Public Version

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

(DS430)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

September 18, 2013

TABLE OF CONTENTS

TABLE OF EXHIBITS

EXHIBIT NUMBER	LONG CITATION	SHORT CITATION (IF APPLICABLE)
US-143	Statement of David E Swayne	Swayne Supplemental Statement
US-144	Statement of Emi K. Saito	Saito Supplemental Statement
US-145	Statement of Rebecca D. Jones	Jones Supplemental Statement
US-146	Yanbing Li et al., Characterization of an avian influenza virus of subtype H7N2 isolated from chickens in northern China, *Virus Genes*, 33:117–122 (2006)	Li
US-147	Bjorn Olsen et al., Global Patterns of Influenza A Virus in Wild Birds, *Science* 312, 384 (2006)	Olsen
US-148	K. Naeem et al., Avian Influenza in Pakistan: Outbreaks of Low- and High-Pathogenicity Avian Influenza in Pakistan During 2003–2006, *Avian Diseases* 51:189–193 (2007)	Naeem
US-149	Scott Krauss and Robert G. Webster, Avian Influenza Virus Surveillance and Wild Birds: Past and Present, *Avian Diseases* 54:394–398 (2010)	Krauss and Webster
US-150	David L. Suarez, Avian influenza: our current understanding, *Animal Health Research Reviews* 11(1); 19–33 (2010)	Suarez
US-151	Wu Haibo et al., Sequence and phylogenetic analysis of H7N3 avian influenza viruses isolated from poultry in China in 2011, *Arch Virol* 157:2017–2021 (2012)	Haibo
US-152	Peirong Jiao et al., Complete Genome Sequence of an H7N3 Avian Influenza Virus Isolated from Ducks in Southern	Jiao

	China, 86 *Journal of Virology* 7724–7725 (2012)	
US-153	Min Gu et al., Genome Sequence of a Natural Reassortant H5N2 Avian Influenza Virus from Domestic Mallard Ducks in Eastern China, 86 *Journal of Virology* 12463–12464 (2012)	Gu
US-154	Chengmin Wang, Relationship between domestic and wild birds in live poultry market and a novel human H7N9 virus in China, *Journal of Infectious Diseases* (2013)	Wang
US-155	OIE Code, Chapter 5.1	
US-156	Concise Oxford Dictionary	

TABLE OF REPORTS

SHORT FORM	FULL FORM
Australia – Apples (Panel)	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
Australia – Apples (AB)	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
Australia – Salmon (Panel)	Panel Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/R and Corr. 1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS18/AB/R
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
Australia – Salmon (21.5)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*, WT/DS18/RW, adopted 20 March 2000
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 4 August 2000
EC – Hormones (AB)	Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
Japan – Apples (Panel)	Panel Report, Japan – Measures Affecting the Importation of Apples, WT/DS245/R, adopted 10 December 2003, as modified by the Appellate Body Report, WT/DS245/AB/R

Turkey – Rice (Panel)	Panel Report, *Turkey — Measures Affecting the Importation of Rice*, WT/DS334/AB/R, adopted 22 October 2007
Turkey – Textiles (AB)	Appellate Body Report, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999
US – Continued Suspension (AB)	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996

TABLE OF ABBREVIATIONS

ABBREVIATION	FULL FORM
AI	Avian Influenza
DAHD	Department of Animal Husbandry, Dairying & Fisheries, Ministry of Agriculture, Government of India
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
HPAI	Highly Pathogenic Avian Influenza
HPNAI	Highly Pathogenic Notifiable Avian Influenza
LPAI	Low Pathogenicity Avian Influenza
LPNAI	Low Pathogenicity Notifiable Avian Influenza
NAI	Notifiable Avian Influenza
OIE	World Organization for Animal Health
OIE Code	The Terrestrial Animal Health Code of the OIE
SPS Agreement	WTO Agreement on the Application of Sanitary and Phytosanitary Measures
SPS Committee	The Committee on Sanitary and Phytosanitary Measures established under the SPS Agreement
Terrestrial Manual	OIE Manual of Diagnostic Tests and Vaccines for Terrestrial Animals
USDA	United States Department of Agriculture

WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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 Notifiable Avian Influenza ("NAI"), but has offered no risk assessment in support of its measures.

2. The United States explained in its First Written Submission that the World Animal Health Organization ("OIE") has issued recommendations for reporting NAI and for the safe trade of poultry and poultry products with respect to NAI. These scientifically based recommendations do not support the types of import prohibitions India maintains. Because India has not presented any risk assessment to support its major departure from the OIE's science-based recommendations, it is in breach of its obligations under the SPS Agreement.

3. India's response is a contorted and untenable interpretation of the relevant standards in the OIE's Terrestrial Animal Health Code (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.

4. Products that India restricts are not vectors for transmission of LPNAI. The OIE Code reflects this science by allowing trade in the products covered by India's measures. India has not put forward any risk assessment challenging this science. India has no scientific basis for its import prohibitions.

5. India's responses to the other U.S. claims are also unpersuasive. In response to the claims under Article 6, India faults other Members for not having asked India to recognize disease-free areas even though India has categorically disclaimed an ability to do so.

6. In response to the U.S. discrimination claims, India's primary argument is that the United States has challenged the measures India applies to domestic products, and India protests that the United States seeks to have it cull its poultry flock. The United States, however, simply seeks to have India apply measures to imports that are not unjustifiably more stringent than those it applies to domestic products.

7. India's measures have been in place, restricting U.S. exports, for over six years. The United States has shown why these measures are inconsistent with India's obligations under the SPS Agreement, and India has failed to rebut that showing. The Panel should thus find India in breach of the WTO obligations at issue in this dispute.

II. INDIA'S MEASURES

8. India first claims that the United States "assumes that the measure prohibits in perpetuity poultry imports from countries that have reported HPNAI or LPNAI."[1] The U.S. argument, however, is premised on no such assumptions. To be sure, it is not clear from the face of India's measures whether a report of NAI will prompt a perpetual import ban or a ban lasting for some other period. But none of the U.S. arguments in this dispute hinge on the answer to that question. India's measures contradict the OIE Code's recommendations even if they are applied

[1] India's First Written Submission, para. 25.

only for the duration of the period that an exporting Member reports NAI to the OIE, as India asserts.[2] Similarly, even if import bans end upon a notification of disease freedom, India's measures would be more trade restrictive than necessary to achieve India's ALOP, and would cause discrimination against imported products.

9. India also protests that the United States incorrectly alleges that India bans imports on account of detections of LPAI in wild birds.[3] But that is what the text of India's measures requires and is consistent with prior U.S. experience. The United States in its First Written Submission observed that India's veterinary certificates for certain products require attestations that the exporting country is LPAI free.[4] Unlike LPNAI, which by definition exists only in poultry[5] – *i.e.*, in domesticated birds – non-notifiable LPAI is a disease that can exist in either poultry or wild birds. Hence, the plain text of India's certificates demands an attestation that both poultry and wild birds are free from LPAI. As the United States observed, because avian influenza is endemic in wild birds, no veterinarian could make this certification if wild birds fly over any part of the country.

III. 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

10. India's principal, if not sole, defense against U.S. claims in this dispute is its assertion that its measures conform to the OIE Code. As the United States has explained, however, India's measures in fact do not conform to the OIE Code. To the contrary, India's measures amount to a fundamental departure from the OIE Code.[6] As demonstrated in the U.S. First Written Submission, the relevant recommendations in the OIE Code do not support import prohibitions, but actually provide that the products can be safely imported with the proper precautions or control measures.[7] Accordingly, because India's measures contradict these recommendations by imposing prohibitions instead, India cannot avail itself of Article 3.2 of the SPS Agreement

---

2 India's First Written Submission, para. 25.

3 India's First Written Submission, para. 25.

4 U.S. First Written Submission, para. 146 (citing Indian Veterinary Certificate, Chicken/Quail Meat into India, (Exhibit US-52); Indian Veterinary Certificate, Duck Meat (Exhibit US-71); Indian Veterinary Certificate, Turkey Meat (Exhibit US-53)).

5 OIE Code (Exhibit US-1), Article 10.4.1.

6 Indeed, for two products subject to India's measures, (1) live pigs and (2) pathological material and biological products from birds, there are no relevant international standards and thus India has no basis to make a claim of conformity with international standards under SPS Article 3.2.

7 U.S. First Written Submission, paras. 55-61; Annex 1.

11. To avoid this result, India misconstrues both the facts – the content of the OIE Code – and the law – obligations in the SPS Agreement. With respect to the content of the OIE Code, India has asserted that the OIE recognizes India's prerogative to set its own appropriate level of protection ("ALOP") and has drafted the OIE Code with options among which India can select in order to satisfy the ALOP India has chosen for itself.[8] With respect to the SPS Agreement, India asserts that it is entitled to a presumption of conformity with its obligations – and accordingly excused from basing its measures on a risk assessment – because (according to India[9]) its measures incorporate those aspects of the OIE that meet its purported ALOP. Neither assertion is correct.

1. The OIE's Recommendations for Avian Influenza Do Not Reflect Distinct ALOPs

a. <u>The OIE Code's User's Guide and the text of the recommendations are designed to achieve one level of protection: prevention of the disease being introduced into the importing country.</u>

12. As explained in the U.S. First Written Submission, Chapter 10.4 of the OIE Code contains recommendations regarding the safe importation of various products with respect to avian influenza. As an initial matter, 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. Specifically, the User's Guide to the OIE Code contains the following guidance:

> 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. 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.[10]

Based on this statement, as well as the text of the specific AI recommendations, the following points relevant to this dispute are apparent.

13. First, this statement in the User's Guide indicates that the recommendations are designed to prevent the disease from entering into the country and thus to achieve an optimal level of

---

[8] India's First Written Submission, paras. 117-119.

[9] The United States does not agree that India's measures incorporate any part of the OIE Code.

[10] OIE, User's Guide (Exhibit US-117), p. 1 A.2 (emphasis added); *see also* U.S. Responses to the Panel's First Set of Questions, para. 35.

security – full stop. Optimal by definition means "best or most favorable."[11] Thus, there is no indication, as India suggests,[12] that the specific recommendations in the OIE Code amount to a menu of options for achieving different and varying appropriate levels of protection.

14. Second, the recommendations may take into account the nature of the product. This is seen throughout Chapter 10.4 of the OIE Code where there are distinct recommendations for different products. For example, for nearly all the products India bans, there are recommendations in Chapter 10.4 – tailored to the product in question – regarding safe importation.[13]

15. Third, the reference to the animal health status of the exporting country may be a factor to be taken into account with respect to the various recommendations. The exporting country's animal health status is not – as India claims – a reflection that various recommendations in the OIE Code are intended to achieve varying appropriate levels of protection. Regarding avian influenza, there are recommendations specifying how to define and classify the particular animal health status of an exporting country.[14] There are also recommendations with respect to particular products that are refined further with respect to the exporting status of the country. For example, although Article 10.4.7 and 10.4.8 of the OIE Code provide recommendations for the same product (day-old live poultry), these two paragraphs are differentiated by the fact that Article 10.4.7 makes recommendations for importation from a territory whose status is NAI free, while Article 10.4.8 makes recommendations for importation from a territory whose status is HPNAI free.

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

[11] Concise Oxford Dictionary, p. 1004 (Exhibit US-156)

[12] India's Opening Statement at the First Meeting of the Panel, para. 19.

[13] U.S. First Written Submission, para. 128.

[14] *See* OIE Code, Articles 10.4.2, 10.4.3, & 10.4.4.

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*.

16. In short, the recommendations in the OIE Code are designed to achieve a single, consistent appropriate level of protection, *i.e., an optimal level of animal health security*. And, 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. Moreover, 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.[15] The day-old live poultry recommendations noted above illustrate the principle well. If the status of the exporting territory changes from NAI free to

[15] Bruschke & Vallat, "OIE Standards and Guidelines Related to Trade and Poultry Disease," Rev. sci. tech. Off. Int. Epiz, 2008, p. 628 (Exhibit US-47) ("The measures are also designed to prevent the transfer of pathogenic or zoonotic agents without imposing unjustified trade restrictions.")

HPNAI free, trade in day-old live chicks can continue if the certification reflects that a different condition is met – that the parent flocks were kept in a NAI free establishment.

b. India's Assertions That the OIE Code Reflects Different ALOPs is Without Merit.

17. In sharp contrast to the points noted above, India alleges that the OIE Code (i) recognizes India's prerogative to sets its own ALOP;[16] (ii) that the exporting status of a country is an ALOP;[17] 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.[18] India cannot substantiate any of these allegations.

18. With respect to India's first assertion, it generally is not the role of an international standards organization to predetermine a Member's chosen ALOP.[19] And, nothing in the OIE Code indicates otherwise. Rather, as recognized in the WTO Agreement, each Member has the right to set its own ALOP.[20] That right, however, is accompanied by an obligation. Where a Member chooses measures that achieve a higher appropriate level of protection than that achieved by the international standard, the Member has the obligation to ensure that the measure is supported by scientific evidence.[21] The OIE Code is fully consistent with this framework. The User's Guide to the OIE Code takes a similar approach when it states 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."[22]

19. For the second assertion, India does not explain how it can be reconciled with the specific text in the OIE Code. As illustrated with the references to OIE Code Articles 10.4.7 and 10.4.8

---

16 *See, e.g.*, India's First Written Submission, paras. 117-120.

17 *See, e.g.*, India's Response to Panel Question 29(b), fifth paragraph ("As explained in India's First Written Submission the level of protection implicit in the product specific recommendations mentioned above is NAI freedom.")

18 *See,e.g.*, India's First Written Submission, paras. 123-124, 131-132, 135; India's Opening Statement at the First Meeting of the Panel, para. 20.

19 The document India cites for that proposition, "International trade: Rights and obligations of OIE Member Countries," does not claim that the OIE recognizes India's right to set its ALOP, but rather the WTO and that WTO Members "should respect the provisions in the SPS Agreement when setting those measures." (Exhibit IND-4, p.2 fourth paragraph),

20 U.S. Responses to the Panel's First Set of Questions, para. 5.

21 *See, e.g.*, SPS Agreement, Articles 3.3, 2.2, and 5.1.

22 OIE, User's Guide, p.1, A.3 (Exhibit US-117).

above, 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.

20. That the exporting status is simply a factor to be taken into account – and not an ALOP – is also illustrated by those instances in the OIE Code where the relevant recommendation recognizes that the status of the exporting country is irrelevant with respect to the safe importation of a particular product. Article 10.4.19 of the OIE Code is one such example. India claims that its blanket prohibition on poultry meat conforms to Article 10.4.19.[23] The text shows otherwise.

> **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 1.1. and have been found free of any signs suggestive of NAI.

As is evident from the text, the same recommendation applies regardless of whether the exporting territory is classified as NAI or HPNAI free – and that recommendation is for importation with conditions, not for the imposition of an import ban. That the exporting status was simply an irrelevant factor for this product is further confirmed by a report from the OIE Code Commission which noted: "the Code Commission explained that there was no difference in risk between poultry meat from an NAI free and HPNAI free area and therefore the conditions should be the same."[24] Thus, India's assertion that references to NAI or HPNAI free are different ALOPs is incorrect; they are simply factors that are relevant for some products, but not others.

---

[23] India's First Written Submission, para. 140.

[24] OIE, Report of the Meeting of the OIE Terrestrial Animal Health Standards Commission, Feb. 8-12, 2010, p. 16 (Exhibit US-123).

21. With respect to India's third assertion, that Article 10.4.1.10 supports the imposition of a ban, India against cannot reconcile its position against the text of the recommendation. First, there is no language in Article 10.4.1.10 actually suggesting that countries should impose import prohibitions on account of NAI detections in poultry.

> 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.

The recommendation is thus an exhortation to cease a practice ("immediate bans … in response to a notification … of infection with HPAI and LPAI …"), not an endorsement or authorization of any other practice. To save itself, India resorts to its claim that Article 10.4.10 is a recommendation unto itself that it can adopt. Notwithstanding the fact that such an argument is still deficient because Article 10.4.1.10 does *not* recommend the imposition of any import bans, 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.

2. India Cannot Conform with the International Standard by Picking and Choosing from Among OIE Recommendations

22. India also asserts conformity with the OIE Code on the basis that, according to India, its measures incorporate some elements of the OIE Code. This argument has no merit. First, the United States does not agree with India's assertion that its AI measures conform with the OIE Code in any respect. India's argument seems to be based on the notion that the Code does not specifically forbid certain aspects of India's measure. This would not, however, amount to "conformity": international standards generally recommend control measures, they are not primarily aimed at stating what specific control measures should *not* be adopted. (In contrast, the latter is a matter to be evaluated under the SPS Agreement.) Moreover, as the United States has explained, India – rather than adopting portions of the OIE Code – has measures that explicitly contradict it.[25] In particular, the OIE Code contains recommendations for importation of products when countries report LPNAI whereas India maintains import prohibitions in those circumstances.

23. 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. India argues that it (1) does not have to adopt all elements of a relevant international standard in order to claim conformity and (2) it can claim conformity even if its measures reflect a higher ALOP than that reflected in the international standard.[26]

---

[25] U.S. First Written Submission, para. 128.

[26] *See e.g.*, India's First Written Submission, paras. 114, 120,132-133; India's Response to Panel Question 29(a), fourth paragraph.

a. Article 3.2 Requires Consistency with the International Standard.

24. First, 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 the standard. The text of Article 3.2 provides that:

> 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.

This text on its face requires that the measure conform to the standards, guidelines, or recommendations, not just part of them. The Appellate Body in *EC – Hormones* found explicitly that anything less than total adoption precludes the Member from obtaining the rebuttable presumption of consistency under Article 3.2:

> 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 ….[27]

In short, a Member is not obligated to completely adopt an international standard as its SPS measure, but unless it does, it cannot invoke Article 3.2 of the SPS Agreement.

25. In the face of this clear principle, India attempts to justify its approach by arguing that international standards under the SPS Agreement are "recommendatory" and not binding.[28] That argument is a complete *non sequitur*. As discussed above, the United States agrees that a Member need not conform its SPS measures to international standards, and therefore, that the adoption of an international standard is not mandatory. But, 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, the question of whether or not a measure conforms to the international standard does not determine whether or not the measure

---

[27] *EC – Hormones (AB)*, para. 171; *see also US – Continued Suspension (AB)*, para. 694 ("This presumption, however, does not apply where a Member has not adopted a measure that conforms with an international standard."); European Union's Third Party Submission, para. 33 ("In the present case the European Union considers that conformity with the OIE Code standards mean conformity with the notification and regionalization recommendations, and conformity with each product specific recommendation."); Brazil's Third Party Submission, para. 20 ("A Member may not therefore pick and choose which parts of a standard to follow and still argue that the measure conforms to that standard. While there is a presumption on Article 3.2 for measures conforming to international standards, such presumption is not extensive to measures simply based on standards or which apply them partially or liberally.").

[28] India's First Written Submission, paras. 114, 132-133.

may be adopted. Rather, it determines whether a Member must have a scientific basis for adopting the measure.

26. Second, India does not argue that its measure is aligned with any particular conduct put forward in the OIE Code – nor could it – but simply that its measures are not prohibited under the OIE Code. In particular, India seems to place complete reliance on the rejection in Article 10.4.1.10 of the OIE Code of import prohibitions on account of detections in wild birds.[29] By India's logic, a Member may assert its measures conform to an international standard under Article 3.2 of the SPS Agreement unless the international standard explicitly rejects the measures. That is, silence in the international standard with respect to the treatment of a specific product would mean any treatment in a measure would "conform" to the standard. That position of course contradicts the Appellate Body's finding in *EC – Hormones* that noted that under Article 3.2, the Member's measure "would embody the international standard completely" and "converts it into a municipal standard" – not that a Member's measure could do whatever was not expressly prohibited by the international standard.[30] Moreover, in the present case, there are other voices India is ignoring. Specifically, there are product specific recommendations for importation in the rest of the Chapter 10.4 of the OIE Code. These recommendations explicitly provide for the importation of various poultry products from countries reporting NAI, including LPNAI.[31]

27. Third, India's position erroneously conflates Articles 3.2 (measures that "conform" to international standards) and 3.1 (measures that are "based" on international standards) of the SPS Agreement; a position the Appellate Body has already rejected. The section of *EC – Hormones* referenced by India in support of its argument is instructive in this regard. The referenced section discussed Article 3.1 – not Article 3.2 contrary to what India suggests – and found that Article 3.1 does not require measures to conform to international standards.[32] In other words, the Appellate Body recognized that the use of the term "conform" in Article 3.2 imposes a more stringent requirement than the obligation that measures be based on international standards found in Article 3.1. This distinction is not critical in the current dispute, however, because India's measures neither conform to, nor are based on, the OIE Code.

---

[29] *See, e.g.*, India's First Written Submission, paras. 138-140; India's Response to Panel Question 29(a).

[30] *EC – Hormones (AB)*, para. 1710; see also European Union's Third Party Submission, para. 48 ("Of course the OIE Code allows countries to go beyond the stated standards. The SPS Agreement is crafted with the same principle in mind. But if a country decides to go beyond the relevant international standards it should comply with the risk assessment requirements in Art. 5.1 of the SPS Agreement.")

[31] U.S. First Written Submission, para. 51; *see also* European Union's Third Party Submission, para. 47.

[32] India's First Written Submission, para. 133, footnote 176 citing *EC – Hormones (AB)*, para. 165.

b. India Cannot Claim Conformity and Maintain Different Measures than the OIE Code to Achieve a Higher ALOP

28. In claiming consistency with the OIE standard, India also relies on the proposition that India has the sovereign right to decide its ALOP.[33] This argument provides no support for India's positions. First, this is not the issue. The SPS Agreement explicitly provides that Members may choose their own ALOP. A Member's right to do so is not the issue in this dispute. Rather, the issue is where, as India has done here, a Member decides to adopt a measure that departs from an international standard (for reason of a higher ALOP or for any other reason), it must have a scientific basis for its measure.

29. Turning to the specific articles of the SPS Agreement, India's position of allowing Members to maintain disparate measures due to differing ALOPs yet nonetheless assert the measures are in conformity with international standards finds no support in the text of the SPS Agreement. Indeed, the Appellate Body has found that a Member is not entitled to a presumption of conformity under Article 3.2 where the Member chooses a different measure from than the relevant international standard in order to achieve a higher ALOP than the international standard is designed to achieve:

> Article 3.2 provides that SPS measures which conform to international standards shall be deemed necessary to protect human, animal or plant life or health, and shall be presumed to be consistent with the relevant provisions of the SPS Agreement and of the GATT 1994. This presumption, however, does not apply where a Member has not adopted a measure that conforms with an international standard. *Article 3.2 is inapplicable where a Member chooses a level of protection that is higher than would be achieved by a measure based on an international standard*.[34]

Accordingly, India's assertion that it could maintain different measures than the OIE Code and still claim conformity under Article 3.2 is incorrect.

B. India's Measures Breach Article 3.1 Of The SPS Agreement As They Are Not Based On The OIE Code

30. India argues that if the Panel does not find India's measures to conform to international standards under Article 3.2 of the SPS Agreement, then it should find that India's measures are based on international standards under Article 3.1 of the SPS Agreement.[35] However, India's assertion that its measures are based on international standards is flawed for the same reason noted with respect to India's conformity arguments: India is not pointing to actual recommendations that its measures embody.

---

33 India's Opening Statement at the First Meeting of the Panel, paras. 6, 9.

34 *US – Continued Suspension (AB)*, para. 694 (emphasis added).

35 India's First Written Submission, para. 143.

31. In short, there is no basis in the OIE Code and the record of this dispute to support any argument that India's measures are based on international standards. First, India has not adopted any recommendations of the OIE Code.[36] Second, as explained in the U.S. First Written Submission, India's measures either prohibit products for which there is no recommendation in the OIE Code, such as live pigs, or prohibit the importation of products that the recommendation explicitly provides can be imported.[37] Accordingly, India's measures, at best, are either unsupported by the OIE Code's recommendations or in outright contravention of them. Under these circumstances, India cannot claim that its measures are based on international standards, guidelines, or recommendations in accordance with Article 3.1.

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

1. India's Proposed Order of Analysis and its Preliminary Observations Should be Rejected

32. 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.[38] India's logic is that if the Panel finds India not to have breached Article 2.2, it can forego an examination of Articles 5.1 and 5.2. The problem with India's approach is that 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. Therefore, while a breach of Article 2.2 may not necessarily result in a breach of Articles 5.1 and 5.2, a breach of either Article 5.1 or 5.2 in many cases will result in a consequential breach of Article 2.2.[39] Accordingly, a more efficient approach is to start with the specific applications of Article 2.2, *i.e.*, determining whether India's measures are based on a risk assessment in accordance with Articles 5.1 and 5.2, and then determine whether to proceed to see if Article 2.2 has been further breached. India's approach would force the Panel to try and navigate the entirety of what may be required under Article 2.2.

33. 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,[40] and the product

---

[36] *EC – Hormones (AB)*, para. ("Such a measure may adopt some, not necessarily all, of the elements of the international standard.")

[37] U.S. First Written Submission, para. 128; *see also* European Union, Third Party Submission, paras. 41-49.

[38] India's First Written Submission, para. 149.

[39] *Australia – Apples (AB)*, para. 340.

[40] *See e.g.*, U.S. Responses to Panel Questions, paras. 49-51.

scope of the dispute is governed by the product scope of India's measures. In that respect, 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.[41] 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. The fact that the United States noted this specific failure in India's purported justification of its measures in no way indicates any restriction in the scope of this dispute.

2. India Has Failed to Demonstrate That Its Measures Are Based on a Risk Assessment

34. Up to this point in the dispute, 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."[42] As demonstrated above though, India's measures neither "conform to" nor are "based on" 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 Articles 5.1, 5.2, and 2.2 of the SPS Agreement.

35. Aside from India's silence on the issue, the United States would also recall that it has fully met its burden of establishing that India has not based its measures on a risk assessment. With respect to the one document or report that India might have claimed to amount to a risk assessment – namely, the Summary Document – the United States has shown that it is not a valid risk assessment under the SPS Agreement. And, in the course of this dispute, India has agreed that the Summary Document is not a risk assessment.[43] In addition, both the United States and the Panel have pursued every possible avenue for obtaining information from India on any other document that might serve as a risk assessment. To summarize, the following requests have been made to India to identify any possible risk assessment:

- Requests have been made to India in the WTO SPS Committee;[44]
- The United States requested in January 2012 in its Article 5.8 Request that India indicate if its measures were based on a risk assessment and if so, to provide a copy; [45]

---

41 Preliminary Ruling of the Panel (May 22, 2013), para. 3.21.

42 India's Opening Statement at the First Meeting of the Panel, para. 4.

43 India's Response to Panel Question 3 ("India fails to appreciate the merit of a suggestion seeking expert advice concerning a document which is not claimed by India to be its risk assessment or the basis for its measure.").

44 *See generally*, U.S. First Written Submission, para. 80.

- The Panel sought clarification from India at the First Panel Meeting; and
- The Panel requested India in Question 31 to confirm whether India's AI measures are based on a risk assessment, and if so, to provide it to the Panel.

Despite all of these inquiries, India has never identified any risk assessment.[46] Under these circumstances, the United States has more than met its burden of showing that India's measures are not based on a risk assessment.

D. India's Failure To Ensure Its Measures Are Maintained With Sufficient Scientific Evidence Results In An Independent Breach Of Article 2.2

36. 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.

The United States is asserting 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.

37. The Panel in *Japan – Apples*, when considering the meaning of the term "sufficient" noted the following:

> When addressing the meaning of the term "sufficient", we thus enter the realm of the relationship between the phytosanitary measure at issue and the "scientific evidence" relating to the risk that the phytosanitary measure is supposed to address. An adequate relationship is thus required between the restriction on imports of apples applied by Japan and the relevant scientific evidence. Such an adequate relationship would not be satisfied in a situation where only patent insufficiency would be considered as not "sufficient."[47]

---

45 U.S. Article 5.8 Request to India, Q.4 (Exhibit US-4).

46 *Compare Canada – Aircraft (AB)*, para. 202 ("the appropriate inference is that the authority to draw adverse inferences from a Member's refusal to provide information belongs a fortiori also to panels examining claims of prohibited export subsidies. Indeed, that authority seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement: a view supported by the general practice and usage of international tribunals.); *Turkey – Rice (Panel)*, paras. 7.97, 7.106-7.107.

47 *Japan – Apples (Panel)*, para. 8.102

Likewise, the critical question here is whether there is an adequate relationship between India's import prohibitions on account of LPNAI and the relevant scientific evidence. The United States submits no.

38. The scientific evidence the United States draws upon includes the evidence supporting the OIE Code and the studies referenced by the United States in its First Written Submission.[48] In response, India has only pointed to a few items, none of which rebut the U.S. showing that India has breached its Article 2.2 obligation not to maintain measures without scientific evidence. In particular, India cites (i) its assertion that its measure conform to international standards;[49] (ii) the purported practice of other countries;[50] (iii) a study by Jacob Post (the "*Post*" Study),[51](iv) a risk assessment by Australia,[52] (v) a paper by Van den Berg,[53] (vi) a paper by Ziegler,[54] (vii) a paper by Cobb,[55] and (viii) its assertions regarding the import of certain studies submitted by the United States.[56] The United States addresses each in turn.

39. First, India's conformity argument fails for the reasons noted above. Specifically, there is nothing in Chapter 10.4 of the OIE Code that actually recommends import prohibitions on *any* products from countries reporting LPNAI.

40. Second, the purported practice of other countries is irrelevant. First, those countries, like Australia, may not agree with how India has characterized its practices.[57] More pertinently, the particular practice of states provides no insight in and of itself regarding the scientific basis (if any) for the practice

---

48 *See* Swayne Statement, pp.1-2 (referring to various scientific studies in support of assertions) (Exhibit US-97).

49 India's First Written Submission, paras. 161-166.

50 India's First Written Submission, paras. 167-174.

51 India's First Written Submission, paras. 156, 175-177.

52 India's First Written Submission, para. 179-180

53 India's First Written Submission, para. 181, n. 273 (Exhibit IND-109).

54 *Id*. (Exhibit IND-110)

55 India's First Written Submission, para. 181, n. 275 (Exhibit IND-111).

56 India's First Written Submission, para181, n. 272, 273, 276 referencing Exhibit US-20; Exhibit US-31; and Exhibit US-103

57 Australia's Third Party Submission, para. 15; Australia's Response to Question from India (Sept. 2, 2013).

41. Third, the *Post* study cited by India is also inapposite with respect to supporting import prohibitions on account of LPNAI for two reasons. One, the study did not concern infection in poultry muscle or eggs or any particular tissue that it traded and is subject to India's measures. Thus, even if the study provides "scientific evidence," that evidence cannot be "sufficient" to maintain India's measures if it is irrelevant to the imported product that purportedly poses the risk against which the measures protect. Two, the study's design precludes it from having any commercial relevance. As explained in an additional statement by Dr. David Swayne, the conditions in the study are highly artificial, such that the findings have no applicability with respect to commercial trade in poultry products.[58] These errors include, *inter alia*, the lack of immunohistochemistry use in the study, which is necessary to confirm that systemic infection took place; that the sample, one day old chicks, was inapposite since they are biologically immature and exposure in the field occurs for chickens when they are 3 weeks of age or older; and that the test subjects would have had their infections clear by the time they would have been subject to slaughter.[59]

42. Fourth, India relies on a risk assessment. As an initial matter, a risk assessment is not scientific evidence; it is an evaluation that relies on scientific evidence. In any event, India misreads the Australian Risk Assessment as clarified by the Government of Australia.[60] In particular, Australia explained that:

> 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.[61]

Accordingly, India cannot rely on the Australian Risk Assessment – which supports measures that allows import – as indicating there is scientific evidence in support of its measures.

43. Fifth, the Van Den Berg paper, rather than supporting import prohibitions, suggests that safe trade is viable. The reference India points to in that paper notes the following:

> The risk of introducing LPAI infection into a country which imports hatching eggs from a country not known to be free from LPAI is mainly related to faecally contaminated materials (e.g. trays, packaging materials, etc.) which may be re-used in the importing country. However, legal requirements for fumigation and egg packaging are *likely to reduce these risks to negligible levels*.[62]

---

58 Swayne Second Statement (Exhibit US-143).

59 *Id*., para. 4 (Exhibit US-143)

60 Australia's Third Party Submission, para. 15.

61 Australia's Third Party Statement, para. 7.

62 Exhibit IND-109, p. 97 (emphasis added).

Thus again, the scientific evidence suggests control measures that allow trade rather than outright prohibitions.

44. Sixth, the Ziegler study does not even address LPAI transmission via any particular products or even reference the possibility of a ban. To the contrary, the analysis of the particular outbreak that was reviewed in the study appears to suggest no commercial impact:

> Further separation between the layer and broiler industries (different feed suppliers, service people, de-livery vehicles, etc.) may also be a factor in failure of the disease to affect any commercial broiler flocks.[63]

45. Seventh, the only reference in the Cobb Study regarding LPAI transmission reinforces the notion that a ban is unwarranted:

> Swayne and Beck (174) demonstrated that LPAI virus could not be found in the blood, bone marrow, or breast or thigh meat of experimentally infected poultry, and that feeding breast or thigh meat to a susceptible bird did not transmit infection.[64]

Far from supporting a rational relationship between the scientific evidence and India's measures, the Cobb Study provides simply further evidence that India's measures are inconsistent with Article 2.2.

46. Eighth, India cites three U.S. exhibits: (1) a Fact Sheet by the Canada Food Inspection Agency (Exhibit US-20); (2) a study by Swayne and Thomas (Exhibit US-31); and (3) a study by Swayne & Beck (Exhibit US-103). The first exhibit make no reference to LPNAI transmission by any particular products and simply notes that avian influenza can spread to birds through contact with infected poultry and poultry products, not that a ban is warranted as a result.

47. The second exhibit actually provides scientific evidence that undermines the notion that scientific evidence supports an import ban. In particular, it notes:

- Eggs products in an LPNAI affected country, zone, or compartment could be imported into an NAI free country if the eggshell surface were sanitized to eliminate any LPNAI virus and eggs were transported in new packing materials.[65]

- After listing the following products in order of risk (highest to lowest): live poultry; live birds other than poultry; day-old live poultry; hatching eggs; eggs for human consumption; eggs products; products derived from poultry such as semen, raw meat, and other untreated products, and products treated to inactive NAI

---

63 Exhibit IND-110, p. 148.

64 Exhibit IND-111, p. 151.

65 Exhibit US-31, p. 502.

> virus, the study notes "If the product is from an NAI *affected* country, zone, or compartment, treatment to inactivate NAI can be used to eliminate the risk provided the exporter has taken appropriate steps to prevent recontamination of the final product, as recommended by the OIE."[66]

Rather than provide scientific evidence for India's measures, the study validates the use of OIE recommendations to allow safe trade from countries affected with NAI.

48. The final exhibit noted by India, a Swayne & Beck study from 2004, does note that another study suggested there may be a possibility that acutely infected hens could deposit LPAI virus in eggs, but also noted "but to date LPAI virus infected eggs have not been identified, which suggests the frequency of virus infection and the potential levels of virus in the such eggs may be low."[67] As explained in the U.S. First Written Submission though, other studies, including by the same scientist that occurred afterward, note the scientific evidence is that vertical transmission to eggs does not occur.[68] In short, India cannot show that its measures have *any* relationship to the scientific evidence, let alone an adequate one.

49. On a final note, the United States notes there is important context regarding the extent of any science behind India's measures. Specifically, the United States in its Article 5.8 Request to India asked it to identify the scientific evidence upon which its import restrictions are based.[69] India did not do so. As recognized by the Appellate Body, such a failure creates a presumption that the Member imposing the measure did not have scientific support for its measure.[70] In short, the United States has provided scientific evidence showing that India's measures are not based on scientific evidence. Not only has India failed to rebut this evidence, but its failure to respond to the Article 5.8 requests further confirms that India has no such evidence.

---

66 *Id*.

67 Exhibit US-103, p. 517.

68 U.S. First Written Submission, para. 58, n. 88.

69 U.S. Article 5.8 Request to India, Q.4 (Exhibit US-4).

70 *Japan – Agricultural Products II (AB)*, para. 137 ("Raising a presumption that there are no relevant studies or reports is not an impossible burden. The United States could have requested Japan, pursuant to Article 5.8 of the SPS Agreement, to provide 'an explanation of the reasons' for its varietal testing requirement, in particular, as it applies to apricots, pears, plums and quince. Japan would, in that case, be obliged to provide such explanation. The failure of Japan to bring forward scientific studies or reports in support of its varietal testing requirement as it applies to apricots, pears, plums and quince, would have been a strong indication that there are no such studies or reports.")

E. India's Measures Breach Article 5.6 Because There Are Reasonably Available And Less Trade Restrictive Measures That Satisfy Its ALOP

50. India claims the U.S. claim under Article 5.6 of the SPS Agreement is "want of argument."[71] But a straightforward claim does not need extensive elaboration. The U.S. position can be summed up as follows:

- The OIE Code contains scientifically based recommendations that address the risk of avian influenza with respect to trade in various products, including those India bans from countries reporting NAI. The world-wide use of these recommendations demonstrates their application is technically feasible. Moreover, since it is the exports that are subject to control measures in the OIE Code, there is limited, if any, economic barrier to their adoption by importing countries.[72]

- While it appears India's actual ALOP is modest, these recommendations would achieve even a high ALOP.[73] As noted in the OIE User's Guide, OIE recommendations are designed to prevent the disease in question being introduced into the importing country.[74]

- The OIE Code's recommendations are less trade restrictive than India's measures in two respects. One, they permit trade in products that India presently prohibits from importation from countries whenever they report outbreaks of NAI. Two, the OIE Code provides for zoning with respect to avian influenza. Accordingly, while India's measures result in country-wide trade disruptions, the OIE Code provides that any additional trade measures can be applied only to the affected areas.[75]

In short, 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.

51. India's principal complaint is that the United States has purportedly mischaracterized its ALOP.[76] But the problem is that India has never specified what its ALOP actually is.

---

71 India's First Written Submission, para. 235.

72 U.S. First Written Submission, paras. 134-135.

73 U.S. First Written Submission, paras. 136-139.

74 Exhibit US-117.

75 U.S. First Written Submission, para. 140.

76 India's First Written Submission, paras. 235, 240-242.

Accordingly, the United States will begin its response to India's arguments by addressing that issue. Then, the United States will address India's arguments with respect to the specific elements of an Article 5.6 claim. Finally, the United States will explain why India's breach of Article 5.6 also results in a consequential breach of Article 2.2.

1. India Has Failed to Specify its ALOP – But One Can Be Inferred from its Domestic Measures

52. As noted, in evaluating a claim under Article 5.6, the ALOP of the Member maintaining the SPS measures should be identified. Here, instead of explaining, based on record evidence, what India believes its avian influenza associated ALOP to be, India complains at length about the purported failure of the United States to properly identify India's ALOP. The United States finds India's assertion puzzling for two reasons. First, as the Member maintaining the measure, it is India's responsibility to explain, based on the measures it has adopted, what India's ALOP is with respect to avian influenza.[77] Because India has failed to do so, the United States has no other option but to infer an ALOP from the record evidence. Second, the United States explicitly requested through an Article 5.8 request that India identify its ALOP.[78] India, however, has failed to respond. Accordingly, India's grievance is simply one of its own making.

53. In this dispute, 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."[79] Neither are true ALOPs. The first is simply an objective or characterization of India's measure. The second is simply the status of an exporting territory under the OIE Code.[80]

54. An ALOP is defined in 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.[81]

The Appellate Body has explained the relationship between an ALOP and a measure:

---

[77] *See also* European Union's Third Party Submission, para. 79 ("In the present case India has not expressly stated it appropriate level of protection (ALOP).")

[78] U.S. Article 5.8 Request to India, Q. 6 (Exhibit US-4)

[79] *See e.g.*, India's Opening Statement at the First Meeting of the Panel, para. 28; India's Response to Panel Question 35(c).

[80] OIE Code, Article 10.4.3 (Exhibit US-1).

[81] SPS Agreement, Annex A, para. 5; *see Australia – Salmon (AB)*, para. 206 (The level of protection may be expressed quantitatively or qualitatively.).

> The words of Article 5.6, in particular the terms "when establishing or maintaining sanitary ... protection", demonstrate that the determination of the level of protection is an element in the decision-making process which logically precedes and is separate from the establishment or maintenance of the SPS measure. It is the appropriate level of protection which determines the SPS measure to be introduced or maintained, not the SPS measure introduced or maintained which determines the appropriate level of protection. To imply the appropriate level of protection from the existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member.[82]

Moreover, the Appellate Body has additionally explained that Members such as India are obligated to determine their ALOP:[83]

> We recognize that the SPS Agreement does not contain an *explicit* provision which obliges WTO Members to determine the appropriate level of protection. Such an obligation is, however, implicit in several provisions of the SPS Agreement, in particular, in paragraph 3 of Annex B, Article 4.1[161], Article 5.4 and Article 5.6 of the SPS Agreement.[162] With regard to Article 5.6, for example, we note that it would clearly be impossible to examine whether alternative SPS measures achieve the appropriate level of protection if the importing Member were not required to determine its appropriate level of protection.
>
> We thus believe that the SPS Agreement contains an implicit obligation to determine the appropriate level of protection. We do not believe that there is an obligation to determine the appropriate level of protection in quantitative terms. This does not mean, however, that an importing Member is free to determine its level of protection with such vagueness or equivocation that the application of the relevant provisions of the SPS Agreement, such as Article 5.6, becomes impossible. It would obviously be wrong to interpret the SPS Agreement in a way that would render nugatory entire articles or paragraphs of articles of this Agreement and allow Members to escape from their obligations under this Agreement.

---

161 Reasonable questions from interested Members within the meaning of paragraph 3 of Annex B can arise, in particular, with respect to the application of Article 4 of the SPS Agreement. Articles 4.1 and 4.2 imply, in our view, a clear obligation of the importing Member to determine its appropriate level of protection

82 *Australia – Salmon (AB)*, para. 203.

83 *Australia – Salmon (AB)*, paras. 204-206

> [162] Furthermore, it could be argued that an implicit obligation for a Member to determine the appropriate level of protection results also from Article .8 and Article 12.4 of the SPS Agreement.
>
> ----------

In short, the Appellate Body has made clear that neither the Panel nor the United States should be in the present situation where they are left to surmise India's ALOP. Rather it is India that has the obligation to determine its ALOP, and to identify it with at least sufficient precision that an evaluation under Article 5.6 is feasible.

55. India having failed to do so, both the United States and the Panel have no option – in applying Article 5.6 – other than to infer an ALOP based on the record evidence in this dispute. As discussed in the U.S. First Written Submission, the India's ALOP can in fact be determined by examining its domestic measures.[84] India takes exception to this approach by arguing its domestic measure, the NAP 2012, is not an SPS measure under the SPS Agreement.[85] India has no basis for this assertion. The NAP 2012 is a measure applied to protect animal life or health within the territory of India from risks arising from the spread of diseases or disease-carrying organism, and thus falls squarely within the definition of an SPS measures as set out in paragraph 1 of Annex A of the SPS Agreement.[86] These domestic measures are a reliable indicator of India's ALOP with respect to AI, because India is willing to adopt measures that achieve this ALOP with respect to domestic products, but has not adopted measures with respect to domestic products that might be called for under some higher ALOP. With those points in mind, the United States reiterates that based India's domestic measures – especially the limited surveillance – that 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

56. 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."[87] 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

---

[84] U.S. First Written Submission, paras. 157-159.

[85] India's First Written Submission, para. 241.

[86] The United States notes the contradiction between India's position for this argument – that the measure is outside the purview of the SPS Agreement – and that made in India's second preliminary ruling request where India claimed the U.S. Article 2.3 challenge must fail because the United States did not explicitly name the NAP 2012 as a measure in its Panel Request. India's First Written Submission, paras. 78-81

[87] Exhibit US-117.

choose from, since it precludes entry of the disease into the importing country. In this respect, even if one accepted India's purported statements that it should be allowed to specify its ALOP in terms of preventing ingress and establishment of LPNAI,[88] then application of the OIE Code should suffice.

57. 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.[89] The United States has already explained why India's interpretation of the OIE Code is misplaced. To eliminate any confusion though, the United States identifies the pertinent recommendations in the OIE Code. First, there are the product specific recommendations for avian influenza in Chapter 10.4.3.

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	Articles 10.4.21

[88] India's First Written Submission, para. 245.

[89] India's First Written Submission, paras. 246-248.

semen of domestic and wild birds including poultry.	Articles 10.4.17 and 10.4.18

India has not asserted that application of any of the foregoing recommendations would result in entry, establishment, or spread of LPNAI nor has India pointed to any scientific evidence that these recommendations could do so.

58. Second, the OIE Code also has recommendations with respect to zoning and compartmentalization.[90] In other words, 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. It is important to note that zoning is fully compatible with a high ALOP.[91] Considering that India applies zoning internally, or claims to, with respect to NAI, there is no reason it would be ineffective in achieving India's ALOP. India's only response is that it is under no obligation to recognize zones on its own authority.[92] 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. Once India complies with its WTO obligation to recognize the possibility of disease-free areas, India may establish its own procedures for recognizing zones in exporting countries.

3. The Recommendations in the OIE Code Are Reasonably Available

59. As noted in the U.S. First Written Submission, the OIE Code's product specific recommendations are reasonably available.[93] Countries around the world already employ the recommendations to protect themselves from the risks of avian influenza. Moreover, the OIE Code recommendations present no additional burden upon India. India already requires veterinary certificates for import; the key distinction is simply what is being attested to.

60. 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.[94] As explained in its response to Panel Question 36, the United States is not making such a request. The United States would also add that India's descriptions of its measures indicate that India is presently placing its "full faith" on the word of exporting countries that they are free of NAI. In particular, 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

---

90 Exhibits US-50 & US-51. Additionally, the product specific recommendations themselves provide that they can be applied at the level of a country, zone, or compartment.

91 *See also* Australia's Third Party Statement, para. 5.

92 India's First Written Submission, para. 251.

93 U.S. First Written Submission, paras. 134-135.

94 India's First Written Submission, para. 255.

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.

61. Zoning and compartmentalization is also reasonably available. Countries around the world practice it presently. Moreover, 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."[95] Contrary to what India asserts, no one is asking that India go out and recognize zones on its own initiative.[96] What is being asked is that India allow for the recognition of zones and compartments rather than maintain measures that are applied on a country-wide basis.

4. The Recommendations in the OIE Code Are Less Trade Restrictive

62. Finally, 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 amount of time is of course more trade restrictive than allowing trade. The same principle applies with respect to zoning. It is of course less trade restrictive to ensure that controls are applied only on the territories where they are necessary rather than broadly on a country as a whole.

5. India's Breach of Article 5.6 Should Result in a Consequential Breach of Article 2.2

63. India summarily contends that a breach of Article 5.6 should not result in a consequential breach of Article 2.2 without engaging in any substantive analysis of the provisions or the specific facts here. Instead, India asserts that such findings are precluded because the provisions do not reference one another.[97] There is no requirement that the provisions reference one another in order to find a consequential breach. If such were the case, a breach of Articles 5.1 and 5.2 could not lead to consequential breaches of Article 2.2, but that is precisely what the Appellate Body has found occurs.[98]

64. The key inquiry is to examine the obligations at issue with respect to each of the provision in order to determine whether a consequential breach has occurred. Article 5.6 provides:

---

95 OIE Code, Article 4.3.2 (Exhibit US-50).

96 India's First Written Submission, para. 251.

97 India's First Written Submission, para. 258.

98 *Australia – Salmon (AB)*, paras. 127-138.

> 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.

Article 2.2 provides:

> 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.

The italicized language implicates similar obligations. The United States is submitting that 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. In other words, 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.

65. The particular facts in this instance support precisely such a finding. As demonstrated above, application of the OIE Code will achieve India's ALOP. India does not appear to dispute that its ALOP is taken with respect to animal health or life, *i.e.*, the protection of its poultry sector. Accordingly, India's measures – import prohibitions – are measures that are applied beyond the extent that is necessary to protect animal or human health. Thus, at least in this instance, India's breach of Article 5.6 also results in a breach of Article 2.2.

F. India Has Breached Its Obligations Under Article 6 of The SPS Agreement

66. Throughout this dispute, India has offered a variety of excuses for its failures to "ensure that [its] sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area … from which the product originated" and to "recognize the concepts of … disease-free areas and areas of low … disease prevalence" with respect to AI. Foremost among these is India's argument that it had no need to comply with these obligations because no other Member presented it with a proposal—and supporting information—for the recognition of specific disease-free areas. However, this does not justify India's failure to abide by its obligations under Article 6 of the SPS Agreement. 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

67. The text of Articles 6.1 and 6.2 make clear that they impose obligations that exist independently of any request consistent with Article 6.3 to recognize any specific pest- or disease-free areas. Article 6.1 provides that:

> 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[.]

That the text 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. The question of whether a particular area presents characteristics of one type or another is a different issue—one for which information supplied by the exporting country will be relevant. But 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.

68. The text of Article 6.2 is likewise clear that it imposes obligations independent of and antecedent to any request for recognition of special status for a given area. Article 6.2 provides that:

> Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence[.]

The obligation under this Article applies regardless of whether another Member has ever requested the Member to accept that any particular area is disease-free. Rather, it requires recognition of "concepts"—specifically, the "concepts of pest- or disease-free areas and areas of low pest or disease prevalence." This is in contrast to Article 6.3, which provides for how a Member is to substantiate any claim that an area is pest or disease-free, or 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

69. 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. As early as 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"[99] In its April 2007 response, the United States explained that: "Requiring an entire country to be free of HPNAI is not consistent with the OlE Terrestrial Animal Health Code or the SPS agreement."[100] India did not send a response to the April 2007 U.S. comments until 2010.[101] In the meantime, the United States in 2009 sent India comments on S.O. 2208(E), one of the predecessor orders to S.O. 1663(E)—comments which took issue with the country-based application of India's measures.[102] India's response to the April 2007 comments responded to these comments as well.

70. India's 2010 document indicated that India was [[[103] [104] [105]]]

71. As the United States has explained, both before and after India's 2010 response to the U.S. correspondence of April 2007, India's failure to apply its AI measures on a less-than-country-wide basis was raised in meetings of the SPS Committee.[106] In those meetings, India's delegate never indicated that this complaint was ill-founded and that India would consider applications from Members seeking regionalized treatment for their imports.[107] As recently as the May 2012 meeting of the OIE, moreover, the Indian delegate criticized the OIE Code's avian influenza chapter, asserting that for India "the concept of zoning looked irrelevant as far as avian influenza was concerned."[108]

---

[99] Letter from Mr. R.K. Chaudary to Ms. Deepa Dhankar (Jan. 9, 2007), p.3, box 6 (Exhibit US-124); *see also* Exhibit US-120, p.5. The Indian statement immediately below this one (*see* exhibit US-124, p.3, box 7) makes clear that "uniform" refers to the fact that the requirement is applied to all countries.

[100] Letter from Holly Higgins to Mr. R.K. Chaudary (Apr. 10, 2007), p.5 (Exhibit US-120).

[101] Exhibit IND-121, p.1.

[102] *See* Letter from Mr. Marc Gilkey to Mr. Arvind Kaushal (Oct. 20, 2009) (Exhibit US-141).

[103] Exhibit IND-121, pp. 23 & 24.

[104] Exhibit IND-121, p. 14, box 1.

[105] [[ ]]

[106] Exhibit US-82, para. 37 ("The European Union also urged India to recognize the principle of regionalisation[.]"); Exhibit US-83, para. 26 ("The European Union called on India to … recognise the principle of regionalization as foreseen under the SPS Agreement."); Exhibit US-84, para. 39 ("The European Union also requested India to recognize the regionalisation principle of the SPS Agreement[.]"); Exhibit US-85, para. 38 ("Moreover, India did not recognize the regionalization principle[.]"); Exhibit US-86, para. 40 ("The European Communities requested India to … recognize the regionalization principle as applied in the European Communities."); Exhibit US-87, para. 43 ("The European Communities regretted that India did not adhere to the principle of regionalization[.]").

[107] Exhibits US-81, US-82, US-83, US-84, US-85, US-86, and US-87.

[108] OIE, 80th General Session FR (Exhibit US-80), para. 231.

72. Despite receiving repeated requests not to apply its measures on a country-wide basis, including at meetings of the WTO SPS Committee, India repeatedly promulgated new iterations of its avian influenza measures that on their face applied to products from anywhere in a country reporting NAI. S.O. 1663(E), the iteration of India's measures currently in force, like its predecessors, on its face applies on a country-wide basis. S.O. 1663(E) prohibits the import of some products into India "from all *countries* in view of Notifiable Avian Influenza" and prohibits the import into India of other products "from the *countries* reporting Notifiable Avian Influenza."[109] Moreover, 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*.[110] 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 over the years to requests that it recognize the applicability of the concept of disease- free areas to AI make clear that India is not overlooking the plain text of S.O. 1663(E) and its predecessor Notifications and applying the concept with respect to NAI through some other means.

73. 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 has pointed to broad provisions that simply 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.[111] India cites section 3 of that Act,[112] which provides that:

> 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, of any livestock 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.

It also cites section 3A, which provides that:

> 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

---

109 Exhibit US-80 (emphasis added).

110 *See, e.g.*, Indian Veterinary Certificate, Chicken/Quail Meat into India, (Exhibit US-52); Indian Veterinary Certificate, Duck Meat (Exhibit US-71); Indian Veterinary Certificate, Turkey Meat (Exhibit US-53).

111 *See* India's Response to Panel Question 43(a).

112 *See* Exhibit US-114.

> import into the territories to which this Act extends, of any live-stock product, which may be liable to affect human or animal health.[113]

74. These legal 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 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. Moreover, the measures at issue in this dispute—those found in S.O. 1663(E)—apply on a country-wide basis, and hence are not adapted to the sanitary characteristics of the areas from which products originate. Sections 3 and 3(a) of the Livestock Act appear to give India the power to promulgate additional measures, and do not in any way undermine the fact that the measures at issue do not meet India's obligations under Article 6.1 of the SPS Agreement.

75. That India has not "recognize[d] the concepts of … disease-free areas" with respect to AI and is failing to "ensure that [its] sanitary … measures are adapted to the sanitary … characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which [an imported] product originated" 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 from India's failure to follow the very first step outlined by the SPS Committee for the consideration of applications to recognize specific areas as disease-free.[114] These Guidelines to Further the Practical Implementation of Article 6 provide, as their first recommendation, that:

> Importing 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 areas or areas of low pest or disease prevalence.[115]

76. 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, the Guidelines to Further the Practical Implementation of Article 6 explain that an:

> [I]mporting Member should, upon request, enter into discussions with the exporting Member with the aim of clarifying the importing Member's general

---

[113] *See* Exhibit US-115.

[114] These guidelines make explicit that they "do not add to nor detract from the existing rights and obligations of Members under the Agreement nor any other WTO Agreement" and "do not provide any legal interpretation or modification to the Agreement itself." G/SPS/48, para. 2. However, they do provide useful guidance on the practical functioning of the process for recognizing disease-free areas.

[115] G/SPS/48, para. 4.

> process and the information generally required to facilitate a request for the recognition of a pest- or disease-free area or area of low pest or disease prevalence.[116]

As noted above, however, when approached about recognizing the applicability of the concept of disease free areas with respect to AI and ensuring that its AI measures were adapted to particular regions, India, rather than commencing discussions to clarify its process to recognize such 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.

77. In sum, taken in combination, the facts that (i) India has never published any 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 instead of commencing discussions to explain its process, 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 Categorically to Apply Its NAI Measures to Areas Smaller Than Countries

78. In addition to relying on Article 6.3, India, in its response to Panel Question 46, seems to suggest that Article 6.1 lets it choose, at its discretion, whether the "area" whose sanitary or phytosanitary characteristics a measure is adapted to, will be "all of a country, part of a country, or all or parts of several countries." India claims that it has simply chosen to adapt its measures to the NAI status of an exporting country. India's interpretation of what the SPS Agreement permits is illogical. If Members had unchecked discretion to define the relevant "area" for purposes of determining whether a disease is absent or present in it, then the obligations of Article 6 would be meaningless. Rather, Article 6.2 provides that the "[d]etermination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls." This supports the conclusion that an "area" for purposes of Article 6.1 could be defined by a combination of several different characteristics, and that to ensure adaptation of measures to the sanitary 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. As India's measures do not do so, and India has refused requests to do so, India's measures breach Article 6.1.

---

[116] G/SPS/48, para. 13.

79. Similarly, in its responses to the Panel's questions, India appears to argue that the OIE Code exempts it from having to recognize HPAI- or LPNAI-free areas, or adapt its NAI measures to areas smaller than countries. According to India, the OIE Code supports requiring that the entirety of an exporting country be free of a disease whenever that disease is not present in the importing country. The OIE Code, however, does no such thing.

80. India's proposed interpretation is strained and unsupportable. India starts with the OIE Code's statement that an "*international veterinary certificate* should not include requirements for the exclusion of pathogens or animal *diseases* which are present in the *importing country* and are not subject to any *official control programme*."[117] This is rather unexceptional – if the importing country has the disease and does not control for it, then it follows that the country should not control imported products for that disease either. And India agrees, noting that "an importing country cannot seek from an exporting country freedom from a disease which is already present in the importing country and is not subject to an official control program."[118] India, however, then turns this around to argue that the OIE Code can be read to imply support for an interpretation that the reverse is also true: i.e., that when a disease is not present in the importing country, the OIE Code recommends demanding that the entirety of the exporting country be free of the disease.[119] But this does not follow. Not only does the OIE Code not speak to this situation, there is no logic in inferring that this part of the OIE Code amounts to a recommendation that countries apply country-wide import bans on account of diseases present in the exporting country, but not in the importing country. Indeed, with respect to NAI, there are relevant, disease-specific international guidelines which provide that AI is a disease for which zoning and compartmentalization can be safely applied.

81. 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."[120] Thus, under the OIE Code, AI-related requirements can be applied on a zone or compartmental basis[121]—and nothing in the

---

117 OIE Code, Article 5.1.2.2 (emphasis in original).

118 India's Response to Panel Question 45.

119 *Id.*

120 Exhibit US-1.

121 As the United States has explained, the OIE Code does not provide for imposition of import bans due to detections of LPNAI. However, to the extent that the Code permits the requirement of additional attestations in veterinary certificates on account of either HPAI or LPNAI, the Code is clear that these requirements can be applied on a zone or compartment basis.

The United States would note that, contrary to India's assertions (*see* India's First Written Submission, paras. 271-275), there is no contradiction between the U.S. argument that India's imposition of any LPNAI-based import bans breaches the SPS Agreement, and the U.S. argument that India breached the SPS Agreement by failing to regionalize its LPNAI-based import bans. While India's LPNAI-based

Code qualifies this conclusion on the basis of an importing country's disease status. In any event, India's argument related to disease-free countries is irrelevant to India's situation: not only is India unable to claim that it is LPNAI-free, but India freely admits that it has had numerous outbreaks of H5 HPAI, which is simply the more virulent flavor of H5 NAI. The relevant disease, NAI, occurs in India.

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

82. There are two basic, striking contrasts between, on the one hand, the measures that the United States has challenged – *i.e.*, the avian influenza measures that India applies to imported products – and on the other hand, those that India applies with respect to domestic products:

1) First, 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) Second, 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 – really HPAI, as India does not detect LPNAI – India restricts trade in products only from a limited zone surrounding the detection.

83. 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 of the SPS Agreement.

84. India responds with a variety of arguments that fundamentally misunderstand the U.S. claims under Article 2.3. Perhaps most significantly, India repeatedly confuses the measure at issue. India casts the U.S. discrimination claim as a challenge to its domestic measures. Yet the opposite is true. Like all other claims in this dispute, the U.S. claim under Article 2.3, challenges the measures that India applies to imported products. Indeed, as the Panel's Preliminary Ruling notes,[122] the measures challenged in this dispute are those that "prohibit the

---

import bans are neither consistent with the OIE Code nor supported by a risk assessment, and therefore breach provisions of the SPS Agreement addressed in earlier sections of this Second Written Submission, India's unwillingness to consider application of those bans on a less-than-country basis *also* amounts to a breach of Article 6 of the SPS Agreement.

[122] Preliminary Ruling of the Panel (May 22, 2013), para. 3.19.

importation of various agricultural products into India."[123] At no point has the United States asserted that the measures India applies to domestic products breach Article 2.3 – or any other Article – of the SPS Agreement or the GATT 1994, nor has the United States requested a recommendation from the Panel with respect to these measures.

85. India's defense of the measures that it applies to domestic products is, however, revealing. India claims that the United States "is essentially suggesting that India apply similar measures in the event of a domestic outbreak of NAI as it does for imports."[124] India adds that "[t]his 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" in the event of an NAI detection[125] India thus believes that the domestic measure equivalent to those that 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." Obviously, India does not do this. By its own account, India thus applies less favorable treatment to foreign products than it applies to domestic products.

1. India's LPAI-Based Import Bans are Discriminatory

86. The United States has explained that India's measures unjustifiably discriminate against imported products by banning them from India 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 domestic poultry flocks. As one piece of evidence of the deficiency of India's surveillance with respect to LPNAI, the United States highlighted the fact that since the OIE instituted a notification requirement for some types of low pathogenic avian influenza, India has never once notified a detection of LPNAI in India, even though it has notified over ninety outbreaks of HPAI. The United States observed that it is not plausible that, during a period when India had over ninety HPNAI outbreaks, there were no cases of LPNAI in India.[126]

87. India has responded to the U.S. assertions about the inadequacy of its surveillance for LPNAI by arguing strenuously that LPNAI is exotic to India. India's evidence however does not demonstrate this. More importantly, though, India's response misses 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

---

123 U.S. Panel Request, p.1.

124 India's First Written Submission, para. 209.

125 India's First Written Submission, para. 209; *see also,* India's Opening Statement at the First Meeting of the Panel, para, 44.

126 U.S. First Written Submission, para. 176 (citing Exhibits US-92 and US-106).

forward with respect to its surveillance programs does not suggest that they are of a type capable of reliably detecting LPNAI.

a. India Cannot Support its Contention That LPNAI Never Occurs in India

88. The United States explained in its First Written Submission that LPNAI is far more common than HPAI,[127] and that HPAI develops through genetic mutations from LPAI viruses.[128] India has reported over ninety outbreaks of HPAI since 2006. It is accordingly implausible that India has never had LPNAI.

89. In response, India has advanced the hypothesis that the South Asia region is somehow unique with respect to LPNAI, and that accordingly all HPAI incidents in India were the result of introduction of the virus into India by migratory birds, not of mutations from LPNAI occurring within India. India has offered no evidence that this is the case. However, even if it were correct that all HPAI incidents resulted from introduction of HPAI by migratory wild birds, there is no reason to think that the ecology of the region is unique in a way that would lead wild birds to spread HPAI but not H5 or H7 LPAI. Indeed, as HPAI results from mutations from LPAI, bird migrations that bring into India H5N1 HPAI – the kind of HPAI that India has experienced[129] – are likely to also bring into India birds exposed to H5 or H7 LPAI.

90. Many species of LPAI wild bird vectors undergo long distance migrations between countries. During migrations, birds from different populations come in contact with one another, allowing for LPAI virus to transmit to new bird populations, and thus, to new geographical areas.[130] LPAI H5/H7 detections have been reported by both Pakistan[131] and Sri Lanka,[132] and numerous NAI detections have been reported in China.[133] These are all countries which border

---

127 U.S. First Written Submission, para. 175.

128 U.S. First Written Submission, para. 32. *See* Swayne, Epidemiology, p. 64 ("Historically, HPAI viruses have arisen from LPAI viruses after circulation in gallinaceous poultry and are the result of mutations at the poreolytic cleavage site of the hemagglutinin protein.") (Exhibit US-13).

129 According to the OIE's WAHID database, all of India's HPAI outbreaks since 2005 have been H5N1. *See* http://www.oie.int/wahis_2/public/wahid.php/Diseaseinformation/statusdetail (last visited accessed September 17, 2013).

130 Olsen, Munster et al., (Exhibit US-147), pp. 384-388.

131 Naeem, Siddique, et al., pp. 189-193 (Exhibit US-148).

132 OIE Word Animal Health Information Database (WAHID). Available at: http://www.oie.int/wahis_2/public/wahid.php/Wahidhome/Home (last accessed September 12, 2013).

133 Haibo, Rufeng, et al, (Exhibit US-151), p. 2017-2021; Jiao, Wei, et al. (Exhibit US-152), p. 7724-7725; Li, Li et al. (Exhibit US-146), p. 117-122; Gu, Huang, J., et al., (Exhibit US-153)12463-12464.

India and are in the same bird flyways.[134] Infected wild birds can carry and spread LPAI virus to domestic poultry while apparently healthy. Even assuming India's theory of the origin of its HPAI outbreaks were true, 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.

91. In addition to establishing that it is epidemiologically implausible for India to have experienced over ninety outbreaks of HPAI but no LPNAI, the United States has adduced evidence – a study by Pawar et al.[135] – that H5 and H7 AI antigens were detected in domestic ducks – a form of poultry[136] – in India. India postulates that the antigens could have resulted from AI vaccination, not LPNAI.[137] India, however, reported to the OIE that vaccination for HPAI and LPNAI did not occur during or prior to the years of the study.[138] India further observes that "mere presence of antibodies does not establish the presence of an infection."[139] But while the presence of antibodies does not establish the current presence of an active infection[140] – something that could be established only through further testing – the presence of antibodies does establish that an infection has at some point been present in the birds in which the antibodies were detected.[141] India also notes that virus isolation and nucleotide sequencing were not conducted to determine if any NAI virus for which antibodies were detected was of the HPNAI or LPNAI variant.[142] However, H7 antibodies were detected in domestic ducks in the

---

134 Olsen, Munster et al., (Exhibit US-147), pp. 384-388.

135 Exhibit US-122.

136 *See* OIE Code (Exhibit US-1), art. 10.4.1.3 ("*Poultry* is defined 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.").

137 India's Response to Panel Question 24.

138 OIE Word Animal Health Information Database (WAHID). Available at: http://www.oie.int/wahis_2/public/wahid.php/Wahidhome/Home (last accessed September 12, 2013).

139 India's Response to Panel Question 24.

140 *See* OIE Code art. 10.4.1.6 ("Antibodies to H5 or H7 subtype, which have been detected in *poultry* and are not a consequence of *vaccination*, should be immediately investigated. In the case of isolated serological positive results, *infection* with avian influenza viruses may be ruled out on the basis of a thorough epidemiological and *laboratory* investigation that does not demonstrate further evidence of such an *infection*.").

141 Jones Supplemental Statement (Exhibit US-145), para. 8; Swayne Supplemental Statement (Exhibit US-143), para. 6.

142 India's Response to Panel Question 24.

Pawar study and India has never reported H7 HPAI.[143] Given the consequences of HPAI for infected poultry, it is unlikely that India would not have detected an H7 HPAI outbreak.[144] It therefore appears that India has experienced H7 LPAI in poultry, which constitutes a form of LPNAI.[145]

92. India dismissed the H7 detections by Pawar et al. by saying "it is now four years since the samples were collected and had poultry developed antibodies to H7 LPNAI, by now this strain should have mutated and resulted in significant mortality in poultry population."[146] This statement is unfounded. It is far from true that H5 or H7 LPNAI will necessarily mutate into HPAI.[147] An absence of H7 HPAI does not indicate an absence of H7 LPNAI.[148] Indeed, there are known outbreaks of H5/H7 LPAI that have circulated for years without mutating into HPAI.[149]

b. India Has Not Rebutted the U.S. Showing That India's Surveillance Cannot Reliably Detect LPNAI

93. India's failure to report LPNAI highlights the deficiencies in India's surveillance and detection mechanisms with respect to LPNAI. It is these deficiencies that are central to the first form of discrimination inherent in India's AI measures: its imposition of import bans based on detections of LPNAI. If India cannot reliably detect LPNAI, it cannot be said to have a system for restricting trade in domestic products on account of LPNAI.

94. India's response to the Pawar study not only fails to undermine the conclusion that India has, in all likelihood, experienced LPNAI, but it serves to highlight the surveillance failures that explain why India has never reported LPNAI. The OIE Code is clear that detections of H5 or H7 antibodies that do not stem from vaccination should result in immediate follow-up investigation.[150] Yet India has provided no indication that follow-up investigation with virus

---

143 According to the OIE's WAHID database, all of India's reported HPAI outbreaks since 2005 have been H5N1. *See http://www.oie.int/wahis_2/public/wahid.php/Diseaseinformation/statusdetail* (last visited September 17, 2013).

144 Swayne Supplemental Statement (Exhibit US-143), para. 6.

145 Swayne Supplemental Statement (Exhibit US-143), para. 6.

146 India's Response to Panel Question 24.

147 Jones Supplemental Statement (Exhibit US-145), para. 9.

148 Jones Supplemental Statement (Exhibit US-145), para. 9.

149 http://www.fao.org/avianflu/documents/key_ai/key_book_ch2.htm

150 OIE Code, Article 10.4.1 (Exhibit US-1).

isolation and PCR testing was undertaken by India. This indicates a deficiency in India's avian influenza response and control system.[151]

95. In these proceedings, India has made various claims about steps that it takes to detect LPNAI. But 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 asserts that it conducts routine *clinical* surveillance – *i.e.*, observation of birds for signs of NAI.[152] But while the HPAI form of NAI is likely to manifest itself through clinical symptoms, India does not dispute – and in fact acknowledges – that "LPNAI is largely asymptomatic in poultry such as chickens."[153] Clinical surveillance, while adequate to detect HPAI, is thus inadequate to reliably detect LPNAI.

96. India purports to conduct "routine laboratory" surveillance for NAI.[154] But the documents that 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. For example, Exhibit IND-115, simply indicates that India's HSADL tested a certain number of samples during a particular time period. It provides no indication that these samples were the result of routine sampling of apparently-healthy poultry flocks. Likewise, Indian Exhibits IND-15 and IND-123 provide figures of tests conducted. But they do not indicate that the tests were conducted as part of routine surveillance, let alone that such surveillance is conducted nationwide as part of a program or programs under which it is required.[155]

97. India cites the NAP 2012 for details on what happens to samples that get collected.[156] But it 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.[157] Indeed, the NAP simply provides that sampling "may" be conducted on flocks, and that routine surveillance should involve virological testing "where

---

151 Jones Supplemental Statement (Exhibit US-145), para. 10.

152 India's First Written Submission, paras. 43-45.

153 India's First Written Submission, para. 214.

154 India's First Written Submission, para. 105.

155 India cites Exhibit IND-123 for the number of samples tested by HSADL, Bhopal. While this document provides a number of samples tested, it provides no indication of the time period during which that number of samples was tested.

156 India's First Written Submission, para. 46.

157 India also highlights that it conducts targeted surveillance. *See* India's First Written Submission, paras. 48-51. Yet India offers no evidence that it conducts even routine laboratory testing of samples of apparently-healthy flocks selected through targeting in the absence of prior nearby disease detections.

possible."[158] India asserts that the "number of epicentres with outbreaks of avian influenza" has declined since 2008, and that this shows that its surveillance is effective.[159] This misses the point. While India may have developed capacity to detect HPAI outbreaks and thus to reduce the number of reported HPAI detections, its having done so does not amount to evidence that its surveillance can detect LPNAI.

98. The OIE Code supports the inadequacy of India's surveillance for the reliable detection of LPNAI. 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."[160] Yet as noted, India has not implemented the kinds of testing necessary for such a demonstration.[161] The OIE Code also states that "*[s]urveillance* should be composed of random and targeted approaches using molecular, virological, serological and clinical methods." India appears to have no plan or requirement for the usage of such methods. Further Article 10.4.29 provides that a country's "sampling strategy will need to incorporate epidemiologically appropriate design prevalence," and that "[t]he sample size selected for testing will need to be large enough to detect *infection* if it were to occur at a predetermined minimum rate." India's evidence does not suggest the existence of any clear strategy for detection of LPNAI, let alone a sampling strategy incorporating epidemiologically appropriate design prevalence or a sample size for testing (in apparently healthy birds for detection of LPNAI) large enough to detect infection if it were to occur at the predetermined minimum rate.[162]

99. A nationwide program for the conduct of the sort of systemic routine laboratory testing necessary to reliably detect LPNAI—and to declare LPNAI-freedom—would have a substantial associated paper record. India has provided no such documentation. This suggests that India has no nationwide routine testing requirements or plans for NAI that it omitted to mention in the NAP. 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 domestic LPNAI are not be imposed.

2. India's Unwillingness to Regionalize is Discriminatory

100. India's First Written submission explains at length the measures it takes once an NAI outbreak (all of which to date have been HPAI) occurs.[163] However, India does not dispute the

---

158 India's AI Action Plan (2012) (Exhibit US-90), pp. 2, 4.

159 India's First Written Submission, para. 51

160 OIE Code (Exhibit US-1), Art. 10.4.2.

161 Jones Supplemental Statement (Exhibit US-145), para. 6; Saito Supplemental Statement (Exhibit US-144), para. 7.

162 Jones Supplemental Statement (Exhibit US-145), para. 7; Saito Supplemental Statement (Exhibit US-144), para. 8.

163 India's First Written Submission, para. 197.

key point that it does not apply movement restrictions on products from more than 10 kilometers from an NAI detection. And as noted above, India itself takes the position that culling of its entire domestic poultry flock both would be completely unreasonable, and would be the domestic measure equivalent to those that it applies to imports.

101. India argues instead 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 the disease containment and disinfection methods of those countries. By contrast, it has such knowledge and control with respect to domestic disease incidents.[164] Yet as discussed in connection with the U.S. regionalization claims, India's measures apply import bans categorically to any exporting country when that country reports NAI – regardless of the disease surveillance and control mechanisms applied by that country. India's imposition of more restrictive measures with respect to imports is thus unrelated to risk associated with the potential for surveillance or control failures in exporting countries.

102. Indeed, it is illogical to suggest, as India does, that lack of knowledge about other countries' response systems and outbreaks can 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. Members will likely always have more information about their own measures, and incidents occurring within their borders, than they have about measures and occurrences in other Members. India's logic would suggest that application of more stringent measures to imported products than to domestic products would never be discriminatory.

103. Underscoring the fact that India's application of AI-based import bans to the entirety of an exporting Member is discriminatory, India apparently believes its trading partners should be willing to apply NAI measures on a less-than-countrywide basis to exports from India. Specifically, in order to facilitate exports of Indian agricultural products, Indian authorities have certified compartments within India with respect to avian influenza.[165] Thus, while India asserts that, with respect to imports, only countrywide application of import bans will suffice, India takes the position that other Members should trust its own AI surveillance and control measures. India's position is simply that its own products are entitled to more advantageous treatment than products from other Members.

---

[164] India's First Written Submission, paras. 196, 199, 211.

[165] India, Department of Animal Husbandry, Dairying, and Fisheries, Letter from B. Prashant Kuman to Commissioner, re: Recognition of Venco Research and Breeding Farms Ltd,. Sngvi, Talukia Khandala, Distric Stara as a notified compartment against Avian Influenza (June 6, 2010) (Exhibit US-69); India, Department of Animal Husbandry, Dairying, and Fisheries, Letter from B. Prashant Kuman to Commissioner, re: Recognition of establishments of M/s C&M Farming Limited, Nasik as notified compartment against Avian Influenza (Sept. 13, 2010) (Exhibit US-70).

3. India Cannot Justify its Discrimination with the Argument that LPNAI is Exotic to India

104. From its contention that LPNAI has not occurred within its borders, 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 for several reasons.

105. First, as noted above, India has in fact had LPNAI. This was demonstrated by the Pawar study, and even in the absence of that study,[166] India's contention to the contrary is simply implausible.

106. Second, India acknowledges that it has had numerous H5 HPAI outbreaks over the past decade. Yet H5 LPNAI and H5 HPAI are the same disease—the only difference between the two is their lethality and scoring on an intravenous pathogenicity index.[167] Moreover, India explains that it worries about LPNAI because it could spread and then mutate into HPAI.[168] But India already experiences regular outbreaks of HPAI, the disease it is worried about LPNAI converting to. India argues, in essence, that it is justified in discriminating against imported products to keep out a disease because that disease might mutate into one that India has reported over ninety times just in the past few years.

107. Third, India does not claim that this 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 India has expended considerable effort in this proceeding arguing that it takes surveillance for LPNAI within India seriously.[169] In light of that position,

---

[166] Exhibit US-122.

[167] OIE Code Chapter 10.4.1 (Exhibit US-1).

[168] India's First Written Submission, para. 214.

[169] India's First Written Submission, paras. 41-56. India points to the conclusion of the *Australia – Salmon (21.5)* Panel that Australia's prohibition on the importation of Canadian salmonids, but lack of domestic controls on the internal movement of dead domestic fish within Australia, did not breach Article 2.3. *See* India's First Written Submission, para. 207 (citing *Australia – Salmon (21.5)*, para. 7.113). The situation in this proceeding is different than that at issue in the *Australia – Salmon (21.5)* proceeding, however, in that India, while claiming the disease of concern (LPNAI) is exogenous, acknowledges a substantial risk from the disease of concern even in the absence of imports. India also cites comments in *Australia – Apples* and *Australia – Salmon (21.5)* for the proposition that exotic pests or diseases are of greater concern than pests or diseases that are not exotic to the territory of the importing Member. *See* India's First Written Submission, para. 213 (citing *Australia – Apples (Panel)*, paragraph 7.994; *Australia – Salmon (21.5)*, paragraph 7.93). However, these disputes involved claims under Article 5.5 involving two different diseases or two different pests, one of which was not present in the territory of the importing Member. They merely stand for the proposition that it may be consistent with Article 5.5 for a Member to apply more stringent measures to imported products to prevent the introduction of an exogenous pest or disease than the Member applies to domestic products to prevent the domestic spread of a *different* pest or disease.

India cannot plausibly claim that its domestic conditions are so dissimilar from conditions in the rest of the world that a lack of effective domestic surveillance and application of control measures only within ten kilometers of a domestic outbreak, alongside measures for imported products far more stringent than recommended by OIE guidelines, simply reflect differences in disease conditions between India and elsewhere.

108. Fourth, contrary to what India has claimed,[170] the OIE Code does not support India's import bans. As discussed in the context of the U.S. regionalization claims, the OIE Code does not support import bans by negative implication—whether by negative implication from statements in Chapter 10.4 or by negative implication from statements in Chapter 5.1. As the United States has discussed at length in this proceeding, Chapter 10.4 of the OIE Code provides product-specific recommendations for the safe trade of different products notwithstanding the presence of NAI in the exporting country. Nowhere do those recommendations suggest that they do not apply in the event the importing Member is free of LPNAI.

109. In sum, 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

110. India's measures not only breach Article 2.3 by discriminating against imported products, they result in an additional breach of Article 2.3 because they amount to a disguised restriction on trade. Contrary to what India suggests,[171] this claim is not about just India's country-wide application of its import bans. Rather, it is about what can be inferred from the totality of the circumstances surrounding India's measures, including the ways that India's measures 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. For this reason, India's argument that import bans do not *ipso facto* amount to disguised restrictions on trade[172] misses the point. The United States is not suggesting that any import ban *ipso facto* amounts to a disguised restriction on trade. Rather, the United States argues that the facts surrounding this particular import ban reveal it to be a disguised restriction on international trade.

111. In its First Written Submission, the United States noted a variety of considerations surrounding India's measures that constitute indicia of a disguised restriction on international trade. They include: the existence of substantial differences in the stringency of the measures applied to imports and domestic products, as well as the arbitrary or unjustifiable character of

---

170 India's Opening Statement at the First Meeting of the Panel, para. 45.

171 India's First Written Submission, para. 214.

172 India's First Written Submission, para. 222.

those differences;[173] India's shifting position on whether its measures are justified by OIE guidelines or a risk assessment; 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; and the manner in which India conducted its aborted attempt to construct a risk assessment.[174] These considerations are similar to those that the *Australia – Salmon* panel 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.[175] The Appellate Body upheld consideration of the "warning signals" and "additional factors" identified by the *Australia – Salmon* panel – except for one "additional factor" that it deemed duplicative.[176]

112. Taken together, the considerations surrounding India's measures establish that these measures amount to a disguised restriction on international trade. India has accordingly breached the second sentence of Article 2.3.

I. If India Were Viewed As Having Different ALOPs For Foreign And Domestic Products, India Would Be In Breach Of Its Obligations Under Article 5.5 Of The SPS Agreement, With A Resulting Consequential Breach Of Article 2.3

113. India's assertions that the United States failed to articulate its claim under Article 5.5 of the SPS Agreement[177] are ill founded. As the United States explained, to the extent that India is viewed as having different ALOPs with respect to transmission of NAI in foreign and domestic products, this distinction in ALOPs would be arbitrary and unjustifiable, and would result in discrimination or a disguised restriction on trade, thereby breaching India's obligations under Article 5.5 of the SPS Agreement.

---

[173] In the context of examining the applicability of Article XX of the GATT 1994, the Appellate Body has explained that "[t]he kinds of considerations pertinent in deciding whether the application of a particular measure amounts to 'arbitrary or unjustifiable discrimination' may also be taken into account in determining the presence of a 'disguised restriction' on international trade." *United States - Gasoline (AB)*, para. 66.

[174] India has strenuously denied (*see* India's First Written Submission, para. 7) that it ever put forward the document submitted as Exhibit US-110 as a risk assessment. The document's title, however, clearly indicates otherwise. The title is "India's Risk Assessment on Avian Influenza for imposing ban on import of poultry and poultry products from Avian Influenza positive countries." Exhibit US-100.

[175] *Australia – Salmon (Panel)*, paras 8.149-8.151.

[176] *Australia – Salmon (AB)*, paras 159-178.

[177] India's First Written Submission, paras. 225-227.

114. India is more appropriately considered as having a single ALOP with respect to NAI than separate ALOPs for foreign and domestic products. However, if India were considered to have separate ALOPs for foreign and domestic products, those ALOPs would, in the absence of a clear articulation of them by India, have to be inferred from the measures that India applies with respect to foreign and domestic products. In its First Written Submission, the United States explained why India's measures with respect to imported products are far more trade restrictive than those applied to domestic products as a result of two key contrasts between them. The reasons why a more stringent ALOP would be inferred from the measures that India applies to imports than from the measures applied to domestic products are thus clear.

115. To the extent that India is considered to have separate ALOPs for foreign and domestic products, nothing that has happened in the course of this proceeding has altered the need to infer those ALOPs from the measures that India has applied to foreign and domestic products. To be sure, India has made statements in this proceeding about what its appropriate level of protection is with respect to NAI. For example, in its response to a question from the Panel, India states that its "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."[178] India has also appeared to assert that its ALOP is "NAI freedom."[179] These are not statements of a true ALOP.[180] In any event, they amount to post hoc attempts to establish an ALOP not stated or implied in India's measures. The Panel thus continues to have no choice but to infer India's ALOP or ALOPs from its measures.

116. To the extent that transmission of NAI through imported products and through domestic products can be viewed as different situations, the ALOPs that would be inferred from them are drastically different. For the former situation, a low ALOP would be inferred both from the fact that India restricts domestic trade following domestic NAI detections only in a very limited geographical area, and from the fact that India lacks surveillance mechanisms that would reliably detect LPNAI, resulting in a non-application of LPNAI-based movement restrictions to domestic products. One would infer that India has a high ALOP for imported products both from India's application of LPNAI and HPAI-based import bans only on a country-basis, and from the fact that India imposes LPNAI-based bans at all. The drastic and unjustified distinction between these two different ALOPs breaches Article 5.5.

117. India faults the United States for not precisely identifying its levels of protection.[181] But to the extent there is any lack of clarity in this regard, India has only itself to blame. India

---

[178] India's Response to Panel Question 35(a); *see also*, India's Response to Panel Question 35(b).

[179] India's Opening Statement at the First Meeting of the Panel, para. 28. India's First Written Submission also states (at para. 248) that India's ALOP is "to prevent ingress of an exotic disease through products that are clearly identified as risk factors even by the OIE."

[180] Annex A, paragraph 5 of the SPS Agreement defines an appropriate level of protection 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."

[181] India's First Written Submission, para. 231.

refused to identify its ALOP in response to the U.S. request under Article 5.8 of the SPS Agreement, and as noted, India has failed in this proceeding to articulate anything that would amount to a true appropriate level of protection. More importantly, the question under Article 5.5 is not what exactly the ALOPs applied in the two different situations are, but whether they have "distinctions," and if so, whether those distinctions can be justified. Here, to the extent that there are separate ALOPs for foreign and domestic products, they are indeed demonstrably distinct.

118. Similarly, contrary to what India argues,[182] the comparability of the different situations at issue in the U.S. 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."[183] There is no doubt that the situations at issue here are comparable.

119. 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, in the sections of its First Written Submission immediately preceding discussion of the claim under Article 5.5, the United States had established that India's measures cause discrimination and amount to a disguised restriction on international trade—thereby satisfying the third element of a claim under Article 5.5. Having done so in order to make freestanding claims under Article 2.3, the United States did not have to do so again to show that India's measures result in discrimination or a disguised restriction on international trade for purposes of Article 5.5.

120. In sum, the United States believes that it is appropriate to consider India's measures as breaching Articles 2.3 (by discriminating against imported products and amounting to a disguised restriction on trade) and 5.6 (by imposing measures more trade restrictive than necessary to meet the ALOP inherent in the measures that India applies to domestic products). In addition, to the extent that transmission of NAI through imported products and through domestic products are viewed as distinct situations for which India maintains separate ALOPs, then India is in breach of its obligations under Article 5.5 by maintaining these distinct ALOPs without justification, and thereby causing discrimination or a disguised restriction on international trade. As "a finding of breach of Article 5.5 will necessarily imply a breach of Article 2.3, first sentence, or Article 2.3, second sentence,"[184] the breach of Article 5.5 here would result in a consequential breach of Article 2.3.

---

182 India's First Written Submission, para. 231.

183 *EC – Hormones (AB)*, paras 216-217.

184 *Australia – Salmon (AB)*, para. 252.

J. India Cannot Excuse Its Failure To Comply With Article 7 And Annex B

121. India's only response to the U.S. claims under Article 7 and Annex B is that its measures conform to international standards.[185] The requirement to comply with paragraph 2 of Annex B, however, does not hinge on the extent to which a Member's measures do or do not accord with international standards.

122. Furthermore, a Member must comply with paragraph 5 of Annex B when a measure first, has a significant effect on the trade of other Members and second, "is not substantially the same as the content of an international standard, guideline or recommendation." An import prohibition clearly has a significant effect on the trade of other Members.

123. With respect to the second condition, the dictionary defines "substantially" as "[e]ssentially, intrinsically," and "[i]n essentials, to all intents and purposes, in the main."[186] 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."[187] As the United States has discussed in detail, 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. India's measures are thus fundamentally in contradiction to, and not at all the same as, the relevant international standards. Moreover, with respect to live pigs (covered under S.O. 1663(1)(ii)(g)), there is no international standard for AI that India's measures could be substantially the same as.[188]

124. In response to Panel Question 50, India notes that it "notified S.O. 1663(E) as an emergency measure pursuant to Annex B(6)." At no point in this proceeding, however, has India attempted to argue that S.O. 1663(E)—or any predecessor instrument implementing India's AI measures—in fact meets the requirements set out in paragraph 6 of Annex B to exempt a Member from the requirements of paragraph 5. The U.S. First Written Submission explains why India has not in fact met the requirements of paragraph 6.

125. India has offered no defense to the U.S. claims under Article 7 and Annex B apart from the measures' purported conformity with international standards. As explained, the United States has demonstrated that India has breached these provisions.

K. India Has Breached Article XI of the GATT 1994

126. Article XI:1 of the GATT 1994 states, in pertinent part, that "[n]o prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by any

---

185 India's First Written Submission, para. 274.

186 Shorter Oxford English Dictionary, p.3124 (Exhibit US-140).

187 *Turkey – Textiles (AB)*, para. 50.

188 OIE Code (Exhibit US-1).

contracting party on the importation of any product of the territory of any other contracting party." India's measures are clearly import prohibitions. Article 2.4 of the SPS Agreement provides that "[s]anitary or phytosanitary measures which conform to the relevant provisions of this Agreement shall be presumed to be in accordance with the obligations of the Members under the provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures." However, as established above, India's measures are not in conformity with the relevant provisions of the SPS Agreement. India has not suggested any other reason why the measures prohibiting imports at issue in this dispute might be consistent with GATT Article XI. India's measures place India in breach of Article XI:1 of the GATT 1994.

IV. CONCLUSION

127. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that India's measures, as set out above, 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.