agreement obliges India to base its measures on both types of risk assessment – a Pest Risk Assessment and a Food Safety Risk Assessment. India has done neither. The United States has requested for India to provide a risk assessment without any

success. As India's measures are not based on a risk assessment, India is in breach of SPS Article 5.1. Additionally, without a risk assessment, India could not have taken into account the factors noted in SPS Article 5.2, thereby breaching that provision as well.

17. With respect to the document that India provided at the October 2010 meeting of the SPS Committee – which India subsequently disavowed as a risk assessment – it does not constitute a Pest Risk Assessment or a Food Safety Risk Assessment either. That document is deficient with respect to all of the elements required for either assessment.

18. A finding that SPS Article 5.1 or 5.2 has been breached results in a violation of Article 2.2. Therefore, in the absence of *any* risk assessment, and, thus, in the absence of sufficient scientific evidence, supporting India's measures, India also breaches Article 2.2. India's ban on the identified avian products, moreover, is not maintained with sufficient scientific evidence because there is no scientific evidence that these products may not be safely traded under any circumstances. To the contrary, the scientific evidence establishes that LPAI virus is not present in poultry meat or inside eggs and thus LPAI cannot be transmitted through these products.

19. The United States notes that India may not invoke SPS Article 5.7 to avoid its obligations under Articles 5.1 and 5.2. Although it is India's burden to establish such a defense, the facts here are sufficiently defined as to confirm the unavailability of Article 5.7. In particular, relevant scientific evidence exists and it does not support the imposition of import prohibitions.

C. India Breached Article 3.1 By Failing to Base Its Measures on the OIE Code

20. SPS Article 3.1 imposes a positive obligation on a Member to base its measures on international standards unless the Member's measure is justified through another provision of the SPS Agreement. The relevant international standards in this dispute, per Annex A of the SPS Agreement, are those set out in the OIE Code.

21. A defining characteristic of the OIE Code is that it distinguishes between HPNAI and LPNAI with respect to trade. India's measures refuse to make such a distinction and impose a complete ban for certain products regardless of whether the country is reporting HPNAI and LPNAI. In short, the OIE Code allows trade; India's measures do not. Under these circumstances, there can be no dispute that India's measures are not based on the OIE Code.

22. India's failure to abide by Article 3.1 is not excused by Article 3.3. India cannot avail itself of this provision because it lacks a risk assessment. Moreover, India cannot invoke Article 3.3 as a result of its ALOP. Although India has not elucidated its ALOP, it may be possible to infer it from measures India is applying. India does not require surveillance that would effectively detect LPNAI and, even with respect to the more dangerous HPAI, imposes only a simple quarantine zone of a few kilometers. Viewed together with the minimal restrictions on movement of domestic products that India imposes following domestic HPAI outbreaks, it is clear that measures based on the OIE international standard would achieve India's ALOP.

D. India Breached Articles 5.6 and 2.2 By Maintaining Sanitary Measures That Are More Trade Restrictive than Required to Achieve its Appropriate Level of Protection

23. A complainant must establish three cumulative elements for a breach of SPS Article 5.6. First, there must be an alternative measure that "is reasonably available taking into account technical and economic feasibility." Here, the OIE Code provides a reasonably available alternative. Second, the measure must achieve "the Member's appropriate level of sanitary or phytosanitary protection." The OIE Code achieves India's ALOP because some products India prohibits are not vectors for transmission, and in any case, the OIE control measures have proven effective. Also, the OIE Code's provisions for AI containment, and trade in products originating outside the area where AI was detected, through the use of zoning and compartmentalization, is consistent with India's measures with respect to *domestic* products, which impose controls and restrictions on products only within a limited area following an AI outbreak. Third, the measure must be "significantly less restrictive to trade than the SPS measure contested." As the OIE Code allows for trade from countries reporting LPNAI detections and India's measures do not, the OIE Code is less trade restrictive. Thus, all three elements are satisfied.

24. A breach of SPS Article 5.6 may also indicate a breach of Article 2.2. The first component of Article 2.2 is that a measure be "applied only to the extent necessary to protect human, animal or plant life or health …" A finding under Article 5.6 necessitates a determination that a viable alternative measure that achieves a Member's ALOP exists and is less trade restrictive. The existence of such an alternative measure – and the concomitant finding that the Member has declined to adopt it – may lead to the conclusion that a Member has adopted a measure that is applied to a greater extent than necessary and is accordingly inconsistent with Article 2.2.

E. India Has Breached Its Obligations Under Article 6 of the SPS Agreement

25. India's measures ban products from all parts of a country whenever NAI is detected anywhere in the country. This precludes the application of AI restrictions on a regionalized basis, as provided for in the OIE Code, and as required under SPS Article 6.

26. By applying its measures exclusively on a country-basis, India breaches both the first and second sentences of Article 6.1. First, India fails to ensure that its measures are adapted to the sanitary characteristics of the areas from which covered products originate, contrary to the first sentence of Article 6.1. Even if there has been no detection of NAI within thousands of kilometers of the area from which covered products originate, and regardless of how rigorous a country's AI-control mechanisms are, India bans the shipment of those products based on a single detection of NAI anywhere in the country of origin.

27. Second, by applying its measures on a country-basis, India has failed to take into account the considerations specified in the second sentence of Article 6.1. India's measures preclude it from accounting for "the level of prevalence" (*i.e.*, the lack of prevalence) of NAI in areas within a country that are far from a detection. Under its measures, India is also precluded from accounting for "the existence of [disease] eradication or control programmes." Also contrary to the second sentence of Article 6.1, India has not taken into account the relevant international AI guidelines in OIE Code Chapter 10.4, which provide for the application of AI-related trade restrictions at the zone or compartment level when appropriate surveillance, control, and biosecurity measures are in place.

28. India's measures are also contrary to Article 6.2. The first sentence of Article 6.2 requires Members to recognize the concept of disease-free areas. Yet India's measures explicitly preclude recognition of such areas upon notification of a detection of NAI anywhere in the territory of a Member. The second sentence of Article 6.2 requires countries to determine disease-free areas "based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls." By precluding recognition of disease-free areas with respect to AI, India's measures preclude it from determining HPAI-free and LPNAI-free areas based on these factors, contrary to Article 6.2's second sentence.

29. Further, India's country-based application of its measures is contrary to Article 3.1, which provides that "Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3." India's measures are not applied on a zone or compartment basis, as provided for in the OIE Code, and India has no scientific justification for its more-trade-restrictive approach. Further, India's country-based measures cannot be justified by virtue of India's ALOP, which may in the circumstances be inferred from India's measures governing trade in domestic products following domestic AI detections—measures that do not restrict trade in domestic products beyond the ten-kilometer zone surrounding an AI detection.

F. India Has Acted Inconsistently With Its Obligations Under Article 2.3 of the SPS Agreement by Treating Imported Products Differently from Domestic Products Without Justification

30. When it comes to regulating trade in its own products on account of AI, India takes a diametrically different approach from that which it applies to imported products. India's measures therefore serve, not as a buffer against AI, but as a means of arbitrarily or unjustifiably discriminating against imported products and applying a disguised restriction on trade. In so doing, India breaches SPS Article 2.3.

31. India's arbitrary or unjustifiable discrimination against imports, in breach of the first sentence of Article 2.3, takes two key forms. First, India imposes a ban on all imports of covered products from an exporting country whenever there is a notification of AI occurring anywhere in the country. By contrast, when India detects AI within its own borders, it imposes no controls on the movement of these products within its own borders, aside from a ban on the movement of such products to or from a ten kilometer zone surrounding the detection.

32. Second, India bans products from countries that notify detections of LPAI. Yet India has not put in place mechanisms that would provide effective detection of instances of LPNAI within its own territory. As a result, despite having had over ninety outbreaks of the far rarer HPAI since 2006, India has never notified a detection of LPAI. India's reliance on the detection of LPNAI thus only affects imported products. India's measures only serve to block imports from countries that have taken steps necessary to detect LPNAI effectively.

33. India's measures not only run contrary to the anti-discrimination discipline in the first sentence of Article 2.3, but they also constitute a disguised restriction on trade, in breach of the second sentence. Various facts, taken together, establish that India's measures constitute such a disguised restriction, including: India's application of drastically more stringent measures to foreign products than to domestic products; India's shifting position on whether its measures are justified by OIE guidelines or a risk assessment; India's failure to offer either a risk assessment or scientific evidence that would justify LPAI-based import bans or India's application of AI measures to entire countries; and India's aborted attempt to justify its measures by taking analysis from a risk assessment drafted by another country in support of a different conclusion.

G. In the Alternative, India Could be Viewed as Having Breached Its Obligations Under Article 5.5 of the SPS Agreement, with a Resulting Consequential Breach of Article 2.3

34. To the extent that transmission of AI by foreign agricultural products is viewed as a "different situation" than the transmission of AI by India's domestic agricultural products, India is maintaining arbitrary or unjustifiable distinctions in its appropriate levels of sanitary protection in different situations, and these distinctions result in discrimination or a disguised restriction on international trade.

35. As India's AI measures with respect to imported products are far more restrictive than those applied with respect to domestic products, the level of protection that would be inferred from the measures applied to imported products would far exceed that which would be inferred from India's measures for domestic products. Further, the maintenance of different levels of protection based on whether products presenting the same risks are imported or domestic would be unjustifiable. Moreover, in the circumstances here, the measures that India applies to imported products amount to a disguised restriction on trade.

36. Accordingly, if the Panel were to view transmission by way of foreign and domestic products as different situations for purposes of Article 5.5, India's measures would be contrary to Article 5.5. Moreover, as a finding of a breach of Article 5.5 necessarily implies a breach of Article 2.3, first sentence, or Article 2.3, second sentence, then considering transmission by way of foreign and domestic products to be different situations for purposes of Article 5.5 leads to the conclusion that India's measures result in a consequential breach of Article 2.3.

H. India Has Acted Inconsistently With Its Obligations Under SPS Agreement Article 7 and Annex B By Failing to Notify Properly Its AI Restrictions

37. India breached the obligations in SPS Agreement Article 7, and Annex B, paragraphs 2 and 5(a)-(d). India notified S.O. 1663(E) to the WTO almost three months after it took effect, and published S.O. 1663(E) the day it took effect. This prevented other Members from having a meaningful opportunity to provide comments.

I. India Has Breached GATT Article XI

38. India has breached GATT Article XI because India's measures that are inconsistent with the SPS Agreement constitute import prohibitions or restrictions other than duties, taxes, or other changes.

IX. INDIA'S PRELIMINARY RULING REQUEST IS WITHOUT MERIT

39. Contrary to what India argues in its Preliminary Ruling Request, the U.S. Panel Request identifies the measures and claims in accordance with DSU Article 6.2. With respect to measures, it clearly identifies the measures at issue: India's import restrictions imposed on countries because of NAI. It also cites specific legal instruments that reflect these measures, thus providing additional clarification. The United States has done so notwithstanding India's failure to respond to the U.S. request under SPS Article 5.8. With respect to claims, the Panel Request identifies the precise treaty provisions at issue, not simply the parent articles. It also provides a textual explanation after each cited provision as to the nature of the breach. It even previews certain arguments. The Panel Request includes more information about the U.S. claims than is legally required. It provides fair notice to India and other Members of both the specific measures at issue and the legal basis of the complaint.

X. CONCLUSION

40. The United States respectfully requests the Panel to find that India's measures are inconsistent with India's obligations under the GATT 1994 and the SPS Agreement. The United States further requests, pursuant to DSU Article 19.1, that the Panel recommend that India bring its measures into conformity with the GATT 1994 and the SPS Agreement.

ANNEX B-2

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

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. 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.

ANNEX B-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The key issues in this dispute remain straightforward. India prohibits the importation of various agricultural products from countries that report outbreaks of NAI, but has offered no risk assessment in support of its measures. India's response is a contorted and untenable interpretation of the relevant standards in the OIE Code. Contrary to India's arguments, its measures simply ban trade in a situation where the Code provides no basis for a ban. The Panel should thus find India in breach of the WTO obligations at issue in this dispute.

II. LEGAL ARGUMENT

A. India's Measures Do Not Conform To The OIE Code And Therefore Do Not Fall Within Article 3.2 Of The SPS Agreement

2. India's defense is its assertion that its measures conform to the OIE Code. India asserts that the OIE recognizes its prerogative to set its ALOP and has drafted the OIE Code with options that satisfy India's chosen ALOP. But India's measures fundamentally depart from the OIE Code by imposing import prohibitions. With respect to the SPS Agreement, India asserts that it is entitled to a presumption of conformity with its obligations because its measures incorporate those ALOP-consistent aspects of the OIE Code. This assertion is also incorrect.

1. The OIE's Recommendations for Avian Influenza Do Not Reflect Distinct ALOPs

3. The United States notes that India's assertion that the OIE Code seeks to achieve different ALOPs is at odds with the OIE's own guidance regarding the use of the OIE Code contained in the User's Guide. This guidance indicates that (1) the recommendations are designed to prevent the disease from entering into the country and thus to achieve an optimal level of security; (2) the recommendations may take into account the nature of the product, as seen throughout OIE Chapter 10.4 where there are distinct recommendations for different products; and (3) the animal health status of the exporting country may be a factor to be taken into account with respect to the various recommendations, but the exporting country's animal health status is not an ALOP. In short, the recommendations in the OIE Code are designed to achieve a single, consistent ALOP, *i.e.*, *an optimal level of animal health security*.

4. India alleges that the OIE Code (i) recognizes India's prerogative to sets its own ALOP; (ii) that the exporting status of a country is an ALOP; and (iii) the admonition in a particular recommendation, Article 10.4.1.10, *not* to impose import prohibitions in poultry products on account of NAI detections in wild birds somehow also means ban should be undertaken when NAI is detected in poultry. India cannot substantiate any of these allegations.

5. With respect to India's first assertion, the WTO recognizes the rights of Member to set their own ALOP; international organizations do not have that role. Where a Member chooses measures that achieve a higher ALOP than international standards provide, the Member has the obligation to ensure that the measure is supported by scientific evidence. The User's Guide to the OIE Code takes a similar approach. For the second assertion, India does not explain how it can be reconciled with the specific text in the OIE Code. India's so-called condition of entry is not an ALOP, but rather a factor to be taken into account in applying any measure. With respect to India's third assertion, India cannot reconcile its position against the text of Article 10.4.1.10. Moreover, it is also legally untenable for India to pick only certain aspects of OIE recommendations and successfully invoke SPS Article 3.2.

2. India Cannot Conform with the International Standard by Picking and Choosing from Among OIE Recommendations

6. India asserts conformity with the OIE Code on the basis that its measures incorporate some elements of the OIE Code. This argument has no merit. Simply because the Code does not specifically forbid certain aspects of India's measure cannot amount to "conformity": international standards generally recommend control measures, *not* what should be avoided. India – rather than adopting portions of the OIE Code – has measures that explicitly contradict it. Second, the United States does not agree with India's stated legal position regarding the meaning of "conform to international standards" under Article 3.2.

7. India is incorrect in asserting that its measures may "conform" for the purposes of Article 3.2 with the relevant international standard when the measure is not fully consistent with it. The Appellate Body in *EC – Hormones* found that anything less than total adoption precludes the Member from obtaining the rebuttable presumption of consistency under Article 3.2.

8. India's argument that international standards under the SPS Agreement are "recommendatory" and not binding is a *non sequitur*. If a Member chooses not to adopt the international standard, then the Member must comply with all relevant SPS disciplines, including having a risk assessment to justify the measure. Thus, whether or not a measure conforms to the international standard does not determine whether or not the measure may be adopted. Rather, it determines whether a Member must have a scientific basis. India does not argue that its measure is aligned with any particular conduct put forward in the OIE Code, but simply that its measures are not prohibited under the OIE Code. India's position contradicts the Appellate Body's finding in *EC – Hormones*. There are also product specific recommendations for importation in the rest of Chapter 10.4 of the OIE Code that contradict India's measures. India's position erroneously conflates SPS Articles 3.2 and 3.1; a position the Appellate Body has rejected.

9. In claiming consistency with the OIE standard, India also relies on the proposition that India has the sovereign right to decide its ALOP. This is not the issue. The issue is that, where a Member decides to adopt a measure that departs from an international standard (for reason of a higher ALOP or other), it must have a scientific basis. India's position – disparate measures due to differing ALOPs are still in conformity with international standards – finds no support in the SPS Agreement. Indeed, the Appellate Body has found the contrary.

B. India's Measures Breach Article 3.1 Of The SPS Agreement As They Are Not Based On The OIE Code

10. India argues that if the Panel does not find India's measures to conform to international standards under SPS Article 3.2, then it should find that India's measures are based on international standards under SPS Article 3.1. India's assertion that its measures are based on international standards is flawed because India is still not pointing to actual recommendations that its measures embody.

C. India's Failure To Base Its Measures On A Risk Assessment Result In A Breach Of Articles 5.1, 5.2, And 2.2

11. India has urged the Panel to consider two threshold positions in reviewing U.S. claims, neither of which have any merit. First, India urges the Panel to commence its analysis with Article 2.2 and then proceed to Article 5.1 and 5.2. However, any inquiry regarding Article 2.2 will normally examine the obligations in Articles 5.1 and 5.2, because the latter provisions are specific applications of the more general principle elucidated in Article 2.2.

12. Second, India claims it is "apparent" that the United States has limited its challenge under these provisions to fresh meat of poultry and eggs from countries reporting LPNAI. To the contrary, the United States is challenging India's AI measures in their entirety. The Panel has already recognized in its findings on India's First Preliminary Ruling Request that the *measures* at issue are those that constitute and support an import ban of various agricultural products, purportedly on account of NAI. As explained in its response to Panel Question 11(e), India's unsupportable position is premised on the U.S. observation that the Summary Document was inadequate because it only referenced fresh meat and eggs.

13. India's only response to the U.S. claims involving the absence of a risk assessment is that the "non-existence of a risk assessment is of no consequence when India's measure is in conformity with the OIE Code." Accordingly, if – as the record fully supports – the Panel finds that India's measures are not in conformity with the OIE Code, then the United States respectfully request the Panel to find that India's measures are in breach of India's obligations under SPS Articles 5.1, 5.2, and 2.2.

D. India's Failure To Ensure Its Measures Are Maintained With Sufficient Scientific Evidence Results In An Independent Breach Of Article 2.2

14. India's measures breach Article 2.2 because they are maintained without scientific evidence. The measures impose import prohibitions on products that scientific evidence indicates can be safely imported with proper precautions, specifically products from countries reporting only LPNAI.

15. The scientific evidence this U.S. claim draws upon includes the evidence supporting the OIE Code and the studies referenced in the U.S. First Written Submission. In defense, India cites (i) its assertion that its measures conform to international standards; (ii) the purported practice of other countries; (iii) a study by Jacob Post (the "*Post*" Study) (iv) a risk assessment by Australia, (v) a paper by Van den Berg, (vi) a paper by Ziegler, (vii) a paper by Cobb, and (viii) its assertions regarding the import of certain studies submitted by the United States. Not a single one of these authorities even references import prohibitions in connection with LPNAI. To the contrary, some explain that OIE recommendations can mitigate any potential threat. Additionally, the U.S. Article 5.8 Request provides important context. Per the Appellate Body, India's failure to respond creates a presumption that its measures lack scientific support.

E. India's Measures Breach Article 5.6 Because There Are Reasonably Available And Less Trade Restrictive Measures That Satisfy Its ALOP

16. India has breached Article 5.6 because there (1) are reasonably available measures – the OIE Code recommendations – that (2) would achieve India's ALOP since they provides a high level of protection and (3) are less trade restrictive since they allow for trade in instances that India presently prohibits and are applied in a more tailored fashion.

1. India Has Failed to Specify its ALOP – But One Can Be Inferred from its Domestic Measures

17. In evaluating a claim under Article 5.6, the ALOP of the responding Member should be identified. India has not identified a true ALOP. India has described its ALOP alternatively as "to prevent the ingress of LPAI and HPNAI from disease notifying countries through imports of products that are clearly identified as risk factors even by the OIE" or "NAI freedom." Neither are true ALOPs. The first is an objective or characterization of India's measure. The second is the status of an exporting territory under the OIE Code.

18. The United States and the Panel have no option other than to infer an ALOP based on the record evidence in this dispute. India takes exception to examining its domestic measures arguing it, the NAP 2012, is not an SPS measure under the SPS Agreement. The NAP 2012 is a measure that falls squarely within the definition of an SPS measures as set out in paragraph 1 of Annex A and a reliable indicator of India's ALOP with respect to AI. Accordingly, India's ALOP is relatively modest with respect to HPNAI and negligible with respect to LPNAI since surveillance is unlikely to detect it.

2. Measures Based on the OIE Code Would Achieve India's ALOP

19. As explained in the User's Guide to the OIE Code, the OIE's recommendations are "designed to prevent the disease in question being introduced into the importing country" and allow for trade "with an optimal level of animal health security, based on the most up to date scientific information and available techniques." These recommendations accordingly achieve a high ALOP. Indeed, not only would the achieved ALOP be higher than the one inferred from India's domestic measures, it would be high enough to achieve whatever ALOP India could choose from, since it precludes entry of the disease into the importing country.

20. India's response to why the OIE recommendations cannot achieve its ALOP is a *non-sequitur*. Specifically, India claims that the OIE recommends an import ban on a country-wide basis because there are risks such as contamination. To eliminate confusion, the United States has identified the pertinent recommendations in the OIE Code, which show the contrary. India has not asserted that these recommendations would result in entry or establishment of LPNAI.

21. The OIE Code also has recommendations with respect to zoning and compartmentalization. A Member rather than apply its trade measures broadly against a country as a whole can apply them simply to an affected area without unnecessarily disturbing trade elsewhere. India's only response is that it is under no obligation to recognize zones on its own authority. But no one is asking it to do so. India's measures on their face impose country-wide bans rather than considering the possibility of regionalization.

3. The Recommendations in the OIE Code Are Reasonably Available

22. The OIE Code's product specific recommendations are reasonably available. Countries around the world already employ the recommendations to protect themselves from the risks of AI. The OIE Code recommendations present no additional burden upon India. India already requires veterinary certificates for import; the key distinction is what is being attested to.

23. India makes the puzzling assertion that the recommendations in the OIE Code are not reasonably available because it requires India to put its "full faith" on U.S. attestations. As explained in its response to Panel Question 36, the United States is not making such a request. Additionally, India's response to Panel Question 21 notes that India "relies on a country's self-notification to the OIE to ascertain if a country is free of NAI." If India is willing to accept representations from a country that its surveillance has not detected NAI, India cannot contend that attestations in OIE consistent veterinary certificates are somehow less reliable.

24. Zoning and compartmentalization is also reasonably available. Countries around the world practice it. The OIE's recommendations for zoning and compartmentalization recognize that the "exporting country should be able to demonstrate, through detailed documentation provided to the importing country, that it has implemented the recommendations in the Terrestrial Code for establishing and maintaining such a zone or compartment."

4. The Recommendations in the OIE Code Are Less Trade Restrictive

25. India contends that application of the OIE Code's recommendations is not less trade restrictive than India's present measures because the latter may only block trade for 3 months at a time. But prohibiting trade for any period is more trade restrictive than allowing trade. The same principle applies with respect to zoning. It is less trade restrictive to ensure that controls are applied only on the areas where they are necessary rather than on an entire country.

5. India's Breach of Article 5.6 Should Result in a Consequential Breach of Article 2.2

26. India asserts that a breach of Article 5.6 is precluded because it does not reference Article 2.2. This misses the point which is the provisions implicate similar obligations. A measure that is more trade restrictive than necessary to achieve an ALOP under Article 5.6 also implicates the obligation in Article 2.2 to apply measures only to the extent necessary to protect human, animal or plant life or health. Article 5.6 can be a specific application of Article 2.2. The distinction appears to be that Article 2.2's obligation to apply measures to the extent necessary to protect human, animal, or plant life or health may encompass more situations than ALOPs.

27. The facts here support such a finding. Application of the OIE Code will achieve India's ALOP. India does not appear to dispute that its ALOP is with respect to animal health or life. India's measures are thus measures that are applied beyond the extent necessary to protect animal or human health. India's breach of Article 5.6 results in a breach of Article 2.2.

F. India Has Breached Its Obligations Under Article 6 of The SPS Agreement

28. India argues that it had no need to comply with SPS Articles 6.1 and 6.2 because no other Member presented a proposal, and supporting information, for the recognition of specific disease-

free areas. After refusing over many years to apply the principle of regionalization to AI, giving no indication that requests to recognize disease-free areas would be entertained, India cannot rely on the failure of other Members to conclude that "no" really means "yes" and to submit applications that India had made clear it would reject out of hand.

1. Articles 6.1 and 6.2 Impose Obligations that Exist Independently of Any Request to Recognize a Specific Disease-Free Area or Area of Low Disease Prevalence

29. Articles 6.1 and 6.2 impose obligations that exist independently of any request to recognize any specific pest- or disease-free areas. That Article 6.1 requires Members to "ensure that their" SPS measures are adapted to the characteristics of an area, not just to adapt their SPS measures to particular areas, is significant. It requires Members to take measures that account for the fact that different exporting areas may have different characteristics. By failing to "ensure that" a sanitary measure can reflect regional conditions, a Member breaches its obligations independent of whether any Member requested special consideration of the characteristics prevailing in any region or area. The obligation under Article 6.2 likewise applies regardless of whether another Member has ever requested the Member to accept that any particular area is disease-free. Article 6.2 requires recognition of "concepts" – specifically, the "concepts of pest- or disease-free areas and areas of low pest or disease prevalence."

2. India Has Not Been Willing to Adapt Its Measures to the Sanitary Characteristics of Areas From Which Products Originate or to Recognize the Concepts of Disease-Free Areas

30. In this dispute, India has purported to be willing to recognize the "concepts" of disease-free areas with respect to AI, but the statements and conduct of Indian officials over the past seven years belie India's contentions. In 2007, in response to a U.S. proposal for a new veterinary certificate for poultry meat, India informed the United States that the "Indian side would insist on country freedom as the condition is uniform." India's failure to apply its AI measures on a less-than-country-wide basis was raised in meetings of the SPS Committee. India's delegate never indicated that this complaint was ill-founded. At the May 2012 OIE meeting, the Indian delegate criticized the OIE Code's AI chapter, asserting that for India "the concept of zoning looked irrelevant as far as avian influenza was concerned."

31. Despite requests not to apply its measures on a country-wide basis, India repeatedly promulgated new iterations of its measures that on their face applied to products from anywhere in a country reporting NAI. S.O. 1663(E) on its face applies on a country-wide basis. India has continued to require that shipments of products covered by S.O. 1663(E) be accompanied by veterinary certificates with a required attestation about the AI status of the exporting *country*. The text of India's measures thus does not allow for the application of import prohibitions on less than a country-wide basis. And India's responses to requests that it recognize the applicability of the concept of disease-free areas to AI make clear that India is not overlooking the text of its Notifications and applying the concept through some other means.

32. India has claimed that its Livestock Act gives it the power to recognize zones and compartments, pointing to broad provisions that simply delegate to its Central Government the power to "restrict or prohibit … as it may think fit, the import" of livestock and livestock products. These provisions do not modify the measures at issue in the dispute so as to recognize the concept of disease-free areas, nor do they themselves reflect the concept of disease-free areas. The measures at issue here—those found in S.O. 1663(E)—apply on a country basis, and hence are not adapted to the characteristics of the areas from which products originate. The Livestock Act appears to give India the power to promulgate additional measures, and does not undermine the fact that the measures at issue do not meet India's obligations under Article 6.1.

33. That India has not complied with Articles 6.1 and 6.2 is confirmed by its failure to follow the first step outlined by the SPS Committee for consideration of applications to recognize specific areas as disease-free. India has not published information explaining the basis for recognition of disease-free areas with respect to LPNAI or HPAI, a description of any process that would be used to evaluate a request for recognition of such an area, the information that India would need to evaluate such a request, or a contact point for such requests.

34. In combination, the facts that (i) India has never published information explaining the basis for recognition of disease-free areas with respect to LPNAI or HPAI, (ii) in response to requests to regionalize, India has categorically refused, and (iii) India's measures on their face apply to entire countries, make clear that India is in breach of its obligations to "ensure that [its] sanitary … measures are adapted to the sanitary … characteristics of the area … from which [an imported] product originated." Further, India has made clear, including through its responses to trading partners who raised the need for regionalization, that India does not ensure that its measures are adapted to the sanitary characteristics of an area. This is not a situation where a Member has demonstrated that the application of its measures will respond appropriately to any demonstration under Article 6.3.

3. Neither Article 6.1 nor the OIE Code Permits India to Refuse to Apply Its NAI Measures to Areas Smaller Than Countries

35. India suggests that Article 6.1 lets it choose, at its discretion, whether the "area" whose sanitary characteristics a measure is adapted to, will be "all of a country, part of a country, or all or parts of several countries." If Members had unchecked discretion to define the relevant "area" for purposes of determining whether a disease is present, then Article 6 would be meaningless. Rather, Article 6.2 supports the conclusion that an "area" for purposes of Article 6.1 could be defined by a combination of different characteristics, and that to ensure adaptation of measures to the characteristics of the area from which products originate, a Member's measures must allow for the application of requirements or restrictions with respect to areas that are appropriately sized and bounded in light of these characteristics. India's measures do not do so.

36. India also appears to argue that the OIE Code supports requiring that all of an exporting country be free of a disease whenever that disease is not present in the importing country. The OIE Code does not do so. Rather, for each product discussed in the OIE Code Chapter on AI, the recommended import requirements apply either a) "for importation from an HPNAI free country, zone, or compartment," b) "for importation from an NAI free country, zone, or compartment," or c) "[r]egardless of the NAI status of the country of origin." Thus, under the OIE Code, AI-related requirements can be applied on a zone or compartmental basis—and nothing in the Code qualifies this conclusion based on an importing country's disease status.

G. India Has Acted Inconsistently With Its Obligations Under Article 2.3 Of The SPS Agreement By Treating Imported Products Differently From Indian Products Without Justification

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

38. India casts the U.S. discrimination claim as a challenge to its domestic measures. Yet like all claims in this dispute, the claim under Article 2.3 challenges the measures applied to imports. India asserts that the United States suggests "that India apply similar measures in the event of a domestic outbreak of NAI as it does for imports," adding that the U.S. would "essentially require[] India to cull or destroy its entire poultry population and further completely put a stop to poultry trade in the country" in the event of an NAI detection. India thus believes that the domestic measure equivalent to those it applies to imports would be one requiring it "to cull or destroy its entire poultry population and further completely put a stop to poultry trade in the country." India does not do this, and thus by its own account applies less favorable treatment to foreign products than to domestic products.

1. India's LPAI-Based Import Bans are Discriminatory

39. India's measures unjustifiably discriminate against imported products by banning them following detections of LPNAI in the exporting country while India does not even maintain surveillance requirements that would result in reliable detection of LPNAI cases occurring in India's poultry flocks. As one piece of evidence of the deficiency of India's surveillance, the United States highlighted that India has never notified a detection of LPNAI, despite notifying over ninety outbreaks of HPAI in recent years. It is not plausible that, during a period when India had over ninety HPNAI outbreaks, there was no LPNAI in India. India has responded to the U.S. assertions about India's surveillance by arguing that LPNAI is exotic to India. India's evidence does not

demonstrate this. Further, India's imposition of import bans based on LPNAI detections discriminates against imports not because LPNAI has occurred in India, but because India's surveillance for LPNAI is inadequate, resulting in a situation where controls on trade in domestic products due to domestic LPNAI will not be imposed.

40. India advances the hypothesis that South Asia is somehow unique with respect to LPNAI, and that accordingly all HPAI incidents in India resulted from introduction of HPAI into India by migratory birds, not mutations from LPNAI in India. India offered no evidence that this is the case. But, even if it were correct, there is no reason to think the ecology of the region is unique in a way that would lead wild birds to spread HPAI but not H5 or H7 LPAI. As HPAI results from mutations from LPAI, bird migrations that bring into India H5N1 HPAI – the kind of HPAI that India has experienced – are likely to also bring birds exposed to H5 or H7 LPAI. Further, the large number of H5N1 HPAI outbreaks in India's poultry would serve as an indicator of the high level of interaction occurring between wild birds and poultry, and thus of the likelihood of transmission of H5 or H7 LPAI from wild birds to poultry in India—thereby producing LPNAI.

41. The United States has also shown that H5 and H7 AI antigens were detected in domestic ducks in India. The antibodies establish that an infection has at some point been present in the birds. It is unlikely that India would not have detected an H7 HPAI outbreak. It therefore appears that India has experienced H7 LPAI in poultry—a form of LPNAI.

42. India does not dispute that it has no mandatory requirement for the conduct of routine laboratory tests in apparently healthy flocks for LPNAI, even though LPNAI's lack of symptoms makes visual observation inadequate for its detection. India purports to conduct "routine laboratory" surveillance for NAI. But the documents India cites do not demonstrate that India actually conducts routine testing of apparently-healthy flocks for LPNAI, let alone that such testing is conducted nationwide as part of a program or programs under which it is required. Further, India does not dispute that the NAP does not set forth programs under which routine testing of sample birds in apparently healthy flocks is conducted throughout India on a large-scale or systematic basis, let alone required. Indeed, the NAP simply provides that sampling "may" be conducted on flocks, and that routine surveillance should involve virological testing "where possible." The OIE Code supports the inadequacy of India's surveillance. The OIE Code provides that determination of the NAI status of a country, zone, or compartment involves "appropriate surveillance … to demonstrate the presence or absence of infection in the absence of clinical signs in poultry." India has not implemented the kinds of testing necessary for such a demonstration. India's failure to report LPNAI highlights the deficiencies in its surveillance. India, in sum, lacks the ability to reliably detect LPNAI, and this results in a situation where controls on trade in domestic products due to LPNAI are not imposed.

2. India's Unwillingness to Regionalize is Discriminatory

43. India does not dispute that it does not apply movement restrictions on products from more than 10 kilometers from an NAI detection. Rather, India argues that its application of more stringent measures to imports is not discriminatory because India does not know the details of NAI detections in exporting countries or control their disease containment and disinfection methods. Yet India applies import bans categorically to any exporting country when it reports NAI. India's imposition of more restrictive measures to imports is thus unrelated to risk associated with the potential for surveillance or control failures in exporting countries. Lack of knowledge about other countries' response systems and outbreaks cannot logically render non-discriminatory a measure that categorically precludes inquiry into how an exporting country identifies and contains NAI, and whether that identification and containment will be as effective as a response directed by India. India's logic suggests that application of more stringent measures to imported products than to domestic products would never be discriminatory. Underscoring that India's application of AI-based import bans to the entirety of an exporting Member is discriminatory, India believes its trading partners should be willing to apply NAI measures on a less-than-countrywide basis to its exports. India's position is simply that its products are entitled to more advantageous treatment than products from other Members.

3. India Cannot Justify its Discrimination with the Argument that LPNAI is Exotic to India

44. From its contention that LPNAI has not occurred in India, India attempts to argue, not just that its measures are not discriminatory, but also that subjecting imports to AI measures more stringent than those applied to domestic products is justified. This argument lacks merit. As noted, India has had LPNAI. Further, India acknowledges that it has had numerous H5 HPAI outbreaks, and H5 LPNAI and H5 HPAI are the same disease. Moreover, India explains that it worries about LPNAI because it could mutate into HPAI. But India already experiences regular HPAI outbreaks. Additionally, India does not claim that LPNAI is a disease that could not reach its territory in the absence of imports. Rather, India itself believes that it is a country with significant risk for domestic LPNAI incidents and argues that it takes surveillance for LPNAI seriously. In light of that, India cannot plausibly claim that its domestic conditions are so dissimilar from conditions elsewhere that a lack of effective domestic surveillance and application of control measures only within ten kilometers of an outbreak, alongside measures for imports far more stringent than recommended by OIE guidelines, simply reflect differences in disease conditions between India and elsewhere.

45. India has not rebutted the U.S. showing that India's AI measures discriminate against imported products and that the discrimination is arbitrary and unjustified—by differences in conditions between India and elsewhere or by anything else. India's measures accordingly are inconsistent with the first sentence of Article 2.3.

H. India's Measures Constitute A Disguised Restriction On Trade

46. India's measures result in an additional breach of Article 2.3 as they amount to a disguised restriction on trade. Contrary to what India suggests, this claim is about what can be inferred from the totality of the circumstances surrounding India's measures, including the ways that they discriminate against imported products. A variety of considerations surrounding India's measures constitute indicia of a disguised restriction on international trade. These considerations are similar to those that the *Australia – Salmon* panel considered to be "warning signals" and "additional factors" indicating a disguised restriction.

I. If India Were Viewed As Having Different ALOPs For Foreign And Domestic Products, India Would Be In Breach Of Article 5.5 Of The SPS Agreement, With A Resulting Consequential Breach Of Article 2.3

47. If India were considered to have separate ALOPs for imported and domestic products, these would have to be inferred from the measures applied with respect to those products. In its First Written Submission, the United States explained why India's measures with respect to imports are far more trade restrictive than those applied to domestic products as a result of two key contrasts. The reasons why a more stringent ALOP would be inferred from the measures applied to imports than from those applied to domestic products are thus clear.

48. Similarly, the comparability of the different situations at issue in the U.S. claim under Article 5.5 needs no elaboration. They involve trade in the *same* products and control of the *same* diseases. The arbitrariness of application of different ALOPs to different situations based exclusively, as here, on whether the otherwise identical products involved are imported or domestic likewise needs no elaborate proof. Moreover, the United States has established that India's measures cause discrimination and amount to a disguised restriction on international trade, satisfying the third element of a claim under Article 5.5. In sum, to the extent that transmission of NAI through imports and through domestic products are viewed as distinct situations for which India maintains separate ALOPs, then India is in breach of Article 5.5—with a resulting consequential breach of Article 2.3.

J. India Cannot Excuse Its Failure To Comply With Article 7 And Annex B

49. India's only response to the claims under Article 7 and Annex B is that its measures conform to international standards. However, India's measures are fundamentally in contradiction to, and not at all the same as, the relevant international standards.

K. India Has Breached Article XI of the GATT 1994

50. India's measures are not in conformity with the relevant provisions of the SPS Agreement, and India has suggested no other reason why its measures might be consistent with GATT Article XI. India's measures place India in breach of GATT Article XI:1.

III. CONCLUSION

51. The United States respectfully requests the Panel to find that India's measures are inconsistent with India's obligations under the GATT 1994 and the SPS Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with the GATT 1994 and the SPS Agreement.

ANNEX B-4

EXECUTIVE SUMMARY OF THE OPENING STATEMENT
OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

I. INTRODUCTION

1. The United States would recall that in its first written submission, we provided extensive record evidence concerning the proper interpretation of the OIE Terrestrial Animal Health Code ("OIE Code" or "Code"), and the inadequacy of India's domestic surveillance program. This evidence includes:

– *With respect to the OIE Code*: the text of the OIE Code, reports from the OIE Terrestrial Animal Health Standards Commission, the OIE User's Guide, and statements by an OIE representative and other commentators; and

– *With respect to India's surveillance*: India's National Action Plan ("NAP") for avian influenza; and the OIE Code provisions on surveillance and the scientific authorities and methodologies that were compiled and applied by two veterinary epidemiologists.

2. The input from the OIE and the individual experts provides further support that this record evidence establishes the following points:

– *First*, the OIE Code does not recommend import prohibitions in response to a notification of notifiable avian influenza, including low pathogenic notifiable avian influenza ("LPNAI") – instead it provides that products India bans can be safely imported from countries or zones even if they are reporting LPNAI outbreaks;

– *Second*, the recommendations in the OIE Code can be applied on a regional basis – which is another reason why mandatory country-wide prohibitions are not in accord with the OIE Code; and

– *Third,* India does not have an active surveillance program capable of reliably detecting the presence of LPNAI in India.

In short, the expert consultation process provides further confirmation that our proposed understanding of this evidence is indeed the correct one.

II. INDIA'S MEASURES ARE NOT JUSTIFIED BY THE OIE CODE

A. India's Measures Are Not in Conformity with (Art. 3.2) or Based on International Standards (Art. 3.1)

3. The OIE Code notes that the importation of products from countries reporting LPNAI is possible regardless of the exporting country's disease status. India's contrary interpretation is a misstatement of both Article 5.1.2 of the OIE Code and the User's Guide. Article 5.1.2 is an admonition to an importing country not to ban an imported product to protect against a disease already present in that country and not to impose requirements that are stricter than what the country applies to domestic products. Similarly, the User's Guide provides that "[t]he recommendations in … the Terrestrial Code are designed to prevent the disease in question being introduced into the importing country, taking into account the nature of the commodity and the animal health status of the exporting country."

4. In trying to defend its untenable arguments, India describes the responses by the OIE as "evasive, highly ambiguous and contradictory." In particular, India purports not to understand why the OIE said notification helps countries address "diagnostic and management challenges of avian influenza" and why the OIE did not instead explain that notification should result in trade

consequences. This criticism reflects why India's position is so misguided. India fails to recognize that notifications may be used to advance scientific understanding and not just protectionist objectives.

1. The Proper Understanding of the OIE Code

5. India appears to argue that the plain reading of the OIE Code, as explained by the United States, would vitiate (1) Article 10.4.1.10's admonishment not to impose bans in respect to NAI detections in wild birds; (2) the Code's notification provisions; and (3) the language – which India calls "NAI freedom" – at the beginning of various control or mitigation measures.

6. All three provisions serve a clear purpose. First, Article 10.4.1.10 is an affirmative statement not to impose bans on account of wild birds. Second, regarding the Code's notification provisions, they remain significant because notifications are important to further scientific understanding and help lead to the appropriate mitigation measures. The OIE Responses support this understanding. And third, with respect to the control or mitigation measures for particular products in the OIE Code, these provisions address different scenarios and are intended to provide appropriate mitigation measures that allow for safe trade.

7. That India is ignoring significant – indeed most – of the OIE Code is established by contrasting its arguments against its own veterinary certificates. India's veterinary certificates do not actually conform to OIE guidelines the way India says they should.

2. The Purported Positions of Other Members

8. India also seeks support for its reading of the OIE Code by referring to purported positions and measures of the United States and some other Members. India errs with respect to the United States. There is no reason to believe India is any more accurate with respect to other Members. Furthermore, India's argument is misplaced because interpretation of the OIE Code does not, as India suggests, involve an application of the customary rules of treaty interpretation. In any event, India's characterization of a handful of measures adopted by certain WTO members cannot be said as establishing the agreement of the OIE membership regarding the OIE Code.

B. India's Measures Are Not Justified by a Risk Assessment or Otherwise Maintained with Sufficient Scientific Evidence

9. With respect to the question of a risk assessment, the record continues to show that India has no risk assessment within the meaning of the SPS Agreement. When India notified S.O. 1663(E) to the WTO, its notification form stated that the purpose of the measure was: (1) food safety; (2) animal health; and (3) to protect humans from animal pest or disease. Accordingly, India's avian influenza measures require both types of risk assessments provided for in paragraph 4 of Annex A of the SPS Agreement. Thus, India breaches Articles 5.1 and 5.2 of the SPS Agreement because it was required to base its measures on both types of risk assessments provided for in paragraph 4 of Annex A and its measures are based on neither. India has consequentially breached Article 2.2 by failing to base its measures on a risk assessment.

III. INDIA'S MEASURES ARE MORE TRADE RESTRICTIVE THAN NECESSARY TO ACHIEVE ITS ALOP

10. India's second written submission, in contrast to its opening statement at the first meeting of the Panel, acknowledged that the OIE Code product-specific recommendations are different from the measures India presently applies. Nonetheless, India posited three reasons why application of the OIE Code would not result in a less trade-restrictive measure that would achieve its ALOP. Each of these grounds is legally or factually incorrect.

11. First, India submits that reliance on the control measures would not achieve its ALOP. But, India never identifies its ALOP. As previously explained, India is not controlling for LPNAI at home, and its domestic restrictions for HPNAI contain limitations such as zoning. At best, India's ALOP can be described as very modest. Accordingly, while it appears India's ALOP is modest, even a high one would be achieved by application of the OIE Code.

12. The second point India raises is that such measures would be technically infeasible since India cannot trust the veterinary certificates – and that would mean more work for its authorities since there would actually be imports entering India. This is interesting because India claims that it allows imports if countries are free from NAI for three months. If India is willing to accept that a veterinarian can make an attestation regarding the entire LPAI situation in the exporting country, then India should be prepared to rely on a veterinarian attesting to things that might actually be in that person's personal knowledge.

13. The last point India raises is that the OIE Code is more trade restrictive than the import prohibitions it maintains now. India claims that would be the case because it would take it longer to confirm that other countries maintain adequate surveillance systems than to accept imports from a country if it does not report NAI for three months. India's position has no basis in fact or common sense. There would be far less potential disruptions to trade by adopting the OIE Code, rather than leaving it perpetually to the possibility of suspension.

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

14. The parties and the Panel's experts have spent substantial time exchanging views related to the U.S. claims under Article 2.3. These exchanges have confirmed that India's measures discriminate against imported products without justification. The United States recalls that there are in fact two separate ways that India's measures discriminate against imported products. One of these forms of discrimination exists independently of India's surveillance deficiencies. When either HPAI or LPNAI is detected anywhere in an exporting country, India applies an import ban covering the entirety of that exporting country, even where the detection is thousands of kilometers away from the area where the exported product is produced. By contrast, when NAI is detected in India—and in practice that means HPAI, as India does not detect LPNAI—India restricts trade in products only from a limited zone surrounding the detection.

15. Surveillance *is* at the core of the second manner in which India's measures discriminate against imported products. India imposes import bans when an exporting country reports detections of LPNAI, but does not have in place surveillance mechanisms capable of reliably detecting LPNAI when it occurs in India. When LPNAI cannot be detected, it obviously cannot lead to any restrictions on the trade of domestic products.

16. The inadequacy of India's domestic surveillance regime to reliably detect LPNAI is clear from the NAP and from the other evidence reviewed by the Panel's experts, as those experts' answers confirmed. As India has acknowledged, "LPNAI is largely asymptomatic in poultry." The Panel's experts have confirmed that systematic active surveillance involving laboratory testing of samples from apparently-healthy flocks is therefore necessary to reliably detect LPNAI. India does not appear to be disputing this point.

17. The United States has explained that India's NAP sets out a surveillance regime that relies on clinical signs for the detection of avian influenza, and that does not require any routine laboratory testing of samples from apparently healthy flocks for AI. Indeed, apart from "physical/clinical" surveillance, routine surveillance in accordance with the NAP involves only the use "where possible" of *virological* testing. In its instructions on "Guidelines for Collection, Packing and Transportation of Samples," the NAP instructs that samples should be forwarded to a Regional Disease Diagnostic Laboratory or to HSADL Bhopal "[o]nly in case of unusual sickness/ mortality raising suspicion of AI."

18. In response to the U.S. *prima facie* case, India submitted a variety of documents which provide figures on numbers of AI tests conducted by certain laboratories in India, without stating why the tests were conducted, or which relate to surveillance for or response to clinical events. India's documents do not demonstrate that India actually conducts routine testing of apparently-healthy flocks for LPNAI, let alone that such testing is conducted nationwide as part of a program or programs under which it is required. The independent experts reviewed the evidence and agreed.

19. Although India attempted to challenge the experts' conclusion and belatedly add to the record 76 new exhibits, these new exhibits make no difference at all. India's new exhibits simply contain more of the same kinds of evidence that India submitted previously, and that is not illustrative of an active, systematic surveillance regime capable of reliably detecting LPNAI –

reinforcing the fact that India does not have one. Some of India's new exhibits are requests to test small numbers of samples of different types collected in individual Indian states, districts, and localities for unknown reasons. There are similar requests explicitly referencing HPAI surveillance, as well as reports of surveillance following HPAI outbreaks. There are reports of projects to monitor for AI in migratory birds in certain isolated locations. There are four letters from long ago, predating India's NAPs, its AI-based import prohibitions, and even the notifiability of LPNAI, simply requesting that, in light of HPAI, states collect some samples for routine testing, but specifying nothing more about number of samples, number of flocks to sample, or frequency of collection. And there are a handful of documents requesting tests on, or reporting results of tests on, small numbers of samples collected in individual districts or localities as part of routine surveillance performed in them at particular times. These documents evidence nothing more than temporally and geographically sporadic, ad hoc surveillance testing activities.

20. In its Comments on the Expert Responses, India cites the fact that it has submitted a handful of gene sequences for non-reportable AI strains to GenBank—a Genetic sequence database run by the U.S. National Institutes of Health. Contrary to India's arguments, the submission of some gene sequences to GenBank does not indicate the existence of adequate AI surveillance.

21. Lacking reliable surveillance, India has focused on an issue slightly different from surveillance: India's disease status. But it is the adequacy of India's surveillance to reliably detect LPNAI, and not India's disease status, that is the fundamental question for purposes of determining whether India's imposition of LPNAI-based import bans constitutes discrimination in breach of Article 2.3. If India has no means to reliably detect LPNAI, and thus to restrict trade in domestic products in the event that poultry in India becomes infected with LPNAI, it would be discriminatory to restrict the trade in imported products due to detections of LPNAI in exporting countries.

22. Having said this, not only does India have no surveillance basis on which to claim that it has never had cases of LPNAI, but the Pawar study provides strong evidence that domestic ducks in India have been infected with a type of LPNAI known as H7, either at the time of the study or in the past. India's failure to perform virological follow-up testing meant that there was no way to know definitively that the ducks were infected *at the time of testing*, which would trigger an obligation to inform the OIE of an ongoing LPNAI incident. But this failure confirms that India is not taking the surveillance steps that would be necessary to reliably detect and report LPNAI.

23. The Pawar study's strong evidence of LPNAI infections in India is entirely expected: India lies in the flyways of wild birds coming from places with LPAI, including H5 or H7 LPAI; India has a large backyard poultry population, opening an avenue for AI transmission from wild birds to poultry; India had 35 million domestic ducks in 2007, and ducks are a key host species for preservation and perpetuation of LPNAI; and India has experienced non-notifiable LPAI strains, and there is no reason to believe they circulate differently from notifiable LPAI strains. The key point, however, is that India bans imported products due to LPNAI even though it does not have surveillance requirements or plans capable of reliably detecting LPNAI.

V. INDIA'S MEASURES DO NOT PROVIDE FOR REGIONALIZATION

24. India argues that SPS Article 6 obligations can be triggered only by an application for recognition of specific zones or compartments. India's theory would mean that the United States and other exporting Members had an obligation not to accept the plain meaning of the words of India's measure. India's theory, moreover, suggests that the United States had an obligation not to believe the statements of India's own officials, who made clear that regionalization simply was not an option for countries exporting to India the products covered by S.O. 1663(E).

25. India's insistence that Article 6 obligations can be triggered only by an application for recognition of specific zones or compartments ignores the phrasing of that article. Article 6.1 does not provide for Members to "adapt their sanitary or phytosanitary measures" to the sanitary characteristics of an area at some point in the future. Rather, it provides that "Members *shall ensure* that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area … from which the product originated" (emphasis added). This wording would make no sense if the paragraph was not intended to require maintenance of an ability

(existing independently of and antecedent to any regionalization request), to account for the disease conditions of sub-national areas from which traded products originate.

26. Similarly, Article 6.2 requires that "Members shall, in particular, recognize *the concepts* of pest- or disease-free areas and areas of low pest or disease prevalence" (emphasis added). It does not require recognition of specific areas, but rather of concepts: those of pest- or disease-free areas. It would make no sense for an obligation to recognize these *concepts* to be triggered only in the event of a request to recognize specific compartments or zones. The United States has explained how India rebuffed various requests that it accept the possibility of applying its measures not on a countrywide basis. For this reason, India's argument that the United States should have inquired "on its laws and procedure that India might adopt to recognize an exporting country's zones or compartments" is disingenuous at best.

27. As the United States explained, it explicitly asked that India apply its measures on a less-than-country basis with respect to products from the United States. India's response was not to provide information on laws and procedures that could be used to secure the recognition of zones and compartments. Rather, India's response was that its requirement of country-freedom "is uniform." Indeed, India's erroneous assertions in this dispute that it has an ALOP of "NAI country freedom" of the exporting country from NAI, that "India's level of protection as reflected in S.O. 1663(E) is to prevent ingress of LPNAI and HPNAI from disease notifying *countries* through imports of products that are clearly identified as risk factors even by the OIE, and that "India's ALOP is met by maintaining import restrictions against *countries* notifying HPNAI or LPNAI," thoroughly belie its contention that it would consider recognizing zones and compartments if only another country submitted a properly documented request.

28. In its regionalization argument, India urges the Panel to presume that the United States must not have procedures in place that would allow for the limitation of trade restrictions on U.S. products to a limited zone around the outbreak. As the United States has explained, while the United States does have such procedures, U.S. procedures are irrelevant to the question of whether India recognizes "*the concepts* of pest- or disease-free areas and areas of low pest or disease prevalence" (emphasis added), and is "*ennsur[ing]* that [its] sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area … from which [a] product originated" (emphasis added).

VI. THE UNITED STATES HAS NOT LIMITED ITS CLAIMS

29. India alleges that the United States has limited its claims to poultry meat and eggs. The Panel has already heard a variant of this argument – and rejected it in the Preliminary Ruling. India's argument makes no sense – the presentation of certain examples regarding some of the products covered by a measure is no indication of a withdrawal or limitation of a claim. And more generally, India does not – because it cannot – identify any legal basis to require a complaining party to repeat every product covered by a measure at every portion of its submissions in order to maintain a challenge to the entire scope of a measure.

VII. CONCLUSION

30. This dispute can be distilled to a few simple points:

- India's measures are not based on either type of risk assessment prescribed by the SPS Agreement;
- India's measures are maintained without sufficient scientific evidence because the evidence does not support prohibitions on account of LPNAI;
- India's measures are more trade restrictive than necessary to achieve its appropriate level of protection because measures conforming to the OIE Code are reasonably available;
- India's measures unjustifiably discriminate as India does not have a surveillance regime capable of reliably detecting LPNAI yet bans imported products on account of LPNAI and since India restricts trade in domestic products from only a very limited

area following a domestic HPAI outbreak, yet whenever a trading partner reports LPNAI or HPAI, India bans importation from the entire country;

– India's measures do not take into account the possibility of regionalization; and

– India has no justification for its failure to properly notify and publish its measures.

In short, this dispute is about precisely what the SPS Agreement was intended to address: a Member misusing safety concerns in order to fulfill protectionist objectives.

ANNEX B-5

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF INDIA

A: INTRODUCTION

1. The WTO Agreement on Sanitary and Phytosanitary Measures (**the SPS Agreement**) strongly encourages Members to harmonize SPS measures on as wide basis as possible by basing their respective SPS measures on international standards, guidelines and recommendations developed by relevant international organizations as international organizations, in developing these standards are deemed to have taken into account relevant current scientific information concerning the risk to human or animal health arising from international trade in animal or animal products.

2. Thus it was the understanding of India that having adopted an OIE recommendation, it was not required to further conduct a risk assessment. The measure at issue, S.O. 1663(E) implements the *Office International des Epizootics* (**OIE**) standard which 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 High Pathogenic Avian Influenza (**HPAI**) or Low Pathogenic Avian Influenza (**LPAI**) in poultry. Yet United States sought from India a risk assessment as a further justification that its measure is based on science.

3. Therefore in October 2010, India informally and in good faith provided a document to the United States and the European Communities which contained a brief summary of scientific material which India believed formed the basis of the OIE recommendation and hence also the justification behind India's measure. India also categorically stated that this was not India's risk assessment and should not be treated as one. However in spite of India's clarification, United States together with the European Communities specifically sought an opinion from the OIE as to whether the document qualified as a risk assessment, this despite the fact that India had not sought OIE's opinion on the matter and shared the document with the OIE only for information purposes.

4. Even though the OIE does not have a separate mandate to assess, judge or comment on the existence or content of a Member's risk assessment and is only an observer at SPS Committee meetings, the OIE took the floor and proceeded to opine on the document stating that it was severely deficient in many aspects. India took strong objection to the OIE taking the floor as did Chile, Argentina and Peru. Thus it is clear that the OIE has already made known its opinion. This coupled with its inappropriate interjection at the SPS Committee meeting casts serious doubt over the OIE's ability to provide guidance to the Panel and India submits that the Panel should not rely on the OIE as an expert in this case.

A(I): NATURE OF INDIA'S AVIAN INFLUENZA MEASURES

5. S.O. 1663(E) was implemented under Section 3 and 3A of the Livestock Importation Act, 1898 and prohibits import of certain livestock and livestock products from countries reporting High Pathogenic Notifiable Avian Influenza (**HPNAI**) or Low Pathogenic Notifiable Avian Influenza (**LPNAI**) or Notifiable Avian Influenza **(NAI)** in poultry. Hence imports are prohibited upon a notification of NAI, but when a country declares freedom after culling (or slaughter), disinfection and surveillance, which generally takes three months as recommended by the OIE, the country is no longer considered to be *"reporting Notifiable Avian Influenza"* and imports from such countries are permitted. Further the United States assertion that India imposes measures on account of LPNAI in wild birds is incorrect. The measure specifically states that imports will be prohibited from countries reporting HPNAI or LPNAI in poultry.

6. As noted above, once the country is free from avian influenza in poultry, imports from such countries are permitted under permits called sanitary import permits (**SIPs**) which are issued under S.O. 655 (E). This is evident from SIPs granted for imports of products such as unprocessed duck and goose meat, turkey meat and chicken meat from countries such as France, Spain, United Kingdom, United States, Italy, Netherlands, Thailand and Malaysia which did not report any

outbreak of HPAI or LPAI on the date of approval of the SIP. Further India on a number of occasions in the SPS Committee meetings and at bilateral forums has clarified that S.O 1663(E) and its predecessor measures provide for a temporary ban against countries reporting NAI in poultry and that the ban is lifted once the country notifies freedom.

B: INDIA'S DOMESTIC AVIAN INFLUENZA MEASURE FOR CONTROL & SURVEILLANCE

7. The Government of India implements the control and surveillance procedure through the National Action Plan (**NAP**), 2012 which has been issued pursuant to the Prevention and Control of Infectious and Contagious Disease in Animals Act, 2009 (**Prevention of Disease Act).** The schedule of diseases under the Act indicates that highly pathogenic avian influenza and low pathogenic avian influenza in poultry are regulated by the Act and contained in accordance with measures taken in the NAP 2012.

8. With respect to the surveillance, India under NAP 2012 and in accordance with the OIE Code conducts three different types of surveillance system. First among them is the Random clinical surveillance wherein surveillance of population and density of poultry in each block, both in backyard and commercial establishments, flyways of migratory-birds, live-bird markets including wet-markets, existence of wildlife sanctuaries/ national-parks/ water-bodies visited by migratory/ wild birds is carried out and any unusual sickness or mortality in poultry or wild birds is taken into account. Further NAP 2012 also identifies and lays down signs for identifying unusual sickness such as swelling around the eyes, neck, head, nasal discharge, discoloration of the wattles, combs, legs, drop in egg production, sudden weakness, drooping wings and lack of movement among birds. These symptoms are also similar to what has been prescribed by the United States Department of Agriculture.

9. The second type of surveillance being carried out by India is the Random Laboratory Surveillance. Under this, samples including tracheal and cloacal from both poultry and wild birds are regularly/weekly screened for NAI using virological methods. The faecal and/or tracheal swabs from poultry is collected by officials of the State Department of Animal Husbandry, and from wild birds is collected by officials of the State Forests Department and the same are sent to the High Security Animal Disease Laboratory (**HSADL**), Bhopal or Regional Disease Diagnostic Laboratory **(RDDLs)**. Currently India has five RDDLs. Such surveillance for NAI has resulted in the testing of about 8, 49,332 samples by HSADL, Bhopal and the various RDDLs.

10. The third type of surveillance is the targeted surveillance wherein surveillance is undertaken for areas adjacent to international land-borders, especially those affected with avian influenza, interstate borders with the avian influenza affected States and in live bird markets including wet markets. The samples collected from these are sent to either HSADL, Bhopal/RDDLs for testing. The fact that avian influenza is not found in other regions of the country and is localized predominantly within India's eastern states is also an indication that India's control and containment measures are effective.

11. Further the control measures applied by India pursuant to NAP 2012 are also in conformity with the OIE Code. India employs control measures in two situations. Firstly control measures are employed in suspected avian influenza outbreaks wherein upon reporting of unusual sickness and mortality in birds, an officer visits the site to conduct a preliminary investigation. During the pendency of the investigation and the results of the test, an alert zone is created to prevent further ingress or spread, if any, to villages and habitations within a 10 km radius from the affected place.

12. The second type of control measures are employed upon occurrence of confirmed cases of outbreak of NAI. Once an occurrence of NAI is confirmed, the government immediately notifies the same to the OIE and subsequently carries out the control measures as prescribed under Chapter III of NAP 2012 upon occurrence of a NAI and which are also in consonance with the OIE Code. Post operative surveillance is carried out as per the procedure laid down in Chapter IV of NAP 2012 and which is in conformity with the OIE Code. It should also be noted that the control measures maintained by India are similar to control measures maintained by other countries such as Chinese Taipei, China and Canada.

C: RELEVANCE OF THE ARTICLE 5.8 REQUEST BY UNITED STATES

13. The United States made a request under Article 5.8 of the SPS Agreement on 17 January 2012 for certain information. As per the letter, the information was to be provided within 1 month even though Article 5.8 does not provide any time line within which the information is to be provided. India replied on 16 February 2012 requesting for some more time. However India did not receive any further communication from the United States and instead within 2 weeks received a request for consultations from the United States. Based upon these facts, United States alleges that India has refused to provide information under Article 5.8 even after 14 months of the request being made.

14. However argument of the United States is legally and factually incorrect. Firstly India never refused to provide information but instead requested for more time, to which it never received any reply. Secondly, Article 5.8 is a pre dispute measure and is not applicable in a dispute settlement situation. Hence it is inapposite that the United States complains that 14 months have passed since it made its request, when this period includes 12 months under dispute procedure itself. In view of the above, no adverse inference, as alleged by the United States, should be drawn against India.

D: SECOND REQUEST FOR PRELIMINARY RULING UNDER ARTICLE 6.2

15. The United States First Written Submission (FWS) alleges a violation of the national treatment obligation by India under Article 2.3 of the SPS Agreement. Therefore the object of the challenge, i.e. the discrimination, is alleged to be caused by India's domestic measures which do not allegedly apply similar controls with respect to like domestic products. Thus in this situation, United States has to necessarily adduce and impugn such of India's measures which it believes are the cause of this arbitrary or unjustifiable discrimination.

16. However nowhere in the panel request, there is any mention of the NAP, whereas in the FWS, the United States now claims that India does "not apply similar avian influenza related controls with respect to like domestic products and their internal movement within India". The National Action Plan was enacted in 2006 **(NAP 2006)** and later amended in 2012 and is promulgated under the Prevention of Diseases Act. The United States has brought to India's notice its challenge of the NAP 2012 for the first time in its FWS, while making no mention of it in its panel request.

17. Since the NAP is the object of the United States challenge under Article 2.3, it was imperative that the NAP was identified with precision in the panel request. The panel request does not mention the NAP explicitly by name and there is nothing in the description of the measure at issue in the panel request which would have provided notice to India that the United States did in fact intend to challenge the NAP. This is in spite of the fact that attendant circumstances indicate that the United States was well aware of the NAP and yet the panel request is devoid of any reference to it.

18. Further the United States cannot take umbrage under the reference to 'related or implementing measures' to raise claims with respect to NAP as it is not an implementing measure of S.O. 1663(E) or the Livestock Importation Act, 1898 because it does not implement the prohibition on imports of livestock and livestock products from NAI positive countries. The sphere of activity of S.O. 1663 (E) and the NAP is entirely different and it cannot be said that there is a significant degree of overlap between the two measures.

19. In addition to the NAP, United States has also adduced health certificates for livestock products as a new measure for the first time in its FWS on the ground that these health certificates implement the import prohibition laid out in S.O.1663 (E). However the argument of the United States is incorrect. The requirement to provide a health certificate with every consignment of livestock products emerges from SIPs which are issued under a separate notification, namely, S.O. 655 (E). Thus while S.O. 655 (E) governs conditions to be met by exporting consignments, S.O. 1663 (E) prohibits imports of certain livestock products from countries reporting NAI. Thus, though the two notifications are enacted under the same statute they deal with the dissimilar subject matters.

20. S.O. 655 (E) and S.O. 1663 (E) cannot also be said to be related measures merely because both notifications were enacted under the Livestock Act. The objective of the Livestock Act is to regulate, permit or prohibit the trade in livestock products. Hence, while S.O.655 (E) regulates the trade in livestock products, S.O. 1663 (E) prohibits the trade in livestock products under specific conditions. Thus the United States must not be permitted to raise claims concerning the health certificates in its submissions.

E (I): ORDER OF ANALYSIS

21. United States has raised claims under the following provisions of the SPS Agreement and GATT 1994: Articles 5.1, 5.2, 2.2, 3.1, 5.6, 6.1, 6.2, 2.3, 5.5, 7, and Annex B of the SPS Agreement and GATT Article XI. Though the United States has commenced its submission with a claim with Article 5.1 of the SPS Agreement, it is India's submission that the Panel must commence its analysis under Article 3 as India being the party imposing the SPS measure is claiming that its measure conforms to the international standards. In the event, the SPS measure at issue is held to be in conformity with international standards, the Panel need not examine compatibility of the SPS measure at issue with other provisions of the SPS Agreement.

22. The above is equally applicable if the SPS measure is found to be 'based on' international standards and only that aspect of the law which the Panel holds is not 'based on' the international standard will need to be further examined under Article 2.2, 5.1 and 5.2.

23. Further if the Panel were to find that India's measure is not consistent with Article 3, then India submits before the Panel that it should analyze the claim of consistency by India with Article 2.2 as it provides for an overarching principle and is applicable to the entire SPS Agreement. Further Article 2 informs Article 5.1 and Article 2.3 informs Article 5.5 and if the Panel were to find that India's measure is based on scientific principles and not maintained without sufficient scientific evidence pursuant to Article 2.2 of the SPS Agreement, a further analysis under Article 5.1 would be unnecessary. Hence India would submit before the Panel that it should commence its analysis with Article 3 of the SPS Agreement.

E (II) & E (III): INDIA'S MEASURE CONFORMS TO THE OIE CODE

24. The OIE recognizes the prerogative of every Member to set its own level of protection and in view of the same has formulated a code wherein it has provided various situations in which products may be traded. For instance for poultry products mentioned within the chapter, the importing country may condition the entry of a poultry product upon the exporting country being free from both HPNAI and LPNAI. Alternatively the OIE also enables countries to condition the entry of the poultry product only from the specific zone or compartment which has been recognized by the importing country.

25. Hence an importing country is free to choose the 'condition of entry' upon the fulfillment of which it will allow poultry products to be imported. Because the 'condition of entry' for each poultry product stated in the OIE Code provides several options, the condition of entry that an importing country implements will depend on its appropriate level of protection (**ALOP**). The OIE Code does not stipulate what level of freedom a country must seek from the exporting country, it leaves that choice to the importing country but only recommends sanitary conditions which should be fulfilled by the consignment and which should further be attested to by the veterinary authority of the exporting country.

26. The United States has adduced claims starting with Article 5.1 and 5.2 and 2.2 specifically alleging that as far as fresh meat of poultry and eggs are concerned, there is no scientific basis to maintain a temporary import suspension of the type maintained by S.O. 1663(E). Thus India's claim stating that India's measure is in conformity with the OIE Code will be limited to standards pertaining to eggs and fresh meat of poultry as it is evident that the United States claims pertain only to these products. However, if the United States makes substantive submissions in this regard, India reserves the right to respond to such further submissions.

27. Article 10.4.1.10 of the OIE Code stipulates that if a country notifies HPAI or LPAI in poultry, Member countries can impose immediate ban on trade in poultry commodities depending on the condition of entry they have selected based on the level of protection they have deemed appropriate. Further the OIE Code also provides for condition of entry for each poultry product

mentioned therein. Hence if a country has decided based on its ALOP that it will condition entry of eggs and fresh meat of poultry from the exporting country upon NAI country freedom then if the exporting country notifies either HPNAI or LPNAI in poultry, the said products can be banned from the exporting country upon the notification and will be allowed once the country notifies freedom again to the OIE. Likewise if a country has decided based on its ALOP that it will condition entry of eggs and fresh meat of poultry from the exporting country from specified zones which are free of NAI, then if the exporting country notifies either HPNAI or LPNAI in poultry in areas outside a recognized zone, the said products will be banned from the entire exporting country except the recognized zone and will be allowed once the country notifies freedom again to the OIE.

28. India's sanitary regime for imports of poultry products is governed by S.O. 1663(E) as per which the condition of entry for poultry products into India is NAI freedom in poultry. If the exporting country is not free from NAI in poultry, it provides for import restrictions on commodities mentioned therein till the time the exporting country regains NAI freedom. Once the country regains NAI freedom, poultry products can be imported by applying for SIPs which are valid for 6 months. Imports can then be made on the basis of the SIP and every consignment is required to be accompanied by a veterinary certificate attested to by the official veterinarian of the exporting country.

29. The veterinary certificates contain several sanitary conditions which are required to be attested by the veterinary authorities of the exporting country so that every consignment is safe for import. Hence in effect, S.O. 1663(E) implements the 'condition of entry' requirement reflected in each product specific recommendation and in Article 10.4.1.10. On the other hand the veterinary certificates implement the health certificate requirements under each product specific recommendation.

30. Thus S.O. 1663 (E) provides for immediate suspension of import of livestock product from countries reporting NAI and which conforms to Article 10.4.1.10 of the OIE Code. Similarly according to the condition of entry for livestock products under S.O. 1663 (E), NAI freedom is required for imports into India and which conforms to the condition of entry for the same product under the OIE Code. In view of the above, India submits that its measure conforms to the OIE Code. Since India has established that its measure conforms to the OIE Code, the measure is presumed to be consistent with the SPS Agreement and the GATT 1994. Hence the United States claim under GATT Article XI is not sustainable. Further the United States claim that India's measure violated Article 3.1 by not allowing imports from zones or compartments is also not made out as India has clearly established that the OIE Code and the SPS Agreement permit a country to determine its ALOP and the OIE Code permits countries to condition the entry of a poultry product upon the exporting country being free from both HPNAI and LPNAI.

31. Alternatively India also submits that its measure is based on the OIE Code. As per the Appellate Body (AB), a domestic SPS measure can be found to be "based" on the international standard, if it adopts a part of the international standard or is supported by the international standard. In such a scenario, the part of the domestic measure which adopts the international standard should have the presumption of "conforming" to the international standard and be presumed to be consistent with the SPS Agreement and the part of the domestic measure which does not adopt the international standard should be justified under other provisions of the SPS Agreement.

E (IV): THE UNITED STATES CLAIM UNDER ARTICLE 2.2, 5.1 AND 5.2

32. The United States in its claim under Article 2.2 has adduced scientific evidence with respect to eggs and fresh meat of poultry. As per the statement of David Swayne adduced by United States, since LPNAI virus is only present in the respiratory and digestive tract of chicken and not in the meat, bone and inside eggs, fresh meat of poultry does not present any risk. However because HPNAI virus causes a systemic infection and the HPNAI virus is present in various parts of the chicken, therefore a restriction on fresh poultry meat and eggs products (and other products) originating from an HPNAI infected countries is justified. Thus as per the United States except for systemic distribution, in other respects such as efficacy of transmission and modes of transmission, LPNAI and HPNAI viruses are exactly alike

33. However the study adduced by India, i.e. Post et al. clearly rebut the above argument of United States. The study Post et al. clearly establishes that LPAI viruses (H5N2, H7N1, H7N7,

H9N2. H7N7) can cause systemic infection and can spread to internal organs of the bird. Thus the fact that LPNAI virus can spread systemically within various internal organs clearly puts the risk emanating from the LPNAI virus on the same pedestal as the HPNAI virus. Since Post et al., establishes the systemic spread of LPNAI in the bird, keeping Swayne's statement in mind, a restriction on fresh poultry meat, eggs and other products originating from an LPNAI infected country is equally justified.

34. Having established that United States has not been able to present a prima facie claim under Article 2.2, India submits that its measure is based on scientific principles and sufficient scientific evidence on account of the following: a) India's measure conforms to or at based on international standards, which fulfils the requirement of scientific principles and sufficient scientific evidence; b) The fact that a number of other countries maintain similar import restrictions upon occurrence of NAI proves that the risk is well founded; c) existing scientific literature supports measures maintained by India.

35. With respect to the first requirement, India relies on its submission and arguments made under Article 3 which establishes that India's measures conforms to the OIE Code and therefore is consistent with Article 3 of the SPS Agreement and therefore is also based on scientific principles and sufficient scientific evidence as required under Article 2.2 of the SPS Agreement. With respect to the second requirement, India submits that many other countries such as Singapore, Philippines, Japan, Colombia, China etc. are maintaining similar import prohibition on occurrence of HPAI or LPAI virus. Thus the measures being followed by these countries reflect the risk associated from an occurrence of HPNAI or LPNAI virus.

36. Thirdly in light of available scientific evidence which suggests that the LPNAI virus can spread systemically within the bird, the basis for justifying a ban on fresh poultry meat, eggs and other poultry products from HPNAI countries is equally applicable to these products when they originate from LPNAI countries. This alone suffices for purposes of a finding that a temporary import suspension on fresh meat of poultry, eggs and other poultry products originating from a LPNAI country are based on sufficient scientific evidence.

37. Furthermore even assuming that LPNAI virus is only restricted to the respiratory and intestinal tracts, even so, fresh meat of poultry as it is traded still carries a risk of harboring the LPNAI virus. This is because during processing of raw meat of chicken for export, all the internal organs of the chicken are not removed (especially kidney, liver, heart and even pieces of lungs) and are part of the carcass imported as raw meat. Thus there is a very high possibility of contamination of the rest of the meat due to the presence of LPNAI virus in respiratory and intestinal tracts.

38. With respect to Article 5.1 and Article 5.2, the United States has argued that India's measure is not based on Article 5.1 as India has not conducted its own risk assessment. However if the Member conforms to or bases its measure on the international standard, there is no need to conduct a separate risk assessment. In this respect, it is India's position that since its measure conforms to or is based on the OIE Code there is no obligation on India to conduct a risk assessment.

39. Even otherwise the scientific evidence submitted by India to justify an import suspension on fresh meat of poultry and eggs from LPNAI countries clearly establishes the risk in trade from these commodities and fulfils the requirement of not maintaining its measure without sufficient scientific evidence under Article 2.2 and India is under no obligation to conduct a separate risk assessment in this instance.

E (V) & E (VI): THE UNITED STATES CLAIM UNDER ARTICLE 2.3 AND 5.5

40. The object of challenge under Article 2.3 claim of the United States FWS is NAP 2012. However SPS Agreement is only applicable to measures which may directly or indirectly affect international trade as required by Article 1 of the SPS Agreement. Though NAP 2012 can be considered to be an SPS measure as defined under Annex-A, it is not a measure to which the SPS Agreement applies because NAP 2012 or for that matter NAP 2006 does not directly or indirectly affect international trade.

41. Further as per United States, discrimination under first situation of Article 2.3 results due to the fact that India places a countrywide ban on imports from an exporting country that notifies either HPNAI or LPNAI. On the other hand, when faced with an HPNAI outbreak in its own territory, India applies control measures limited to 10 km surrounding the epicenter of the outbreak.

42. Firstly India considers that the OIE Code permits importing countries to demand country freedom from exporting countries and India believes that a suspension of imports for a minimal period of close to three months is necessary to ensure that infected poultry products do not enter India from a country which is experiencing an active outbreak.

43. Secondly, the situation of a country (such as India) when it experiences an outbreak of avian influenza within its territory and hence has to take control measures to prevent spread of the disease, is highly distinct from its situation as an importing country which has to ensure that infected products from countries experiencing active NAI outbreaks do not enter its territory. The risks that the two situations present are entirely different.

44. A country reporting an occurrence of NAI takes all possible measures to prevent to control and to contain the spread of virus as the epicenter of the virus is known. With imports on the other hand, in the absence of control measures, agents of disease transmission could enter a country and could be dispersed over a large area through internal commerce and trade. This amplifies manifold the risk of initiating several NAI outbreaks in different parts of an importing country through imports of potentially infected agents of NAI. Hence, the measures that a country takes in these two situations would quite naturally and logically be different.

45. As per the United States, discrimination under second situation of Article 2.3 results due to the fact that though it bans poultry products from LPNAI reporting countries it takes no control measures to detect and hence to prevent outbreaks of LPNAI. However this is incorrect. As stated above, India carries out various types of control and surveillance measures for NAI and the same has also resulted in the discovery of other strains of LPAI (strains other than H5 or H7). The OIE provides that countries may take trade related measures to prevent ingress of a disease which is exotic to it. Since India has never had an outbreak of LPNAI and the same is exotic to India, it never needed to take any domestic control measure. Thus mere application of differential control measures cannot *ipso facto* amount to discrimination especially when the risks presented by the two situations are entirely different.

46. The United States also alleges that India's measure constitute disguised restriction on trade, though the claim is quite ambiguous. Firstly as India had already clarified, its measures are neither unjustifiable nor discriminatory. Secondly an import prohibition by itself would not amount to disguised restriction in trade especially when India's measure is based on international standards which recommend the same.

47. With respect to the claim of the United States under Article 5.5, India submits that the United States claim does not establish a prima facie case as it has not established the basis of its allegation under each of the three element of Article 5.5 as required. The FWS by the United States simply makes a reference to what it believes are "different situations", which is only the first element of the three part test under Article 5.5. There is no explanation whatsoever on the other two elements. Even on the first element the submission simply notes that different situations exist but does not explain why those situations are comparable in the first place.

48. Thus the United States FWS is highly inadequate for its lack of any substantive arguments establishing in detail and with clarity the alleged violation of Article 5.5 through the three cumulative elements therein. However without prejudice to India's right to provide a rebuttal to further facts or legal submissions adduced by the United States with respect to its Article 5.5 claim, it is India's submission that for the same reasons as explained before in Article 2.3 with respect to the different situations, a violation of Article 5.5 is not made out by the United States.

E (VII): THE UNITED STATES CLAIM UNDER ARTICLE 5.6 AND 2.2

49. The claim of the United States under Article 5.6 appears to be limited to the prohibition on imports of fresh meat of poultry and eggs from countries notifying LPNAI as the United States has not adduced evidence with respect to other products or HPNAI. Further the United States claim under Article 5.6 incorrectly identifies India's ALOP through its domestic measures, i.e. the NAP. As

per Annex A (1) of the SPS Agreement, an ALOP is the level of protection which is sought to be achieved by the SPS measure at issue, which in this case is S.O.1663 (E). The identification of the wrong ALOP leads to a fatal error in the analysis and strikes at the very root of the United States allegation under Article 5.6.

50. Secondly the United States also does not clearly identify an alternative measure which would fulfill India's ALOP. The submission simply refers to the OIE Code as an alternative measure and perfunctorily states that the OIE Code is reasonably available without explaining which specific controls it is referring to. Thus it is clear from the United States submission that by suggesting India should permit unrestricted trade in eggs and meat from LPNAI countries or permit trade in these products from zones or compartments established in the exporting country, the United States is asking the Panel to compare the trade restrictiveness of S.O. 1663(E) with the ALOP it believes should apply, rather than the level of protection which is reflected in S.O. 1663(E).

51. Since LPNAI is exotic to India, S.O. 1663(E) ensures that poultry commodities from LPNAI reporting countries which present a risk of transmitting the infection are not traded during an active outbreak. Thus an alternative measure suggested by the United States would need to be such as would ensure the same level of protection as the import prohibition currently does which is not the case.

52. The United States makes an unsubstantiated claim that a breach of Article 5.6 results in a consequential breach of Article 2.2. However this is based on an incorrect reading of an AB judgment wherein the AB simply stated that there existed similarities between the requirements of the two articles. However it explicitly stated that such similarity cannot lead to the assumption that a violation of Article 5.6 will in all cases lead to a violation of Article 2.2. The United States incorrectly reads the Appellate Body's ruling as a positive statement that in all cases a violation of Article 5.6 will necessarily lead to a violation of Article 2.2.

E (VIII): THE UNITED STATES CLAIM UNDER ARTICLE 6

53. Article 6.1 states that guidelines developed by international organizations for recognition of pest/disease free areas or areas of low pest/disease prevalence shall be taken into account by Members for the purposes of recognition of such areas. However Article 6.3 places this burden upon the exporting country to initiate the proposal to recognize zoning or compartmentalization and to provide documentary evidence that the proposed pest/disease free areas or areas of low pest/disease prevalence exhibit adequate bio-security measures as may be necessary to achieve the importing country's ALOP and the same is also affirmed by the OIE Code. The United States view that Article 6 places a unilateral and *suo moto* obligation on the importing country to recognize and accept, pest/disease free areas without any evidence represents a flawed understanding of Article 6.

54. However the United States has neither made a formal request to India for information and for recognition of a specific pest/disease free area nor responded to India's suggestion with a counter proposal to take this process forward even though India has communicated its willingness to consider compartments.

55. Lastly the United States by making a claim that India is under an obligation to recognize pest/disease free areas or areas of low pest/disease prevalence, acknowledges that international trade in these products presents a valid risk of transmission of the disease, which justifies a country wide ban, but that under provisions of Article 6, those risks can be minimized by establishing zones or compartments which fulfill the bio-security concerns of the importing country.

E (IX): THE UNITED STATES CLAIM UNDER ARTICLE 7 AND ANNEX B OF THE SPS AGREEMENT

56. The United States claims that India violates its notification obligations under Annex B of the SPS Agreement. The argument of the United States is incorrect as the chapeau of paragraph 5 clearly states that the obligations under that paragraph only arise when there are no international standards or the content of the measure is not the same as the content of the standard. Since international guidelines exist and India's measure conforms to or is based upon such standards, the obligation under Annex B is not applicable to India.

ANNEX B-6

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF INDIA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

OPENING STATEMENT

1. India believes that the crux of this dispute is essentially two-fold: (i) whether India's measures on fresh meat of poultry and eggs conform with the OIE Code (ii) whether India has a unilateral obligation to recognize areas of no or low disease prevalence in the territory of the United States.

2. The United States mischaracterizes S.O. 1663 (E) by stating India imposes a permanent ban and that the ban is imposed even when a country reports LPAI in wild birds. Numerous SIPs submitted by India prove that the ban is not permanent and lasts until a country notifies freedom and that it is not imposed pursuant to notifications of LPAI in wild birds.

3. The United States claims that there is "no need" to prohibit eggs and fresh meat of poultry from countries reporting LPNAI. Hence it recognizes that OIE standards allow a country to demand NAI country freedom from exporting countries but insists that India should ignore these standards and should import eggs and fresh meat of poultry even when a country declares LPNAI.

The OIE Code and how it is to be read

4. The OIE Code definition for NAI includes both HPNAI and LPNAI. When a country declares an HPNAI outbreak it cannot be considered to be free from HPNAI or free from NAI. However when a country declares an outbreak of LPNAI, it may be free from HPNAI but because of the LPNAI outbreak it cannot be said to be free from NAI. Hence recommendations in the OIE Code which mention "NAI free country, zone or compartment" encompass a situation where a country is free from both LPNAI and HPNAI.

5. Since the OIE Code recognizes the prerogative of every Member to set its own level of protection, the issue then becomes what level of protection is implicit in the standards recommended by the OIE for trade in products from countries reporting notifiable avian influenza and does S.O. 1663(E) embody this level of protection.

6. As India has explained in its FWS, the recommendations for poultry products are structured in a manner wherein each recommendation contains a 'condition of entry' followed by international veterinary certification requirements which the consignment needs to meet and which is further attested to by the official veterinarian of the exporting country. To illustrate, Articles 10.4.13 and 10.4.14 contain recommendations for imports of eggs for human consumption. Article 10.4.13 states "*Recommendations for importation from an NAI free country, zone or compartment*". Article 10.4.14 states "*Recommendations for importation from an HPNAI free country, zone or compartment*". This is the condition of entry.

7. Once this is satisfied, the recommendation in both cases details the requirements that a veterinary authority must attest to in the international veterinary certificate. These are the health certificate requirements. Thus the health certificate requirements are relevant only once the condition of entry is fulfilled by the consignment. The health certificate requirements cannot override the condition of entry stated for the product. The United States presents an incorrect and flawed understanding of the Code when it requires that India, instead of seeking country freedom, should simply make do with attested health certificates.

Recognition of ALOP in the OIE Code

8. An importing country can condition entry of poultry products from a range of options such as NAI or HPNAI country, zone or compartment freedom. By giving these options, the OIE Code recognizes the right of an importing country to determine the level of freedom it deems appropriate before permitting imports. Article 10.4.1.10 states that an immediate ban should not

be imposed on poultry commodities due to notifications of HPAI or LPAI in wild birds. That is to say a country may prohibit a poultry product in response to a notification of NAI in poultry. Article 10.4.1.10 simply reasserts the condition of entry under the product specific measure which is taken in light of a country's ALOP.

9. Under the interpretation presented by the United States and EU, notifications of LPNAI would be irrelevant. So long as the notifying country is free from HPNAI, no importing country would be able to restrict imports of poultry products from such country on grounds of a notification of LPNAI. In effect it amounts to suggesting that the specific mention of LPNAI as being a notifiable disease is purely an academic exercise having no significance for the regulation of trade from such countries and all standards providing for NAI freedom are redundant and should be read out of the OIE Code.

India's measure is in conformity with the OIE Code

10. The import prohibition under S.O. 1663(E) with respect to eggs for human consumption, hatching eggs, egg products and fresh meat of poultry is in conformity with the 'condition of entry' requirement reflected in the relevant product specific recommendation and in Article 10.4.1.10 of the OIE Code. The relevant product specific standards allow for imports from a NAI free country. A natural corollary of implementing this level of protection is an import prohibition from a country which is not NAI free. Thus the level of protection is NAI freedom and the element implementing the NAI country freedom standard is the resulting prohibition. Thus the specific clauses for eggs, hatching eggs and fresh meat of poultry of S.O. 1663 (E) not only embody the level of protection, i.e. NAI country freedom which is explicitly provided in each of the relevant product specific recommendations but also embody the resulting element implementing the standard, namely the import prohibition from a country which is not free from NAI.

11. Hence Clauses 1(ii) (c), (d), (e), of S.O. 1663(E) pertaining to fresh meat of poultry, hatching eggs, eggs and egg products are in conformity with Article 10.4.19, Article 10.4.10, Article 10.4.13 and Article 10.4.15 respectively and also in conformity with Article 10.4.1.10 of the OIE Code and should be presumed to be consistent with the SPS Agreement and GATT 1994. For the same reason these clauses are also based on the OIE Code in accordance with Article 3.1 of the SPS Agreement.

India will now address the regionalization claim raised by the United States

12. The United States makes its claim purely on the basis of Article 6.1 and 6.2 of the SPS Agreement while ignoring the critical obligation imposed on exporting countries in this respect under Article 6.3 of the SPS Agreement and under the OIE Code. While Article 6.1 provides broad principles that need to be taken into consideration by a Member while formulating its SPS measure, Article 6.2 provides guidelines on the basis of which disease or pest free areas may be recognized. However the onus to prove that the area is infact disease or pest free and hence fulfils the importing country's ALOP is upon the exporting country under Article 6.3.

13. That the onus is firmly placed on the exporting country is also echoed by the recommendations provided by the OIE Code on zoning and compartmentalization. The OIE Code states, *[B]efore trade in animals or their products may occur, an importing country needs to be satisfied that its animal health status will be appropriately protected. In most cases, the import regulations developed will rely in part on judgments made about the effectiveness of sanitary procedures undertaken by the exporting country, both at its borders and within its territory"*. Further, *The Veterinary Services of an exporting country should be able to explain to the Veterinary Services of an importing country the basis for claiming a distinct animal health status for the given zone or compartment under consideration.*

14. Unless the United States establishes a disease free zone or compartment, makes public the existence of such zone or compartment, establishes through documentation that the control and surveillance measures fulfil India's ALOP, India is under no obligation to unilaterally recognize alleged zones within the United States as being pest or disease free. The United States has not initiated a bilateral mechanism, namely the presentation of a proposal to India for recognition of disease free zones or compartments. India fails to see merit in the United States claim of violation of Article 6. Articles 6.1 and 6.2 do not operate independently of Article 6.3 and do not impose any obligation upon the importing country in the absence of the triggering steps under Article 6.3.

India does not arbitrarily or unjustifiably discriminate between its own territory and that of other Members

15. The United States compares India's domestic control measures versus the NAI country freedom from imported products to suggest that India arbitrarily or unjustifiably discriminates between its own territory and that of an exporting Member. This scenario presented by the United States does not present identical or similar conditions such that it can be validly compared under Article 2.3. A country wide ban against Members reporting an active outbreak of NAI is not an identical or similar situation to a control measure applied within the municipal limits of a country during an outbreak of NAI.

16. In domestic outbreaks, the epicenter of the disease is known and identified and the risk is one of further spread beyond the originally infected area. With imports on the other hand, in the absence of control measures, agents of disease transmission could enter a country and could be dispersed over a large area through internal commerce and trade. Further as an importing country, it cannot exercise control over containment and disinfection methods applied by exporting countries and therefore has to necessarily apply border measures to ensure that agents of disease transmission do not enter its territory.

17. The United States also claims that India bans poultry products from LPNAI reporting countries but takes no control measures to detect and hence prevent outbreaks of LPNAI. This conjecturing is solely to divert the Panel's attention from what is fundamentally a distinction between the situation prevailing in the United States which has experienced several outbreaks of LPNAI and India which has only experienced outbreaks of HPNAI. The fact is LPNAI is exotic to India and India has to date neither detected, despite routine surveillance, nor experienced outbreaks of LPNAI.

18. Under Article 2.3 a mere formalistic distinction between measures does not suffice. It is only distinction that is either arbitrary or unjustifiable which leads to a violation of the Article. Any enquiry must accordingly focus on whether there is a legitimate cause or rationale for the alleged distinction. Panels have advised that measures applied must be examined in the *"specific context of the relevant risks"* posed by the two situations to determine if there is any justification for the distinction in sanitary measures. The United States projects a "one size fits all" approach which is clearly disproportionate to the risks presented in both scenarios.

19. United States' arguments on India's measure constituting a disguised restriction on international trade suffer from a severe lack of clarity. Panels have explained that "the key to understanding what is covered by "disguised restriction on international trade" is not so much the word "restriction", but the word "disguised". The United States has not adduced facts which establish that by prohibiting imports from LPNAI notifying countries, the measure was giving effect to an alleged protectionist aim of benefiting the domestic industry.

Claims under Article 5.5 should be rejected on grounds of serious ambiguity

20. The United States claims under Article 5.5 are vague and prejudice India's right of defense. All 6 factors need to be established by a complaining party through positive proof before a prima facie case under Article 5.5 can be made. Mere assertion of a claim does not amount to proof of having actually established a violation therein. The United States claim is identical to the summary provided in the panel request. There is no further analysis.

21. The United States also cannot rely on its arguments under Article 2.3 to establish a *prima facie* case under Article 5.5 without providing anything more. Panels have held, a violation of Article 5.5 may result in violation of first or second sentence of Article 2.3, but the reverse is not true.

The United States has not made out a case under Article 5.6

22. The United States claim under Article 5.6 is severely deficient on many levels. The United States suggests that India's ALOP can be fulfilled by standards provided for in the OIE Code. This is surprising because India does follow the OIE standards when it requires NAI country freedom from exporting countries before trade in eggs and fresh meat of poultry can take place.

23. Another fatal flaw in the United States claim concerns the discussion on the ALOP. Under Article 5.6 the complainant must establish that an alternative measure suggested by it fulfils the level of protection which is achieved by the measure at issue, which in this case is S.O. 1663(E), and not an ALOP it believes the importing country should apply. Instead the United States identifies the NAP 2012 and incorrectly discerns from it the ALOP it believes India seeks from imports. NAP 2012 has no application to imports and the ALOP India seeks from imports cannot be identified from an unrelated legislation. Due to the incorrect identification of the ALOP, the ensuring analysis is also seriously faulty and should be rejected.

24. The two alternative measures suggested by the United States are also unviable. The first option, 'unrestricted trade' requires India to ignore the 'condition of entry' provided in the OIE Code and suggests that India import poultry products from a country during an active outbreak purely on the strength of its veterinary certificates. The second option pertaining to zoning and compartmentalization would also not be a 'reasonably available alternative measure' until zones or compartments are first established by the United States and further shown to ensure the same level of protection as the import prohibition currently does.

CLOSING STATEMENT

25. The OIE Code has to be read as a whole and not in a piecemeal fashion. The United States adopts a reading which results in reading out entire provisions in the OIE Code pertaining to NAI country freedom. It is undisputed that every WTO Member has a right to determine its own appropriate level of protection. India has determined that its ALOP is fulfilled by NAI country freedom as reflected in the recommendations of the OIE Code. Hence a reading which restricts the right of India to seek NAI freedom in favour of only HPNAI freedom is untenable and undermines India's sovereign right to determine its ALOP.

26. The United States insists that SPS measures should always be supported by a risk assessment. As is clear, any measure that reflects the level of protection prescribed by an international standard *ipso facto* reflects the assessment of risk and scientific evidence of the standard setting body. To insist on a risk assessment even when a Member adopts international standards defeats the purpose and objective of harmonization contained in the SPS Agreement.

27. At the substantive meeting the United States did not dispute that there is no unilateral obligation on the importing country to recognize zones or compartments. The only question then is whether the United States as an exporting country fulfilled its burden by providing information on the basis of which India could have made an assessment that such zones meet India's requirements. To date United States has not provided this information and India is under no obligation to unilaterally recognize areas within the United States which it claims are pest or disease free.

Conclusion

28. Panel must note that the United States has raised objections to India's measure as it applies to eggs and fresh meat of poultry when a country reports LPNAI. It has not addressed other products or another disease, namely HPNAI. The Panel's enquiry must be limited to products and the disease specifically addressed. Further, claims under Article 5.5 and 5.6 are severely deficient and the Panel must hold that the United States has not fulfilled its burden of proof and established a prima facie case.

ANNEX B-7

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF INDIA

1. India's rebuttal submission will address the following themes in response to the issues raised by the United States (**US**) in its First Written Submission (**US FWS**), opening statement made at the meeting of the Panel with the Parties (**US Opening Statement**) and in its replies to questions posed by the Panel (**US Replies**):

I. SELECTIVE AND PIECEMEAL READING OF THE OIE CODE BY THE UNITED STATES

2. India pointed that the US does not object to the right of a country to require NAI country freedom from the exporting country before permitting trade in fresh meat of poultry and eggs. It nevertheless insists that India must accept eggs and fresh meat of poultry from the US when it is reporting an outbreak of LPNAI. The US points out that the OIE expressly provides that detections of HPAI and LPAI in birds other than poultry should not give rise to trade bans in the context of Article 10.4.1.10 of the OIE Code. The US did not cite this Article for the proposition that detections of LPNAI in poultry should not give rise to trade bans. It could not, because the OIE Code nowhere proscribes what is the natural outcome of NAI freedom, i.e. a prohibition on imports of poultry products from a country that declares LPNAI or HPNAI. Likewise the EU made it clear that it believes a ban imposed on countries on account of a notification of LPAI in wild birds is not in conformity with Article 10.4.1.10 and like the US, the EU does not take the position that bans following notifications of LPNAI in poultry are not in conformity with the OIE Code.

a. Does the OIE Code envisage a ban?

3. A review of US submissions and evidence reveals that it believes a ban is justified against countries which report HPNAI in poultry. As a matter of policy the US prohibits imports from countries declaring HPNAI (such as India) and the restriction is imposed on a permanent basis. The distinction that the US makes with respect to HPNAI and LPNAI is surprising because the OIE Code nowhere recommends imposing a ban on account of HPNAI either. Yet the US is of the opinion that the very same Code permits a ban on account of HPNAI but does not permit a ban on account of LPNAI.

4. An import prohibition is the natural implication of the 'condition of entry' not being met by an exporting country. When imports originate from countries having outbreaks of HPNAI or LPNAI such countries are not HPNAI or NAI free. Since the standards recommend that imports should take place from HPNAI or NAI free countries, by its very implication, the standard acknowledges that if a country is not free, the import need not take place. The natural outcome of importing countries enforcing NAI or HPNAI freedom from their trading partners is through an import ban.

b. Purpose behind notification of LPNAI

5. A related point raised by the US is that OIE requirements, as far as LPNAI are concerned, are limited to the notification obligation. This is not the case. Article 10.4.1.10 makes it abundantly clear that while countries may restrict imports from trading partners notifying LPNAI in poultry, they should not do so when a country notifies LPAI in wild birds. Likewise the OIE's User Guide states that the recommendations are designed to prevent 'diseases in question' from being introduced into an importing country. As far as the OIE Code is concerned, the 'diseases in question' are both HPNAI as well as LPNAI.

c. Origin of a product is a risk mitigation condition

6. India has submitted that recommendations which provide for 'importation from a NAI free country' cover a situation where a country is free from both LPNAI and HPNAI. Thus if a country is free from HPNAI but not from LPNAI, this condition would not be met. The US insists that eggs and fresh meat of poultry should nonetheless be imported from LPNAI positive countries as other control measures may be applied to mitigate the risk of LPNAI.

7. Firstly, this reading goes against the US' own position that bans are permissible when products originate from HPNAI countries and secondly it ignores the explicit wording of various recommendations for eggs and fresh meat of poultry which provide *'Recommendations for importation from a NAI free country/zone/compartment'*. The Panel must note that the recommendations in question do not recommend importing from a country which is not free. The OIE recommendations contain two risk mitigation conditions. The first recommendation to mitigation risk suggests that the product must originate in a free country. The second form of risk mitigation requires that the export consignment is additionally accompanied by a veterinary certificate certifying that the export consignment has been rendered risk free through the application of additional control measures. Both conditions ensure that trade in animal takes place with "an optimal level of animal health security." India's regime for the import of poultry products ensures that both risk mitigation conditions are applied as recommended by the OIE Code. India enforces the condition of entry with S.O. 1663(E) and the veterinary certificate through S.O. 655(E). This is not akin to the pick and choose approach advocated by the US.

d. Other recommendations in the OIE Code indicate that countries can ban imports on account of LPNAI

8. Article 10.4.5 which pertains to imports of 'live poultry (other than day old live poultry)' provide recommendation from NAI free country only. A log*ical reading of this recommendation suggests that if a country declares LP*NAI it would not be free from NAI and an importing country need not import from such country. It would be immaterial that such country is free from HPNAI and control measures such as showing no clinical signs of NAI and transportation in sanitized containers, are available to mitigate risk against LPNAI. Even the US agrees that Article 10.4.5 recommends that adult poultry should not be imported from a country not free from LPNAI. Thus the issue is not whether products can be safely traded from countries which have notified LPNAI but whether the OIE Code permits countries to import only from NAI free countries.

e. United States conflicting position on 'level of protection' and 'appropriate level of protection'

9. The US first claimed that standards by themselves did not reflect any level of protection but reflect simply the disease status of the exporting country. The US later admits that international standards do indeed reflect and are premised to achieve a certain level of protection. But only the WTO SPS Agreement recognizes this sovereign right of Member countries and not the OIE Code. This is incorrect as OIE's guidance note provides that concepts provided for in the SPS Agreement are recognised in the OIE Code including a member's right to adopt an appropriate level of protection.

10. The OIE Code recognizes that the animal health status of the exporting country must be taken into account. The OIE also recognizes that the standards are *designed to prevent the disease in question being introduced into the importing country*. HPNAI and LPNAI are both notifiable diseases, the assumption is that Chapter 10.4 recommendations are designed to prevent HPNAI and LPNAI being introduced into the importing country. The Code states that, "recommendations in the Codes focus on the animal health situation in the exporting country, and assume that the disease is not present in the importing country or, if present, that the disease is the subject of official control programmes. Importing countries should not impose sanitary measures for diseases or pathogens that occur in the importing country unless they are the subject of official controls and, in this case, the measures applied to imports should be no stricter than the official controls applied to similar animals/animal products in the country." The guidance makes it clear that while the animal health situation in the exporting country is a relevant factor, just as relevant is the disease and control situation in the importing country. The aim of India's AI regime is to eradicate AI from its territory. India is thus entitled to take sanitary measures that prevent both HPNAI as well as LPNAI from being introduced into India. India's ALOP would not be fulfilled by prohibiting imports from HPNAI countries alone. Thus India takes measures to prevent the ingress of both diseases of concern as recommended by the OIE Code.

f. Practice of other WTO/OIE Members

11. India has also provided extensive evidence in the form of laws maintained by other countries which impose a ban on exporting countries which notify LPNAI. The WTO notifications cite the OIE

Code as the relevant international guideline, standards or recommendation on which the ban is based and supported by.

II. CONFORMITY OF INDIA'S MEASURES WITH THE OIE CODE

a. The relevant standard

12. India has provided substantive arguments for its claim that clauses 1 (ii) (c), (d) and (e) of S.O 1663 (E) conform to the product specific recommendations in the OIE Code (i.e. Articles 10.4.19, 10.4.10, 10.4.13 and 10.4.15) and with Article 10.4.1.10. Articles 3.2 and 3.1 do not use the word relevant. However, Article 3.3 elucidates when a sanitary measure may be said to not be 'based' on an international standard. It clarifies that a measure which results in higher level of protection than measures *based on* the *relevant* international standard shall have to comply with Article 3.3. By implication the standards which are referred to in Article 3.1 and Article 3.2 are the very same standards under Article 3.3, i.e. 'relevant' international standards.

13. S.O. 1663 (E) pertains to the first risk mitigation condition in the product specific recommendations, and hence product specific measures applicable to eggs and fresh meat of poultry contained in S.O. 1663 (E) should be evaluated for their conformity with the relevant standard, i.e. the *"condition of entry"* which is contained in each standard. India asserts that the relevant standard is not only one which pertains to the specific products at issue but also one which pertains to the specific subject matter of the law under challenge. The law under challenge in this dispute is S.O 1663 (E) as it applies to eggs and fresh meat of poultry. The same law prohibits entry of these products from countries reporting NAI. The US has specifically challenged the "prohibition" under this notification. The subject matter of S.O. 1663 (E) does not extend to matters beyond the circumstances under which poultry products from avian influenza positive countries may be allowed entry.

b. Measures based on an international standard

14. The EU specifies that a measure *contrary* to OIE standards would not be considered to be "based on" these standards. According to the EU, a ban on poultry products on account of LPNAI in poultry would not be "*contrary to*" Article 10.4.1.10 as opposed to a ban on account of notifications of LPAI in wild birds. That which is not *contrary* to the Code is in fact supported by the OIE Code. As the OIE Code 'allows' a ban on account of LPNAI in poultry, it cannot by necessary implication be "contrary to" the OIE Code and is thus based on the Code. Thus, implementing recommendations which call for importing from an "NAI free country/zone/compartment" results in importing products from countries which are "free" from NAI. By its natural implication, a country which is 'not free' from NAI would not satisfy this condition. In practical terms this is achieved through an import prohibition, which ensures that products are not imported from countries that have declared HPNAI or LPNAI.

III. CONTINUING DEFICIENCIES IN THE UNITED STATES CLAIM UNDER ARTICLE 6

a. The United States does not maintain zones or compartments within its territory

15. It is clear that the US does not maintain either zones or compartments as required under Chapter 4.3 and 4.4 of the OIE Code and as required under Article 6.3 of the SPS Agreement. In order to describe its zoning measures, the US has instead alluded to measures it takes during an outbreak of HPNAI and LPNAI. The OIE Code recommends that the concept or zoning and compartmentalization pertain to measures taken "prior to outbreaks of diseases". It is evident that the US has not implemented any measures for purposes of "putting the recommendations of the Code in place".

b. United States shifting position on the obligation on an exporting country

16. The US agreed that any recognition by India of zones or compartments maintained by the US would be contingent upon the US making a request and providing supporting documentation. It also agrees that *"the question of whether a particular area presents characteristics of one type or another is a different issue – that question may only be able to be resolved based on information supplied by the exporting Member."* However, in the same vein the US insists regionalization requires the importing member to engage in an information gathering exercise on an exporting

member's diseases surveillance and control measures to ensure itself that imports do not pose a level of risk greater than the ALOP established.

c. The recognition of the "concept" of zones or compartments under Article 6.2 of the SPS Agreement

17. Article 6.2 does not concern itself with the existence or the subject matter of the importing country's legislation. It is immaterial under Article 6.2 whether there exists a law which recognizes the concepts of zones/compartments and the details provided in such law. The Article obligates an importing Member to recognize the concept and leaves the manner in which this may be accomplished to the Member in question. A combined reading of Article 6.3 and 6.2 makes it evident that once an exporting country provides relevant information, it is the obligation of the importing country to give due regard to this proposal and to evaluate it. The Article 6 Guidelines highlight that regardless of whether a law recognizing zones exits, an exporting Member can initiate the process and seek information on how its application may be processed. India has not received proposals for regionalization or received any enquiries on its laws and procedure that India might adopt to recognize an exporting country's zones or compartments.

18. The US claim of a breach of Article 6.1 is baseless. Relevant differences in sanitary characteristics of different areas of the exporting country cannot be established unilaterally by the importing country. Article 6.1 does not require an importing Member to go on an information gathering exercise. Such information would be available once submitted by exporting countries to importing countries.

d. Evidence does not establish that US provided a proposal for recognition of zones

19. The United States in all its correspondence has not identified areas for which it sought disease free status from India. The United States has failed to provide any technical literature/documentation to substantiate its claims. To the contrary the letters cited contain a comment on India's measure but provide no information on the US poultry industry or level of bio security maintained against avian influenza. Merely suggesting that India modify its veterinary certificate requirements does not equate with providing information on US zones or compartments sufficient for India to determine if such zones or compartments meet India's ALOP.

IV. UNITED STATES CLAIMS ON DISCRIMINATION AND DISGUISED RESTRICTION ON TRADE NOT MADE OUT

a. Claim concerning arbitrary and unjustifiable discrimination

20. To support its claim, the United States submitted a study which recorded the presence of antibodies to H7 in ducks. The US relies on this only evidence to suggest that India has LPNAI outbreaks which it is not controlling. India has substantiated that nothing in the study indicates that the antibodies to H7 were low pathogenic. According to the OIE Code, virus isolation tests are required to be conducted before an LPNAI or HPNAI infection can be said to have conclusively occurred. LPNAI is exotic to India and India is entitled to take measures to prevent introduction of a disease.

21. It also alleges that imposing country wide bans against imports but limiting trade to the affected zones internally results in discrimination. India has explained that as an importing country India is compelled to apply dissimilar control measures to its import and to domestic outbreaks because it cannot "exercise control over containment and disinfection methods applied by exporting countries and cannot certify the health and safety of imported products. The US insists that India must gather information on an exporting country's surveillance and control mechanisms to satisfy itself that such measures are strong enough to contain outbreaks in those countries. Article 10.4.30 and Article 10.4.31 which the US cites requires "*the exporting country to provide evidence that it maintains an effective surveillance program. This information can confirm that the territory is indeed the status it purports to be."* This reinforces India's position that applying limited territorial bans on exporting countries during an outbreak is not a decision that an importing country can take unilaterally unless the efficacy of the exporting country's surveillance and control program is established by the exporting country.

b. Disguised restriction on international trade

22. The reasoning in *Australia-Salmon* reasoning on the "sudden change in position" is inapplicable to the facts of this case. For one, India has not shifted positions on whether a risk assessment is required of it. It was always India's understanding that having adopted an OIE recommendation, it was not required to further conduct a risk assessment. Further, in *EC-Asbestos*, the key to understanding what is covered by 'disguised restriction on international trade' is not so much the word 'restriction', but the word 'disguised' and none of the facts taken individually or collectively establish that India is disguising its true intent behind the measure.

V. UNITED STATES HAS NOT MADE OUT A PRIMA FACIE CASE UNDER ARTICLE 5.5

VI. CONTINUING DEFICIENCIES IN THE UNITED STATES CLAIM UNDER ARTICLE 5.6

23. The US had in its first written submission suggested that India follow the OIE Code as its reasonably available alternative measure. It has subsequently provided two alternative measures that it believes are reasonably available. Firstly, it proposes control measures or veterinary certificate requirements prescribed under Chapter 10.4 of the OIE Code. India submits that suggesting India apply veterinary certificate requirements does not meet India's ALOP. Rather the US has suggested an alternative ALOP which India ought to apply with respect to imports.

24. As a second alternative measure the US suggests that India need not accept imports carte blanche and can require exporting countries to provide evidence that they maintain effective surveillance programs required under Article 10.4.30 and 10.4.31.

25. The US' suggestion that India gather information on exporting countries' surveillance systems and determine if such systems are adequate, this alternative is not technically and economically feasible alternative given its current veterinary and scientific human resource and is rather significantly more trade restrictive than the measure currently applied.

VII. LIMITATION OF CLAIMS TO EGGS AND FRESH MEAT OF POULTRY

26. The US has provided arguments on apparent violations by India under the SPS Agreement vide Article 3.1, 3.3, 5.1, 5.2, 2.2 and 5.6 only with respect to eggs and meat and hence claims under these articles are limited to eggs and fresh meat of poultry.

VIII CONCLUSION

27. It is submitted that United States' in its challenge to India's avian influenza measure has limited the same to eggs and fresh meat of poultry. Further, India's measure conforms to the OIE Code and India is not required to undertake a risk assessment. Lastly, India maintains that the United States has not made out a violation by India under Article 6. India's law enables the Central Government to recognize zones or compartments but India cannot be expected to unilaterally recognize zones or compartments.

28. The claim of the United States under Article 5.5 should be rejected as the United States has not fulfilled its burden to establish a prima facie case of violation by India. United States has also failed to establish that India's measures arbitrarily or unjustifiably discriminate or are applied in a manner which would constitute a disguised restriction on international trade as required under Article 2.3. Finally the alternative measures proposed by the United States under the Article 5.6 claim neither fulfill India's ALOP and nor are they technically and economically feasible.

ANNEX B-8

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF INDIA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

OPENING STATEMENT

1. The United States first raised the issue of LPNAI being present in India as part of its claim under Article 2.3 of the SPS Agreement. The argument stated that India does not take domestic measures to control LPNAI which occurs in the country and hence its import measures against countries reporting LPNAI are discriminatory. Since India has not detected and hence not reported LPNAI to the OIE, the United States offered several hypotheses why LPNAI should be present in India. The first was that India's 85+ HPNAI outbreaks strongly suggest an underlying LPNAI infection in poultry. Both Prof. Brown and Prof. Honhold have unequivocally refuted such linkage between HPNAI and LPNAI. The second hypothesis was that India's large backyard poultry population significantly increases the chances of LPNAI introductions from wild birds into poultry. Dr. Brown has vehemently refuted this linkage between backyard poultry and LPNAI introductions while Dr. Honhold has noted that exhibits upon which US has relied on for this proposition are simply personal opinion of individual scientists, unsupported by any scientific basis. The third was the suggestion that H7 LPNAI viruses should have travelled from Pakistan to India where there was a H7 HPNAI infection in poultry. Again as Dr. Honhold explained, this is mere conjecture as presence in Pakistan does not imply presence in India. The fourth was a study by Pawar et al which the United States put forth as proof of presence of H7 LPNAI infection in poultry in India. Contrary to US suggestion on the results of the study, expert opinion instead establishes that the study on its own does not support a conclusion that antibodies found were H7 specific or that the results prove a LPNAI infection. Dr. Brown's written opinion had pointed out the possibility of cross reactions due to the testing method employed by Pawar et al, which he reiterated at the meeting and stated that the study did not beyond reasonable doubt show the presence of H7 antibodies. Dr. Guan also clarified that though India had not practiced vaccination, the role of illegal vaccination could not be ruled out. Importantly both Dr. Brown and Dr. Guan stressed that virus isolation and not serological testing as was done in Pawar et al, was the most solid evidence of presence of virus.

INTERPRETATIONS OF THE OIE CODE

2. The core issues in this dispute are now well known. India restricts entry of poultry products from countries which report either HPNAI or LPNAI in poultry until such time as the reporting country notifies freedom from the infection to the OIE. India is not alone in restricting imports from countries notifying LPNAI as several countries regularly apply similar measures. United States takes exception to India's measure on the ground that India's restriction on eggs and fresh meat of poultry from LPNAI notifying countries are unsupported by the OIE Code recommendations. To the United States it is a significant fact that Chapter 10.4 does not recommend that a "ban" may be imposed. It should be noted that the United States equates "to recommend" with "explicitly stated" an argument that the European Union has also proposed.

3. This argument is misleading for two reasons. One, Chapter 10.4 does not "recommend" imposing bans on poultry products from countries notifying HPNAI either. Yet, the United States (and EU) read the recommendations to mean exactly that and go ahead and ban imports from countries notifying HPNAI. With HPNAI, they read OIE recommendations which state 'Recommendations for importation from a HPNAI free country/zone/compartment' as suggesting that if the country from which the product is sought to be imported is not free from HPNAI, such product need not be imported. Yet a similar interpretation is denied to recommendations which state 'Recommendations for importation from a NAI free country/zone/compartment.'

4. Second, the United States has entered into several arrangements with its trading partners all of whom are OIE Members, which restrict poultry exports from the US when it declares LPNAI. The interpretation it is seeking of the OIE Code is difficult to reconcile with its own trading regime unless of course one recognizes that the US would not acquiesce to restricting its own imports in

the absence of sound science and without the framework of international standards which support such restrictions.

5. The selective reading of the OIE Code leads to this absurd result; a ban on poultry products from HPNAI reporting countries conforms to the OIE Code (even in the absence of an explicit recommendation for a ban) since there are recommendations which state 'Recommendations for importation from a HPNAI free country/zone/compartment' but, a ban on poultry products from LPNAI reporting countries is unsupported by the OIE Code since the recommendations state 'Recommendations for importation from a NAI free country/zone/compartment' and an explicit language recommending a ban is absent

LEGITIMACY OF TRADE RESTRICTIONS

6. Before I go into when trade restrictions may be legitimate under the OIE Code, it will be helpful to understand if the OIE agrees that if a country is not free of a disease, its products may not be imported by other countries? The answer is yes. In its introduction OIE states that "where fresh meat is not recommended to be traded from countries, zones or compartments, it may be possible to establish measures for trade in meat products". Likewise in its discussion of Article 10.4.19 it states "If the requirements of Article 10.4.19 cannot be satisfied, because the exporting country is not free from HPNAI, it is still possible to export processed poultry meat". Likewise when commenting on maintaining disease free status it states that not being disease free can lead to potential loss of commercial trading opportunities. This is a clear admission that disease notification and hence disease status has ramifications for market access.

7. More importantly, the issue is (i) do the OIE recommendations provide that products should originate in NAI free countries and if so, (ii) can countries take measures to restrict imports if a country is not free from NAI. The answer concerning the first question is evident in Chapter 10.4 itself. That Chapter provides recommendations for importation from NAI and HPNAI free countries hence it is clear that the OIE has recommended that trade should take place from a NAI or HPNAI free country. The natural conclusion being that trade need not take place if a product is not originating from a NAI or HPNAI free country. However whether a country is "justified" in restricting imports from countries that are not NAI or HPNAI free is an issue for which the necessary guidance is provided under Chapter 5.1 of the OIE Code.

8. Article 5.1.2 makes it clear that Members may take import measures to fulfill their ALOP. In taking such measures the animal health situation of the exporting as well as importing country are relevant factors. It advises Members not to take import measures against countries which have reported a disease which is not an OIE listed disease and finally it cautions Members not to take import measures against diseases which are present in the Member's own territory and for which no control measures are applied.

OTHER INCONSISTENCIES IN OIE'S RESPONSE

9. The OIE was asked to specifically clarify the purpose of reporting LPNAI in poultry. The response provided by the OIE is as good as not providing a response. The OIE does not explicitly state that notification of LPNAI is limited for the purpose of surveillance. It could not have stated that, since only notifications of HPNAI in wild birds are for the limited purpose of surveillance and no language in the OIE Code suggests that notifications of LPNAI likewise have a limited purpose. The question remains unanswered.

10. Likewise when asked to clarify what the TAHSC meant when it referred to reporting of HPNAI and LPNAI in the same vein as being for 'trade purposes', the OIE instead clarifies that reporting of HPNAI in wild birds was for surveillance. There is no relevance of the answer to the question posed and instead undoubtedly establishes that the OIE has gone out of its way to be evasive in its responses.

11. Similarly, when the Panel asked what measures an importing country must take when an exporting country is reporting LPNAI and wants to export live poultry other than day old poultry, (Article 10.4.5) the OIE instead says that countries wishing to import from HPNAI free countries should do a risk assessment. This is another example of OIE's brazen attempt to divert attention from the main issue, which is that if an exporting country notifies LPNAI, it may not be permitted to export live poultry (other than day old poultry) to its trading partners. If Article 10.4.5 is read

to mean that an importing country may not import live poultry (other than day old poultry) from countries reporting LPNAI, there is no reason the same meaning cannot be attributed to other recommendations which provide for "Recommendations for importation from a NAI free country/zone/compartment".

12. In question 17, the Panel sought a very clear answer from the OIE whether products specific recommendations may be applied as alternatives depending on an importing country's ALOP or were they to be applied strictly based on the disease status of the exporting country. This question goes to the root of the issue because India claims that it can apply LPNAI based restrictions since they fulfill India's ALOP and further that the OIE Code recommendations are worded such that flexibility is provided to countries to import poultry products based on the level of protection deemed appropriate by each importing country. The United States on the other hand has claimed that the only relevant consideration is an exporting country's status so that even if a country is not free from LPNAI but is free from HPNAI, it should be allowed to export poultry products.

13. Surprisingly the OIE agrees with the US reference to avian chlamydiosis to suggest that any restrictions recommended are explicitly provided in the Code. The United States has used this reference to avian chlamydiosis presumably to suggest that the OIE Code has not 'recommended' or 'explicitly' provided for a ban on account of LPNAI and hence these are unsupported by the OIE Code. But equally by this logic the OIE Code has not 'explicitly' provided for bans on account of HPNAI either. Yet the United States believes such bans are supported by or based on the OIE Code. Importantly, the reference to the chapter on avian chlamydiosis supports India's position that if a country is free from a disease it may restrict entry of products from countries not free of that disease. The relevant recommendation states as follows:

> "Article 10.1.2: Trade in commodities
>
> Veterinary Authorities <u>of countries free from avian chlamydiosis may prohibit</u> importation or transit through their territory, from countries considered infected with avian chlamydiosis, of birds of the Psittacidae family."

14. If anything, the reference to Article 10.1.2 on avian chlamydiosis supports India's claim that the disease health situation in the importing country is relevant and must be taken into account when imposing measures and further that a country is justified in taking measures against diseases which are not present in its territory.

CLAIM UNDER ARTICLE 5.6 NOT MADE OUT

15. In its First Written Submission and its Opening Statement at the First Substantive Meeting India had highlighted that the claim under Article 5.6 suffered from a fatal legal flaw. The complaining party bears the burden of establishing that an alternative measure suggested by it fulfills the level of protection which is <u>achieved by the measure at issue</u>, i.e. S.O. 1663 (E). The United States instead sought to discern the ALOP from the National Action Plan, (NAP) which is a domestic measure and in any event is not the measure at issue in this dispute. The United States continues this line of argument and suggests that since India has not defined its ALOP, it is constrained to infer it from record evidence and has again gone on to infer the ALOP from the NAP.

16. India finds the US argument unconvincing because even if the United States had to engage in the exercise of inferring an ALOP, it still had to restrict itself to the measure at issue, i.e. S.O. 1663 (E). On the excuse of inferring an ALOP, the United States cannot impugn an unrelated measure and further still infer an ALOP from it. The identification of an ALOP from a measure which is not at issue leads to a fatal legal error and strikes at the very root of the United States allegation under Article 5.6

17. For the same reason its claim under Article 2.2 also fails. India however reiterates that even in the absence of the legal error in the Article 5.6 claim, the claim under Article 2.2 as a consequential breach of Article 5.6 fails, as the United States has failed to provide a cogent reason for linking and reading together two articles which have made no references to one another.

CLAIM UNDER ARTICLE 5.5 NOT MADE OUT

18. India maintains that the United States claim under Article 5.5 continues to remain ambiguous and should be rejected on this ground alone. The United States Second Written Submission contains broad generalizations on the Article 5.5 claim but nothing in that discussion addresses in any detail or with clarity the separate elements of the claim which are required to be fulfilled cumulatively for a valid claim under Article 5.5.

19. The United States presents no facts to explain why situations being compared are different but comparable. As the Panel in *Australia- Salmon* has stated, situations under Article 5.5 can be compared "if these situations involved either a risk of "entry, establishment or spread" of the same or a similar disease or of the same or similar "associated, biological and economic consequences". To this requirement the United States notes, "… the comparability of the different situations at issue in the US claim under Article 5.5 needed no elaboration. They involve trade in the *same* products and control of the *same* diseases. The Appellate Body has explained that for purposes of a claim under Article 5.5, comparable situations are "situations involving the same substance or the same adverse health effect". There is no doubt that the situations at issue here are comparable." Overall the claim under Article 5.5 remains highly deficient and should be rejected outright.

CLOSING STATEMENT

1. At the outset India will place on record the comments it had to the United States Opening Statement. In paragraph 15 the US refers to an SPS meeting of 2008 and the statement made by India at such meeting to suggest that India applies bans on poultry due to reports of avian influenza in wild birds. As India clarified it is clear from the text of the minutes that the ban was imposed on poultry products in response to notifications of NAI. Its stated concern for avian influenza in wild birds should not be taken to mean its application of bans on this account. India refers to a subsequent SPS Committee meeting in 2010, where India clarified in no uncertain manner that its bans are imposed in response to notifications of NAI in poultry only and not in response to information of avian influenza in wild birds.

2. Second, in response to US suggestion in paragraph 30 of its Opening Statement that India requires attestation that an exporting country is free of LPAI, India reiterates that is not the case. India refers to its response to Panel question 25 where it clarified that though veterinary certificates refer to HPAI and LPAI, they are implemented as meaning HPNAI and LPNAI. That answer also makes reference to import permits issued by India permitting imports from countries which had experienced LPAI in wild birds in the same period when import permits were issued. This clearly proves that India does not in fact restrict imports from countries which report LPAI or HPAI in wild birds.

3. Third, India refers to paragraph 17 of the US Opening Statement where it suggests that certain products such as fresh meat of poultry can be traded regardless of the status of the exporting country. India notes that if the status of the exporting country for fresh meat of poultry were indeed irrelevant the standard, i.e. 10.4.19 would have been worded very differently. There are several product recommendations such as Article 10.4.23 concerning feathers and down of birds other than poultry where the exporting country's status is irrelevant and are worded to convey this meaning clearly. Article 10.4.19 on the other hand is worded such that it makes a clear recommendation to import from a NAI or HPNAI free country/zone/compartment.

4. India reiterates that Panel's questions to experts erroneously shifted the burden of proof onto India. It was the United States which doubted India's notifications to the OIE and insisted that LPNAI had to, as a matter of fact be present in India and it was implausible that India did not have LPNAI in its poultry. India notes that the OIE does not verify disease notification, disease freedom or surveillance for avian influenza. These matters are left to the individual OIE Members and the OIE does not have the mandate to undertake these activities. Such as the US claim that HPNAI is not present in its territory is not subject to verification by the OIE, so is India's claim that LPNAI is not present in India. Thus if the US is doubting India's disease status, the burden is on the US to prove through evidence that its claim is made out. Hence the role of experts should have been to evaluate this claim based on the exhibits submitted by the US and not as has happened to shift the burden onto India to disprove the negative.

5. India also reiterates that S.O. 1663 (E) contains several product specific measures. Thus conformity of individual product specific measures must be evaluated with the relevant international standard to determine if the measure pertaining to that product is conforming to or is based on the OIE Code. Similarly it should also be noted that the US challenges the "prohibition" and hence the relevant standards under the OIE against which the prohibition is to be evaluated is the "condition of entry" that each product specific recommendation provides and not against the veterinary certificate requirements under each product specific recommendation.

6. Further India has explained in detail the deficiencies in the opinion provided by the OIE. As India has stated the Panel has an obligation to objectively evaluate the matter before it and towards that end it must evaluate the OIE Code in light of rules of treaty interpretation in the VCLT. The US states that the OIE Code is not a treaty and VCLT does not apply. Attention is drawn to Article 2 (a) of the VCLT under the definition of which the OIE Code clearly qualifies as a treaty to which its rules of interpretation apply. Further the OIE Code is also referred to in Annex A paragraph 3 (b) of the SPS Agreement as the relevant international standard for animal health and zoonoses. Since the SPS Agreement is undoubtedly a treaty and the OIE Code is an integral part of that Agreement, it too must be interpreted in light of customary rules of treaty interpretation.

7. India also refers to the discussion at the meeting today concerning the US regionalization claim. As was evident, apart from requiring India to change its veterinary certificate requirements there is nothing in the US Exhibits about specific zones or compartments that the US requested India to recognize. It is also telling as the US explained in its response to a Panel question that it initiated no constructive engagement with India post 2010. As India has explained, every time US asked India to change its sanitary requirement it said these conditions could not be changed as they applied to all countries. The US has always been well aware of the 'Guidelines to further the practical implementation of Article 6 of the SPS Agreement' and should have initiated good faith negotiations with India on this issue. If India is faulted for not making abundantly clear to the US that it will recognize zones or compartments if the US so furnishes a proposal, the US is equally responsible for not being unequivocal about its request. As the country requiring an exception in India's trading regime it should have made a clear, explicit and unequivocal request to this effect to India.

8. Finally India notes that India had made a second preliminary ruling request that the US claim under Article 2.3 is not maintainable as the NAP was not identified as a specific measure at issue in the US panel request. To this the US claimed that the NAP was not the measure at issue and that the US had not impugned it. However the deliberations and the scrutiny that the NAP has been subjected to are in fact tantamount to examining NAP as the measure at issue. India requests the Panel to examine the maintainability of the US Article 2.3 claim in light of India's second preliminary ruling request.

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ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA*

1. Argentina will refer exclusively to certain issues raised in this case. Specifically, it will comment on the obligation for Members to base their sanitary and phytosanitary measures on scientific principles, that sanitary or phytosanitary measures should not be maintained over time without sufficient scientific evidence, and that they should be based on a risk assessment. It will also underscore the importance of satisfying the principles of Harmonization and Regionalization, respectively set forth in Articles 3 and 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

2. It is important to recall that the objective of the SPS Agreement is to prevent sanitary or phytosanitary measures from being used as disguised restrictions on trade.

3. WTO jurisprudence has identified three separate requirements arising from the text of Article 2.2: "It is apparent from the text of Article 2.2 that this provision contains three separate requirements: (i) the requirement that SPS measures be applied only to the extent necessary to protect human, animal or plant life or health; (ii) the requirement that SPS measures be based on scientific principles; and (iii) the requirement that SPS measures not be maintained without sufficient scientific evidence".[1]

4. The linkage between the sanitary or phytosanitary measure and the corresponding scientific evidence must be well-founded and meet objectiveness criteria. In this connection, it will be recalled that in "Japan – Agricultural Products II" and in respect of the requirements in Article 2.2 of the SPS Agreement, namely that there should be a rational and objective relationship between the sanitary or phytosanitary measure, on the one hand, and the scientific evidence, on the other, the Appellate Body stated that it was a relationship to be determined on a case-by-case basis.[2]

5. Argentina wishes to reaffirm the interpretation according to which all SPS measures are to be based on scientific principles, not only when the measure is adopted but also throughout the period during which it is in effect. It is important to ensure compliance with the requirement that an SPS measure should not be maintained without sufficient scientific evidence; otherwise, the spirit of the Agreement would be undermined by allowing the continued existence of SPS measures that prove to be inconsistent with Article 2.2 of the SPS Agreement.

6. Argentina further emphasizes that although they are entitled to set their own levels of protection, Members may not disregard their obligation under Article 5.1 to provide scientific justification for their measures by carrying out a risk assessment.

7. Argentina underscores the importance of complying with the "Harmonization" criteria. Article 3 of the SPS Agreement encourages Members to harmonize their sanitary and phytosanitary measures with the existing international standards, guidelines and recommendations. The requirement in Article 3.1 that SPS measures be "based on" points to the need for such measures to rely on the relevant international standards.

* This text was originally submitted in Spanish by Argentina.

[1] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Report of the Panel, WT/DS291/R, WT/DS292/R, WT/DS293/R, paragraph 7.1424.

[2] *Japan - Measures Affecting Agricultural Products* ("Japan – Agricultural Products II"), Report of the Appellate Body, WT/DS76/AB/R, paragraph 84.

8. Argentina considers it essential to take into account the standards, guidelines and recommendations of the OIE to the extent that they enable trade, so as to avoid absolute prohibitions on imports. It emphasizes that the international standards are designed to facilitate - not to restrict - the development of international trade. SPS prohibition measures in relation to international trade have the most restrictive impact. In Argentina's view, a Member which has imposed measures that deviate from the international standards is required to ensure, among other things, that such measures are based on a risk assessment. Argentina also believes that sanitary and phytosanitary measures should be based on a risk assessment which confers scientific legitimacy on the measures in question.

9. It should be recognized that an SPS measure may be regarded as not being "based on" international standards when it manifestly runs counter to the standards issued by the competent international organizations, such as the World Organisation for Animal Health (OIE) in the case of this dispute.

10. Article 5 of the SPS Agreement requires Members to carry out a risk assessment. The need for an SPS measure to be "based on" a risk assessment pursuant to Article 5.1 and 5.2 means, in specific terms, that there must be a rational and objective relationship between the SPS measure and the results of a risk assessment.[3] At the same time, Article 5.6 lays down the obligation to ensure that an SPS measure is not more trade-restrictive than required. WTO jurisprudence takes the same line in that there would be a violation of this provision where there are alternative measures available to achieve the adequate level of protection that the Member has duly determined to be acceptable, which would be less restrictive on international trade than the SPS measure at issue.[4]

11. Argentina accordingly concurs with the position reflected in WTO jurisprudence that the application of mitigating measures will always be less restrictive than outright prohibition[5], which imposes the highest possible level of restriction, that is, total interruption of international trade flows. In particular, Argentina agrees with the United States' view that the alternative which satisfies the Article 5.6 requirements is the adoption of the OIE standards.

12. Another principle that Argentina regards as essential is regionalization. It emphasizes that the obligation to adapt SPS measures to the sanitary characteristics of the areas of origin and destination of the products, taking into particular account the level of prevalence of diseases or pests, is critical to guaranteeing the uninterrupted flow of international trade, while ensuring that Members can exercise their right to protect their territory from the risk of entry, establishment and spread of diseases and pests.

13. The paragraphs of Article 6 of the SPS Agreement taken in conjunction clearly show that the process of determining the areas or regions concerned must be based on a series of objective criteria that will ultimately guarantee non-discrimination, taking into account international standards such as those established by the OIE. Insofar as the interested Member provides the importing Member with the documentation necessary to define a region, non-recognition thereof will be a sign that the SPS measures are not based on those international standards. At the same time, it will point to non-compliance with the provisions of Article 6 of the SPS Agreement.

[3] Report of the Appellate Body, *EC - Hormones*.
[4] Report of the Appellate Body, *Australia – Salmon,* paragraph 194.
[5] See, for example, Report of the Panel, *Australia – Salmon,* paragraph 7.111.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

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.[1] Australia also notes that this presumption is rebuttable.[2]

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*[3] and by the Appellate Body in *Australia-Salmon*[4] 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.[5] 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,[6] 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.*

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

[1] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 170.
[2] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 165.
[3] Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report, WT/DS367/AB/R, paragraph 7.1134.
[4] Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, paragraph 206.
[5] European Union, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – Third Party Submission* (26 June 2013) paragraph 109.
[6] European Union, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – Third Party Submission* (26 June 2013) paragraph 113.

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.[7] 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.[8] In this regard Australia notes the Appellate Body's guidance in *EC-Hormones* regarding the distinction between "based on" and "take into account."[9]

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.

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

[7] United States of America, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – First Written Submission* (10 April 2013) paragraph 117.

[8] Japan, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – Third Party Submission* (26 June 2013) paragraph 21.

[9] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 189.

[10] See also Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute,* WT/DS321/AB/R, adopted 16 October 2008, paragraphs 227 – 231.

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.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil hereby presents its integrated executive summary, where it provides a brief description of the main points presented in its Third Party Submission and Oral Statement.

(a) The presumption established by Article 3.2, and reinforced by Article 5.6, of the SCM Agreement, is rebuttable

2. In Brazil's view, the SPS Agreement offers appropriate policy space for Members to determine the necessary sanitary and phytosanitary protection for the protection of human, animal or plant life or health, according to legitimate regulatory concerns. Nonetheless, such discretionary power has to be consistent with the provisions of the Agreement, as stated in Article 2. While article 2.1 and the preamble of the SPS Agreement are the basis for the right of States to establish SPS measures, Articles 2.2 and 2.3 provide a balance between this right and international trade.

3. Following this rationale, and as put forth by Article 3.2, all measures taken in conformity with these standards are "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".

4. In this sense, the presumption of Article 3.2 gives, one may say, an easier approach when establishing and maintaining SPS measures.1 Furthermore, Article 5.6 explicitly rules out SPS measures conforming with international standards from the requirement of not being "more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility. It, however, does not mean an absolute presumption. Brazil would like to recall that, when article 3.2 establishes said presumption, it does not express that such presumption is not subject to questioning, as put forward by the Appellate Body, in *EC – Hormones*.

(b) According to Articles 3.1 and 3.3 of the SPS Agreement, a SPS measure that does not conform to an international standard, guideline or recommendation must be based on the assessment of the risk to life or health of humans, animals or plants.

5. As previously mentioned, only SPS measures that comply with international standards have the benefit of the presumption of conformity to the SPS Agreement and GATT 1994. Conversely, SPS measures diverging from international standards should be based on a risk assessment, as detailed by Article 5 of the SPS Agreement, in order to be consistent with the provisions of this Agreement.

6. In Brazil's view, Members have the right to define the appropriate level of protection required in their territory and, as a consequence, establish and maintain SPS measures with higher level of protection than international standards. For that, it is necessary that the SPS measure have (i) a "scientific justification" as defined by footnote 2 of the SPS Agreement or to be established taking into account (ii) "the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.

(c) The principle of regionalization recognized by an international organization should not unjustifiably encumber the exporting Member.

7. Brazil believes regionalization ensures fairness of treatment among Members and guarantees that SPS measures are not applied in an arbitrary manner. It also strengthens the principle embodied in Article 5.6 of the SPS Agreement, as the specificity of measures to areas or regions with different risks to human, animal and plant life or health also guarantees that such a measure is no more trade-restrictive than necessary.

1 *EC – Hormones* (Appellate Body Report, para. 102)

8. These considerations have special importance in the present case. The World Organization for Animal Health (OIE), more than establishing notification requirements for Avian Influenza, lays down elements that may qualify a country, zone or compartment as pest-free or disease-free area, under the Terrestrial Animal Health Code, Articles 10.4.3 and 10.4.4. Although not mandatory, the provisions should be taken into account by Members so as to ensure that the SPS measures are adapted to the levels of prevalence of Avian Influenza in a specific area, in light of Article 6.1 of the SPS Agreement.

9. Scientific principles guide Members' adoption of SPS measures. It is a cornerstone of the SPS Agreement for measures to be "adapted to the sanitary or phytosanitary characteristics of the area"[2] and that disease-free areas should be characterized according to "factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls."[3]

10. Regionalization helps SPS Measures to be more effective and less trade restrictive and, for that end, international standards can constitute a useful tool. As the Panel in *EC – Hormones*[4] recognized, it is the exporting Member that needs to comply with Article 6.3 as the burden of proof is explicitly conferred on them. However, once it has complied with its obligations or made a good faith effort to grant reasonable access for inspection and other procedures, it is on the importing Member to justify, with the adequate risk assessment, the divergence from the internationally recognized pest-free area. As in *EC Hormones*[5]: "Once such a prima facie case is made, however, we consider that, at least with respect to the obligations imposed by the SPS Agreement that are relevant to this case, the burden of proof shifts to the responding party."

[2] SPS Agreement, Article 6.
[3] SPS Agreement, Article 6.2.
[4] *EC – Hormones* (Panel Report., fn 250)
[5] *EC – Hormones* (Panel Report,.para. 8.51)

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THE PRELIMINARY RULING REQUESTS

1. The European Union recalls that third parties have the right to comment on a request for a preliminary ruling, as their right stems directly from Article 10 of the DSU as a due process requirement.

2. The European Union considers that the references to 'implementing measures' and 'related measures' 'identify the specific measures at issue'. Unlike in the cases of *EC – Selected Customs Matters* and *China – Raw Materials*, where the challenges concerned a broad spectrum of possible measures, the scope of this case is precisely circumscribed only to those NAI measures. In addition, India failed to answer the US request under Article 5.8 of the SPS Agreement and this should be considered an attendant circumstance.

3. The requirement to 'provide a brief summary of the legal basis sufficient to present the problem clearly' should be assessed on a case by case basis. The simple listing of articles may be enough, as found by the Appellate Body in *EC - Bananas III*. The Articles 2.3, 5.5 and 5.6 claims refer to both HPNAI and LPNAI. The sufficiency requirement is met by the Article 2.3 claim because it not only reproduces the text of the provision, but there is an indication of the country and the measures. The use of the words 'for example' does not render the Article 5.5 claim imprecise. Finally, there is no risk of confusion from the formulation of the Articles 2.3 and 5.5 claims.

4. In light of the above, the European Union considers that the standard in Article 6.2 of the DSU is met by the US panel request.

5. With regard to India's second preliminary ruling request, the European Union agrees that the US panel request makes reference to 'similar avian influenza related controls with respect to like domestic products and their internal movement within India'. The measure at issue should not be the import ban or the National Action Plan regarded separately, but rather the difference between the two. The European Union also considers that the health certificate requirements are 'implementing and related measures', given the particular circumstances of this case.[1]

II. PROCEDURAL ASPECTS

6. The European Union considers that the SPS Agreement is applicable in the present case. Some flexibility in approaching issues of burden of proof may be appropriate, given the judgement inherent in weighing evidence.[2] As a preliminary issue, the European Union recalls that the Appellate Body has stated, in the context of Article 5.1 of the SPS Agreement, that the standard of review in SPS cases is rather deferential to WTO Members' assessments.[3]

7. The starting point for a panel in assessing the utility of expert advice should be the possible contribution towards an 'objective assessment of the matter before it'. Four main contentious points are identified by the European Union in the present case.

8. First, expert advice is not needed for the interpretation of the OIE standards, as they are reasonably clear. This point of the dispute seems to be not about science, but about an interpretative exercise. Second, India's Summary Document cannot be characterized as a valid risk assessment as long as India itself dismisses that. In addition, an OIE expert

[1] Appellate Body Report, *EC – Bananas III*, para. 140.
[2] Appellate Body Report, *Australia - Apples*, paras 360-66.
[3] Appellate Body Report, *US - Continued Suspension*, para. 590.

already examined the document and has concluded to the contrary.[4] Third, India's claim that LPNAI is exotic to its territory cannot be elucidated by simple analysis of the existing data. However, there is strong evidence suggesting that LPAI virus (LPAIV) of the H7 serotype might be occurring in India.[5] Finally, while considering the fourth issue, namely the occurrence of LPNAI in internal organs, other than respiratory or digestive systems, one should keep in mind that the studies by Post et al. and Swayne and Beck do not examine the same tissues. In case of any doubts as regards the presence of viable virus in fresh meat, the OIE Scientific Commission would be the best placed to review the matter.

9. In light of the above, while fully acknowledging the utility of expert advice in SPS disputes in general, the European Union is of the view that it is not necessarily needed in the present dispute and it may rather unduly delay the proceedings.

10. With regard to the order of analysis, for effectiveness-related reasons the European Union considers that the Panel should start its analysis with the harmonization claims and then proceed with the claims related to risk assessment. The European Union submits that the Panel should analyse the US risk assessment claims under the more specific provision first, namely Article 5.1 and only afterwards under the more general principle embodied in Article 2.2 of the SPS Agreement.[6]

III. SUBSTANTIVE ISSUES

A. Claims related to harmonization

11. Article 3 encourages Members to harmonize their SPS measures, distinguishing between three different situations: when the measures are 'based on' international standards, when the measures 'conform to' the said standards and when the measures are more stringent than the international standards. The Appellate Body clarified that 'a measure that conforms to an international standard would embody the standard completely and, for practical purposes, converts it into a municipal standard'.[7] The 'base on' requirement is different from 'conform to' and it means that the measures are 'supported' by the international standards.[8]

12. The European Union submits that there is no obligation of Member Countries concerning notification of LPAI in wild birds in the OIE Code.[9] Information voluntarily submitted concerning LPAI virus infections in wild birds should not serve, in any case, as a justification for the imposition of trade bans in poultry commodities by other countries.

13. Comparing product-by-product the Indian measures and the OIE standards, the European Union notices that while the OIE Code contains no recommendation concerning trade in live pigs, S.O. 1663(E) imposes a ban on this product. Several OIE recommendations for unprocessed poultry products provide different alternatives, depending on the NAI or HPNAI free status of a country/region/compartment. The European Union considers that these alternatives depend on objective factors and do not give countries an unfettered discretion to choose the one they prefer. Thus, to that extent, there is a discrepancy between the OIE standards, which distinguish between HPNAI and LPNAI, and India's measures, which treat both situations in the same way.

14. The European Union is of the view that Article 10.4.1.10 is a general provision which should be interpreted in the light of the product-specific provisions. It cannot be interpreted as allowing an immediate ban following HPNAI or LPNAI notifications. Thus, the European Union submits that India's bans on live pigs and unprocessed poultry products do not 'conform to' and are not 'based on' the relevant OIE standards.

[4] US Exhibit 108.

[5] S. Pawar et al., "Avian influenza surveillance reveals presence of low pathogenic avian influenza viruses in poultry during 2009-2011 in the West Bengal State, India", *Virology Journal*, 2012, 9:151.

[6] Panel Report, *Australia-Salmon*, para. 8.48.

[7] Appellate Body Report, *EC – Hormones*, para. 170.

[8] Appellate Body Report, *EC – Hormones*, para. 163.

[9] Article 1.1.3.1., making reference to Article 10.4.1.1 and Article 10.4.1.2 of the OIE Code, read in conjunction with Article 10.4.1.10 of the OIE Code.

B. Claims related to risk assessment

15. To the extent that India's measures do not 'conform to' and are not 'based on' the OIE recommendations, it is necessary to establish whether there is a solid scientific basis for their imposition. The definition of risk assessment is provided in paragraph 4 of Annex A of the SPS Agreement. As a previous panel notes, there are two types of risk assessment, namely a pests risk assessment and a food safety risk assessment.[10] Article 5.1 does not require Members to carry out their own risk assessment, as an 'SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization'.[11]

16. The Summary Document, presented by India at the October 2010 meeting of the SPS Committee, cannot be considered as a valid risk assessment and does not meet the requirements of Article 5.2 of the SPS Agreement. India itself maintains that the Summary Document is not its risk assessment and that it only summarizes what India believed to be the basis of the OIE recommendation. Furthermore, the European Union recalls that an OIE expert already examined the document and that he concluded that it cannot be considered a valid risk assessment within the meaning of the SPS Agreement or of the OIE Code.

17. Article 2.2 contains the general principles of the SPS Agreement related to necessity and scientific disciplines for the use and maintenance of SPS measures. The necessity requirement has not been clarified in the context of this provision but one may find useful guidance in the interpretations provided in the framework of Article XX(b) of the GATT 1994 or of Article 2.2 of the TBT Agreement.

18. The second element of Article 2.2 is the general requirement to base measures on scientific principles and not maintain them without sufficient scientific evidence. Article 5.1 is a more specific provision related to these principles, requiring WTO Members to undertake a risk assessment. A violation of the more specific provision in Article 5.1 constitutes also a violation of the more general requirements in Article 2.2.[12] However, given the more general wording of Article 2.2, the reverse is not necessarily true.[13]

C. Claims related to risk management

19. The SPS Agreement and the corresponding case law recognize that each WTO Member may establish the level of protection it deems appropriate.[14] This includes a 'zero-risk' policy and may cover any ascertainable risk, including small or 'negligible' risks.[15] However, the risk management choices of Members should be reflected in measures applied in a non-discriminatory and reasonable manner, as prescribed by Articles 5.5 and 5.6 of the SPS Agreement.

20. A SPS measure is more trade-restrictive than required if there is an alternative SPS measure meeting the conditions of footnote 3 to Article 5.6.[16] In the present case India has not expressly stated its appropriate level of protection (ALOP). No answer has been provided by India to the US Art 5.8 request.[17] Accordingly, if the level of protection is not specified in writing, a panel should infer it from the SPS measures applied in practice. Assuming that India has a high ALOP, the European Union submits that *regionalization* meets the three cumulative conditions of Article 5.6: it is reasonably available, achieves the Member's ALOP and is significantly less trade restrictive that a country-wide ban.

[10] Panel Report, *Australia-Salmon*, para. 8.68.
[11] Appellate Body Report, *EC - Hormones*, para. 190.
[12] Appellate Body Report, *Australia-Salmon*, paras 137-38.
[13] Appellate Body Report, *Australia-Salmon*, para. 137.
[14] Appellate Body Report, *EC – Hormones*, para. 124.
[15] Appellate Body Report, *Australia-Salmon*, para. 125.
[16] Appellate Body Report, *Australia – Salmon*, para. 194.
[17] Exhibit US-4.

D. National Treatment claims

21. According to a previous panel there are three cumulative requirements to be met before a violation of the first sentence of Article 2.3 can be established[18]. Without taking position at this stage on the prevalence of similar conditions, the European Union reiterates that it sees no contradiction in having a high level of protection and allowing trade according to the regionalization principles. We also see no contradiction in having a high level of protection and taking domestic measures circumscribed to a certain area.

22. The obligation embodied in Article 5.5 of the SPS Agreement is the principle of non-discrimination in risk management. Three cumulative conditions have to be met in order to establish a violation of Article 5.5.[19]

23. The European Union agrees that while not explicitly stated, India's ALOP can be inferred from the SPS measures applied. WTO Members are free to set their ALOP but they are *not* free to adopt different ALOPs in 'different situations'. It has been previously decided that the type of situations envisaged by Article 5.5 are *comparable* situations, such as 'situations involving the same substance or the same adverse health effect'.[20]

24. As to the relationship between Articles 5.5 and 2.3 of the SPS Agreement, the Appellate Body has stated that a violation of Article 5.5 would automatically trigger a violation of Article 2.3, while the reverse is not necessarily true. [21]

E. Claims related to regionalization

25. The European Union recalls that regionalization is an important principle aiming at allowing trade while maintaining a high health status. In the case of Members with large territories an outbreak of NAI in one part of the territory often means no risks in other parts of the country. The European Union considers that Article 6 of the SPS Agreement imposes an obligation to recognize regionalization as a matter of principle.[22] This formal recognition should be followed by the agreement of the Members on the necessary measures *prior* to outbreaks of the disease. Finally, once these arrangements are in place, the authorities of the importing country will be able to take decisions on individual cases.[23]

26. Furthermore, a cumulative reading of Articles 6.2 and 6.3 reveals that the process of determining the areas is not at the absolute discretion of the importing Member. There are a set of *objective* criteria which shall be taken into account, such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls. In addition, it is the view of the European Union that Members are under an obligation to enter with good faith into a proper dialogue. Otherwise there is a breach *per se* of Article 6.[24]

27. The SPS Committee has developed specific guidelines on Article 6. Even if these guidelines cannot be considered a 'subsequent agreement' among the Parties within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT) because of explicit text to the contrary, [25] they may nevertheless provide 'useful guidance' on how the mechanism of Article 6 may articulate.[26]

[18] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.
[19] Appellate Body Report, *EC - Hormones*, para. 214.
[20] Appellate Body Report, *EC - Hormones*, paras 216-17.
[21] Appellate Body Report, *Australia-Salmon*, para. 252.
[22] Article 6.1 of the SPS Agreement provides that 'Members shall recognize the concepts'.
[23] Chapter 4.3. of the OIE Code.
[24] In a different context, the Appellate Body has already sanctioned the lack of engagement in 'serious, across-the-board negotiations'. Appellate Body Report, *US – Shrimp*, para. 166.
[25] G/SPS/48, para. 2.
[26] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 14-5.

F. Transparency claims

28. Members shall allow a reasonable interval between the publication and the entry into force of an SPS measure under Paragraph 2 of Annex B.

29. The European Union considers that the Indian measures do not 'conform to' and are not 'based on' the OIE standards. Accordingly, the content of India's measures is not 'substantially the same' as the content of the relevant international standard. To the extent the regulation has a 'significant effect on trade' of other Members, which a trade ban may very well have,[27] India's measures are in breach of Paragraph 5 of Annex B and Article 7 of the SPS Agreement.

G. Article XI of the GATT 1994

30. The European Union shares the view that a violation of the SPS Agreement may result in a violation of the GATT 1994.

[27] Panel Report, *EC — Hormones (Canada)*, para. 8.26.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF GUATEMALA[*]

1. Guatemala would like to take this opportunity to comment on three issues:

1.1. First, on the legal interpretation of Article 5.8 of the SPS Agreement;

1.2. Second, on the suggested order of analysis of this dispute; and,

1.3. Third, on the second request for preliminary ruling under Article 6.2 of the DSU.

A. LEGAL INTERPRETATION OF ARTICLE 5.8 OF THE SPS AGREEMENT

2. On the legal interpretation of Article 5.8 of the SPS Agreement, Guatemala observes that there is no particular claim under this provision. The concern of India seems to be related to potential adverse inferences that could be drawn from the facts of the case and the legal interpretation of this provision.

3. Guatemala observes that India appears to suggest that Article 5.8 of the SPS Agreement does not deal with a dispute settlement situation and has no role to play once dispute proceedings are initiated, because it has been characterized by the Appellate Body as providing for a pre-dispute procedure.

4. If Guatemala understands correctly, India is apparently claiming that the obligations under Article 5.8 cease to exist once dispute settlement procedures are initiated. Guatemala disagrees with this interpretation.

5. In the view of Guatemala, the Appellate Body characterized Article 5.8 of the SPS Agreement as a pre-dispute proceeding in the context of a discussion on burden of proof. Nothing in the Appellate Body's conclusions appear to suggest that, once a dispute settlement procedure has initiated, the obligations under this provision are terminated.

6. Furthermore, Guatemala observes that the Appellate Body carefully indicated that a Member seeking to exercise its right to receive information under Article 5.8 "would, most likely, be in a pre-dispute situation". This is probably because, Members resorting to dispute settlement procedures may not need an explanation of the measures at issue but are seeking redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements.

7. Guatemala agrees with India that Article 5.8 of the SPS Agreement provides no time limit to provide the answers required. However, the lack of a time limit in this provision cannot support the legal interpretation that there is no continued duty of performance. Guatemala believes that the only way to comply with the obligation contained in Article 5.8 is, precisely, the provision of "an explanation of the reasons" for a sanitary or phytosanitary measure. Guatemala does not find in any part of Article 5.8, or elsewhere, that initiation of dispute settlement procedures would render the obligations contained in this provision meaningless.

B. ORDER OF ANALYSIS

8. With respect to the order of analysis proposed by the parties, the Appellate Body determined that "as a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member. Furthermore, panels may choose to use assumptions in order to facilitate resolution of a particular issue or to enable themselves to make additional and

[*] Guatemala requested that its oral statement serve as the integrated executive summary.

alternative factual findings and thereby assist in the resolution of a dispute should it proceed to the appellate level".[1]

9. In the present case, it is clear that the parties characterize differently the matters at issue. Although the United States did not appear to suggest a particular order of analysis, initiated the presentation of its legal claims with those under Article 5 of the SPS Agreement. India, on the other hand, suggests that the Panel begins with the analysis of the claims under Article 3.

10. Guatemala agrees with India that it might be appropriate to initiate the analysis of the claims under Article 3 of the SPS Agreement, in view of the existence of an international standard and the claim that the measures at issue "conform" or are "based on" such an international standard.

11. However, should the Panel find that India's measures are consistent with Article 3, Guatemala considers that it might be appropriate to make additional and alternative factual findings on the rest of the provisions in order to assist in the resolution of this dispute, should it proceed to the appellate level.

12. Conversely, should the Panel find that India's measures are inconsistent with Article 3, Guatemala does not share the view that the Panel then needs to start the analysis of the claims under the more general provisions of the SPS Agreement rather than under the more specific and detailed provisions of the SPS Agreement.

13. In the view of Guatemala, there is a well-established practice whereby the Panels and the Appellate Body start their analyses under the provisions that specifically addresses in detail the alleged inconsistencies.[2] Guatemala does not see, and India does not explain, why this Panel should depart from this practice. Therefore, Guatemala respectfully suggest the Panel to initiate its analysis under the more specific and detailed provisions. In this case, the claims under Article 5 of the SPS Agreement.

C. SECOND REQUEST FOR PRELIMINARY RULING UNDER ARTICLE 6.2 OF THE DSU

14. Regarding the second request for preliminary ruling under Article 6.2 of the DSU, India claims that two types of measures are outside the terms of reference of this Panel: a) India's National Action Plan; and b) the health certificate requirements for products listed in subparagraphs a) to j) of paragraph 1) (ii) of S.O. 1663(E).

15. As a matter of fact, none of these measures are identified in the Panel request by name.

16. On the National Action Plan, India is of the view that the United States is challenging this Plan. In response, the United States clarified that it has not sought a finding that India's National Action Plan is inconsistent with the SPS Agreement. The United States considers the National Action Plan of India as evidence to make the legal claim of discrimination.

17. Additionally, India appears to suggest that the United States, by making a claim under Article 2.3 of the SPS Agreement, "has to necessarily adduce and impugn such of India's measures which it believes are the cause of this arbitrary or unjustifiable discrimination".[3] In this case, India makes reference to its National Action Plan.

18. Guatemala does not find in Article 2.3 of the SPS Agreement nor in the jurisprudence any basis to oblige the complaining Member to challenge domestic measures that may serve as the basis to demonstrate the existence of a discrimination.

19. The Panel in Australia — Salmon (Article 21.5) identified three elements, "cumulative in nature", necessary to find a violation of the first sentence of Article 2.3:

[1] Appellate Body Report, Canada - Wheat Exports and Grain Imports, para. 126).

[2] For instance, Panel Report, EC – Asbestos, paras. 8.16–8.17; Appellate Body Report, EC - Bananas, para. 204; Panel Report, EC - Hormones, para. 8.45.

[3] FWS of India, paragraph 73.

19.1. (1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;

19.2. (2) the discrimination is arbitrary or unjustifiable; and

19.3. (3) identical or similar conditions prevail in the territory of the Members compared."[4]

20. The first element requires the demonstration of the existence of the claimed discrimination; and, clearly, the initial burden of proof rests on the complaining party. Generally speaking, if the complaining party asserts an affirmative claim of discrimination, it has to demonstrate that the domestic products are being treated more favorably than the imported products. In so doing, the complaining party is free to choose the means to raise a presumption that what is claimed is true.[5] This may include the analysis of pieces of legislation other than the challenged measures.

21. Guatemala considers that Article 2.3 of the SPS Agreement does not address the measures that need to be challenged. Thus, Guatemala finds no basis to support the proposition of India that it was necessary to challenge, in this case, the National Action Plan to demonstrate the alleged discrimination.

22. For these reasons, Guatemala agrees with the United States that India apparently mistakes evidence that can be used to establish an element of a claim with the measure that is the object of the challenge.

23. Finally, regarding the health certificate requirements, Guatemala sees no relevance on the legal source for their issuance. Given the facts of these case, as explained by the Parties, it seems that the health certificate requirements are "implementing and related measures". If Guatemala understands correctly, the health certificate requirements are necessary to implement the avian influenza-based import prohibitions. As acknowledged by India, its veterinary certificates "are required to accompany every export consignment of certain livestock products".[6] Therefore, Guatemala considers that these health certificate requirements are within the terms of reference of this Panel.

24. Guatemala thanks the Panel for this opportunity and would be happy to respond to any follow-up questions you might have.

[4] Panel Report, Australia — Salmon (Article 21.5 — Canada), para. 7.111.

[5] Appellate Body Report on United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India ("US - Wool Shirts and Blouses"), p. 14.

[6] FWS of India, paragraph 96.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Introduction

1. As a third party, Japan has a systemic interest in the interpretation and application of the SPS Agreement, and therefore, would like to provide its views on several important legal issues raised in this proceeding.

II. Necessity of Seeking Opinions from Independent Experts

A. The Role of Experts in a Panel Proceeding

2. As noted by the United States, a WTO panel is charged with making "an objective assessment of the matter before it."[1] To that end, the panel is authorized to utilize resources such as experts in order to further inform its opinion. Specifically, Article 13.1 of the DSU grants panels "the right to seek information and technical advice from any individual or body which it deems appropriate." Article 13.2 further permits panels to "seek information from any relevant source," and to "consult experts to obtain their opinion on certain aspects of the matter." Indeed, it is well-established that panels have the "right" to seek information – including expert opinions – where the panel deems it appropriate.[2]

3. Expert opinions and analyses are even more important in disputes under specialized agreements such as the SPS Agreement, which involve facts of a highly scientific and technical nature. This understanding is reflected in Article 11.2 of the SPS Agreement, which states that "{i}n a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel." The increased importance of scientific and technical advice in the context of the SPS Agreement is demonstrated by the use of the word "should" in Article 11.2, whereas the DSU provides that a panel "may" seek advice in Article 13.2. The SPS Agreement therefore not only permits, but encourages panels to seek the opinion of experts with regard to the scientific or technical issues of a case.

4. Nonetheless, the United States in its First Written Submission claims that the adoption of an expert procedure in these proceedings would not result in any appreciable assistance to this Panel.[3] The United States claims that because there is no risk assessment, there is no scientific evidence that needs scrutiny with the assistance of experts. In Japan's view, this is an incorrect characterization of the role of expert assistance in SPS-related dispute settlement. To the extent that the U.S. claims that the role of experts is contingent upon the respondent setting forth a risk assessment, nothing in the plain text of the SPS Agreement applies such limits to the role of experts. Article 11.2 of the SPS Agreement provides that in a "dispute under this Agreement involving scientific or technical issues," expert opinions may and should be sought. This language does not limit the use of experts to a particular type of review – risk assessments – as long as the dispute involves "scientific or technical issues".

5. Interestingly, the United States relies only on a discussion in *Australia – Apples* about the panel's use of expert testimony to explain risk assessment procedures.[4] However, other WTO decisions do not limit the use of expert panels in such a way. Moreover, the Appellate Body went on to note that "{t}he experts may also be consulted on the relationship between the risk assessment and the SPS measure."[5] Indeed, the Appellate Body in *Japan – Apples* also confirmed that the panel was entitled to take into account views of experts in assessing whether the complaining party had established a *prima facie* case.[6] Similarly, the panel in *EC – Biotech* found

[1] United States' First Written Submission (10 April 2013) ("US FWS"), para. 170 (p. 55).
[2] *US – Continued Suspension* (AB), at para. 439; *US – Shrimp* (AB), at para. 104.
[3] US FWS, at para. 170 (p. 54).
[4] *Id*. (*citing Australia – Apples* (AB), at para. 215.)
[5] *US – Continued Suspension (AB)*, at para. 592.
[6] *Japan – Apples* (AB), at para. 166.

it proper to seek the advice of experts merely when the submissions raised technical and scientific issues. The panel noted that the experts had assisted the panel in "understanding the issues raised by the Parties," again showing that the panel's reliance on experts was not limited to an evaluation of a risk assessment.[7]

B. Validity of a Risk Assessment

6. Even if the Panel were to accept that expert opinions are only useful when evaluating risk assessments, there remain sufficient issues of scientific and technical nature in this dispute that would require the aid of independent experts in determining whether a valid risk assessment has been conducted. For instance, according to the United States, India has reached a different conclusion with respect to adopting import bans on poultry meat different from the import risk analysis conducted by New Zealand (MAF Regulatory Authority 1999) that concluded, subject to the application of appropriate sanitary measures, chicken meat could be imported safely from countries considered infected with HPAI.[8] The panel may wish to review the underling scientific basis of India's measure with the aid of independent experts.

7. Furthermore, while India claims that the Summary Document is not India's risk assessment, the Panel may still seek to examine whether the Summary Document would nonetheless be considered a *de facto* risk assessment, in which case some additional issues of scientific fact may be disputed. For instance, the United States and India present starkly opposing views on the sources used to develop the Summary Document. The Panel may also seek to obtain expert opinions regarding the accuracy of India's understanding that the sources behind the Summary Document formed the basis of the OIE recommendations.[9] Moreover, India claims that it was not required to conduct a risk assessment because its SPS measure was based on the OIE standard (according to India, a Member is not required to conduct a risk assessment under Article 5 if the SPS measure is based on an international standard, as the standard itself fulfills the requirements of Article 2.2, and circumstantially, Article 5.1).[10] This would seem to suggest that the assessment of risk performed by the OIE is what forms the scientific basis for India's SPS measure, and if so, that the Panel's examination of OIE assessment may benefit from review by independent experts as well.

8. In the present dispute, therefore, whether the OIE standard constitutes the elements necessary to satisfy the SPS Agreement's requirement for a risk assessment, and whether the science cited in the Summary Document is relevant today and pertinent to the circumstances of India, these are issues that may and should be determined with the help of independent experts.

C. The Use of OIE Experts

9. The parties to this dispute disagree with the interpretation of the OIE standard. India claims that Members can impose an immediate ban on trade in poultry commodities from a country reporting LPAI under Article 10.4.1.10 of the OIE Code.[11] However by the very same provision, the United States states that notification of HPAI and LPAI in birds other than poultry should not be a basis to impose ban on poultry commodities.[12] A point that the Panel may wish to clarify is whether LPAI is an exotic disease to India. The disease status in regard to LPAI in India is a fundamental factual question for the Panel to consider in light of the legal claims India has put forward. Japan is of the view that OIE experts are in a good position to provide technical knowledge in order for the Panel to determine these contentious issues, especially with respect to the conformity of India's measures on the relevant OIE Codes.

10. In regard to the use of expert, while India does not categorically reject the necessity of experts in this proceeding, India opposes the use of OIE experts to assist the Panel in this proceeding. According to India, the OIE should not be called upon to provide expert opinion

[7] *EC – Biotech* (Panel), at paras. 7.18, 7.30 .
[8] US FWS, at para. 83.
[9] India's First Written Submission (31 May 2013) ("India FWS"), at paras. 7, 9.
[10] *Id.* at paras. 7, 146, 163-64, and 183-84.
[11] India FWS, at para. 123.
[12] US FWS, at para. 51.

because prior OIE "interjection[s] at the SPS Committee meeting cast[ ] serious doubts over the OIE's ability to provide guidance to the Panel…"[13]

11. Experts are subject to Section II (Governing Principle) of the *Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("Rules of Conduct"),[14] which provides that all covered persons, such as panelists and expert advising panels,[15] "shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved." Integrity and impartiality are further required by Section VI.2 of the Rules of Conduct, which provides that experts "disclose any information ... which is likely to affect or give rise to justifiable doubts as to their independence or impartiality."

12. When selecting experts, panels must consider "whether there is an objective basis to conclude that an expert's independence or impartiality is likely to be affected or there are justifiable doubts about that expert's independence or impartiality."[16] This standard ensures the fairness and impartiality of the experts in conformity with due process. And while a party may object to the selection of a particular expert, such objection should be accompanied by an explanation of why the expert's independence or impartiality has been compromised.[17] Certain affiliations with international organizations may provide a basis to exclude such an expert; for instance, in *EC – Hormones*, the Appellate Body found that – in a case of two competing standards – it was improper for the panel to call on an expert who was involved in developing the standard upon which one of the parties relied in its risk assessment, as the expert would be inclined to defend its standard over the other, rather than conduct an objective assessment.[18]

13. As such, it is not clear to Japan that an OIE expert's independence or impartiality, if selected, would be compromised. Rather, such an expert may even be in the best position to provide guidance to the Panel in this dispute, in particular verifying India's reading of its Summary Document, which India argues formed based on the OIE recommendations and the justification for India's measure.[19] As such, it is Japan's view that the Panel should not preclude the consideration of OIE experts to aid the Panel in understanding the claims raised by the Parties in this dispute as long as their independence and impartiality can be ensured.

III. Appropriate Standards for Determining the Existence of a Risk Assessment Under SPS Articles 5.1 and 5.2

14. If the Panel were to determine that the assessment of risks was conducted either through the Summary Document, or through the adoption of the OIE standard, Japan offers the following observations for the Panel's consideration in determining whether India has complied with its obligations under Articles 5.1 and 5.2 of the SPS Agreement.

A. The Meaning of "Take Into Account" is Different from "Based on" or "Comply with"

15. Article 5.1 stipulates that Members shall ensure their SPS measures are based on a risk assessment, "taking into account risk assessment techniques developed by the relevant international organization." The United States specifically notes that the Summary Document "does not even reference the OIE's standards for a risk assessment such as Chapter 2.1 of the OIE Code or the Handbook."[20] Thus, while the United States concludes that India has failed to "at least take into account" the risk assessment techniques of relevant international organizations, it also raises the question to what extent India should have discussed and deferred to the OIE Code or

[13] India FWS, at para. 10.
[14] Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes, WT/DS/RC/1 (adopted 3 December 1996) ("Rules of Conduct").
[15] Rules of Conduct, at Section IV.1.
[16] *US – Continued Suspension (AB)*, at para. 454.
[17] *Australia – Apples (Panel)*, at paras. 7.31-7.32.
[18] *US – Continued Suspension (AB)*, at para. 469.
[19] India FWS, at para. 7.
[20] US FWS, at para. 117.

Handbook in order to fulfill its requirements under Article 5.1, even if it were to ultimately decide to reject the risk assessment techniques contained in those international standards.

16. At the very least, it is clear that the requirement to take into account risk assessment techniques developed by international organizations does not equate to a requirement to *conform* to such international standards. As the United States correctly notes, a Member whose standards conform to the international standards enjoys a presumption of consistency under the SPS Agreement. It is also true, however, that conformity with international standards is neither required, nor does a presumption of consistency mean that Members who decide not to conform their measures to international standards are subject to "a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*."[21]

17. The requirement to take into account certain risk assessment techniques under the second half of Article 5.1 should also be distinguished from the obligation of a Member to base its risk assessment on scientific evidence under the first half of Article 5.1. The Appellate Body in *EC – Hormones* made clear that the obligations implicated by the two terms are distinctly different. Therefore, the requirement for a Member to "base" its risk assessment on scientific evidence refers to an objective situation. The Appellate Body has established the requisite relationship between the scientific evidence and risk assessment to be one of a "rational relationship." As demonstrated through the Appellate Body's guidance in *EC – Hormones*, the requirement to "take into account" certain factors, on the other hand, leaves the Member a degree of discretion to reject the particular factors considered.[22] The discretion of a Member to reject the risk assessment techniques developed by an international organization is especially clear when a Member has decided not to adopt the level of protection set forth by the international organization. This is because the particular techniques developed by an entity will be tailored to the particular level of protection espoused by that entity.

18. Thus, the above analysis demonstrates that the requirement that a Member take into account risk assessment techniques developed by international organizations is clearly differentiated from an obligation to conform to, or base its risk assessment on, the standards set forth by an international organization. The Appellate Body further indicated that should a WTO Member choose a higher level of protection, that Member may adopt "the scope and method" of its risk assessment different from those of risk assessment performed by the international body that underlies the international standard.[23]

19. India does have the prerogative to adopt a level of protection higher than that espoused under the international standard. In this case, while India would not be required to employ the risk assessment methods set forth in the OIE Code, Article 5.1 still would not exempt India from taking into account the risk assessment techniques developed by international organizations. However, a Member has a degree of discretion in taking into account risk assessment techniques developed by international organizations, and when the Member decided to adopt a higher level of protection than that espoused under the international standard that Member may subsequently decline to adopt such techniques.

B. Guidance on Requirements to Express International Standards that have been Taken Into Account

20. In addition to Article 5.1, Article 5.2 of the SPS Agreement uses similar language requiring an implementing Member to "take into account" seven specific factors in conducting its risk assessment. And similar to its assertion that a failure to "reference" the OIE Code suggests a violation of Article 5.1, the United States argues that India failed to comply with Article 5.2, because "{t}he most recent scientific authority cited is over 14 years old," and "there is not even a cursory reference to available scientific evidence explaining that LPAI does not replicate systematically and the corresponding implications for the safety of poultry meat and eggs."[24] In other words, it appears that the United States assumes that India did not take into account the requisite factors expressed in Articles 5.1 and 5.2 of the SPS Agreement because the Summary Document does not "reference" those specific factors. However, it is not clear that a Member's

[21] *EC – Hormones (AB),* at para. 102. Italic Original.
[22] *Id*. at paras. 189, 193-94.
[23] *US – Continued Suspension (AB),* at para. 685.
[24] US FWS, at 118.

failure to expressly reference each factor provided in Articles 5.1 and 5.2 automatically leads to the conclusion that the Member failed to take those factors into account, especially with regard to information that the Member has ultimately decided to reject in its risk assessment after examining factors to be taken into account.

21. As discussed above, a requirement to "base" an SPS measure on scientific evidence is distinguished from a requirement to "take into account" certain factors. The panel in *EC – Biotech* clarified that when a Member has decided to "base" its risk assessment on divergent opinion, the Member is required to express the information that its risk assessment is based on.[25]

22. With regards to factors that should be "taken into account," however, the Appellate Body in *Australia – Apples* only acknowledged that reference by the risk assessor of the risk assessment technique employed "is useful both to the risk assessor, should a dispute arise in relation to the risk assessment, and to the Panel that is called upon to review the consistency of that risk assessment with the provisions of the SPS Agreement."[26] Thus, while the Appellate Body has found it "useful" for a risk assessment to describe the methods employed, it does not appear to go beyond that to suggest that such description is mandatory. This would suggest that express reference to each factor listed in Article 5.2 may not be necessary, especially for these declined; instead whether a particular factor be taken into account by a Member can be discerned from the examination of the risk assessment as a whole.

IV. CONCLUSION

23. The Government of Japan thanks the Panel for this opportunity to comment on important issues in this proceeding, and asks that the Panel consider the observations of Japan in reaching its determinations.

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[25] *EC – Biotech (Panel),* at para. 7.3060; *see also EC – Hormones (AB),* at paras. 193–194.
[26] *Australia – Apples (AB)*, at para. 246.