Public Version

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

(DS430)

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS FOLLOWING THE FIRST PANEL MEETING

September 3, 2013

TABLE OF CONTENTS

TABLE OF EXHIBITS

Exhibit	Citation
US-123	OIE, Report of the Meeting of the OIE Terrestrial Animal Health Standards Commission, Feb. 8-12, 2010 (excerpt)
US-124	Letter from Mr. R.K. Chaudary to Ms. Deepa Dhankar (Jan. 2007)
US-125	OIE, OIE Terrestrial Code Chapter 5.3 (2012)
US-126	OIE Final Report, 76 GS/FR – PARIS, May 2008 (excerpt)
US-127	Note by the Secretariat, Summary of the Meeting [of the SPS Committee] of Apr. 2-3, 2008, G/SPS/R/49, June 19, 2008
US-128 & US-129	OIE, Report of the Meeting of the OIE Terrestrial Animal Health Standards Commission, Sept. 6-17, 2010 (excerpt) & Annex XXI
US-130 & US-131	OIE, Report of the Meeting of the OIE Terrestrial Animal Health Standards Commission, Feb. 1-11, 2011 (excerpt) & Annex 21
US-132 & US-133	OIE, Report of the Meeting of the OIE Terrestrial Animal Health Standards Commission, Feb. 14-23, 2012 (excerpt) & Annex XXVII
US-134	Notification of Emergency Measures, G/SPS/N/IND/73, Oct. 11, 2011
US-135	*Higashimaru Feeds (India) Ltd. vs Union Of India*, 2004 (3) KLT 502 (Kerala High Court Aug. 3, 2004)
US-136	*M/S Beekey Enterprises :: vs Quarantine Officer (Sr)*, (Madras High Court Mar. 5, 2008)
US-137	Chart prepared in response to Q. 11(d)
US-138	OIE, Manual of Diagnostic Tests and Vaccines for Terrestrial

	Animals, Chapter 2.3.4
US-139	Concise Oxford Dictionary
US-140	Shorter Oxford Dictionary
US-141	Letter from Mr. Marc Gilkey to Mr. Arvind Kaushal (Oct. 20, 2009)
US-142	Letter from Ms. Holly Higgins to Mr. B. Prashant (Dec. 2, 2009)

TABLE OF REPORTS

SHORT FORM	FULL FORM
Argentina – Textiles (AB)	Appellate Body Report, *Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998
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
EC – Chicken Cuts (AB)	Appellate Body Report, *European Communities — Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R and Corr.1, adopted 27 September 2005
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
Turkey – Textiles (AB)	Appellate Body Report, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, 1999, 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

1 PANEL'S CONSULTATION WITH EXPERTS

Question 3: At paragraph 6 of the European Union's oral statement, it suggests:

> **"four main contentious points where the need of expert advice may be discussed: (i) the interpretation of the OIE standards, (ii) the possible characterization of India's Summary Document as a risk assessment, (iii) India's claim that LPNAI is exotic to its territory and (iv) the occurrence of LPNAI in internal organs, other than respiratory or digestive systems."**

Please provide your comments in writing on the above statement as well as on the discussion in subsequent paragraphs of the European Union's oral statement on this issue.

ANSWER:

1. At the outset, the United States notes its agreement with a framework principle articulated by the European Union: recourse to experts should be decided by considering the potential contribution towards the Panel's "objective assessments of the matter before it."[1] An objective assessment under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") encompasses two inquiries: "an objective assessment of the facts of the case and [2] the applicability of and conformity with the relevant covered agreements …."[2]

2. Expert assistance ultimately relates to the first query, as the second is exclusively within the panel's competence.[3] In particular, experts may aid the Panel in evaluating the evidence that is *submitted* by the parties. As detailed below, for three of the items identified by the European Union, (i), (iii), and (iv), the United States believes the evidence put forward by India in favor of its arguments is non-existent or insufficient on its face, and accordingly does not warrant expert assistance. For issue (ii), the Summary Document, the United States notes its characterization – as not a risk assessment – is not in dispute and thus there is again no need for expert assistance.

(i) The interpretation of OIE Standards

3. As an initial matter, the United States agrees with the European Union that the OIE Terrestrial Animal Health Code ("OIE Code" or "Code") is sufficiently clear on its face such that assistance is unnecessary for its interpretation.[4] There is no text in the avian influenza ("AI") chapter of the Code that recommends the imposition of import bans, particularly on account of low pathogenic avian influenza ("LPNAI"). To the contrary, the text provides that almost all the

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[1] European Union's Third Party Statement, para. 8.

[2] DSU Art. 11; *see EC – Hormones AB*, para. 116 (emphasizing same text when quoting Article 11).

[3] *Australia – Apples (AB)*, paras. 384, 389.

[4] European Union's Third Party Statement, para. 8.

products India bans from import in fact can be safely imported from countries, zones, and compartments with the proper precautions. Moreover, the interpretation of the OIE Code is not itself a matter that calls for an evaluation of scientific or technical evidence; rather, it is a question of what the OIE meant when it used the particular language contained in the Code. Thus, the United States has difficulty seeing how outside scientific experts would be of assistance in assisting the Panel in the interpretation of the OIE Code. And, with regard to the separate question of whether the Panel should consult the OIE itself on the meaning of the OIE Code, the United States addresses this matter in paragraphs 8-13 below.

India Has Failed To Present any Evidence, Let Alone Evidence That Needs Expert Review For Its Article 3.2 Defense

4. With respect to India, its legal claim is that its measures enjoy a presumption of consistency with the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement") because they conform to the OIE Code. In support of this claim, India makes two principal arguments:

- "The OIE recognizes the prerogative of every Member to set its own level of protection" and the "OIE Code provides several options" that depend on the country's appropriate level of protection ("ALOP").[5]

- "The standard [Article 10.4.1.10 of the OIE Terrestrial Animal Health Code] thus stipulates that if a country notifies HPAI and LPAI in poultry, Member countries can impose immediate ban on trade in poultry commodities depending on the condition of entry they have selected based on the level of protection they have deemed appropriate."[6]

The United States does not see how any outside expert could be of assistance in addressing these issues. First, the corresponding evidence that India puts forward for each of these arguments is lacking. Second, evaluation of India's argument does not involve scientific evidence, but rather an understanding of how international standards relate to WTO obligations. This is a legal rather than scientific question.

5. In support of the first argument, India cites a document titled "International trade: Rights and obligations of OIE Member Countries."[7] But this document does not say what India claims; it actually states:

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5 India's First Written Submission, paras. 117, 119.

6 India's First Written Submission, para. 125.

7 Exhibit IND-4, p. 2 (fourth paragraph).

> The WTO recognizes that each Member has the sovereign right to set its appropriate level of protection when applying sanitary measures to international trade. However, WTO Member should respect the provisions in the SPS Agreement when setting those measures.

The document India references plainly states that the WTO – not the OIE – recognizes that each Member may set its appropriate level of protection, provided of course that the SPS Agreement is followed. An expert would have no role in confirming that India has mischaracterized this document, and that the document does not support India's contention that the applicability of the OIE Code's recommendations is designed to take into account distinct ALOPs.

6. For its second argument, India again fails to identify any issue the evaluation of which would be assisted by the use of scientific experts. The text of Article 10.4.1.10 on its face recommends *not* imposing bans in response to avian influenza detections in wild birds; there is no text whatsoever in the provision – or elsewhere in the OIE Code – endorsing bans when avian influenza is detected in poultry. The reports of the OIE Terrestrial Animal Health Commission cited by India also do not say a word about when bans should be imposed.[8] In other words, this is not a case where the evidence presented by India could plausibly support its claim, and experts can assist the Panel in navigating the evidence. This is a case where India has neither identified any relevant scientific issue, nor discharged its threshold evidentiary burden of providing basic support for its contentions.[9] Under these circumstances, the United States submits experts would provide no discernible benefit.

The United States' Article 3.3 Claim Can Be Resolved Without Experts

7. The United States' Article 3.3 claim also requires the Panel to consider the OIE Code in order to determine whether India has failed to base its measures on international standards. However, the United States believes the evidence it has submitted in support of its claim is straightforward enough not to need the assistance of experts. Specifically, the United States points to the plain text of the OIE Code, which (i) recommends only notification of certain avian influenza outbreaks – not bans on account of them[10] – and (ii) provides recommendations for the

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[8] India's First Written Submission, paras. 125-128.

[9] *Japan – Apples (AB)*, para. 154 ("…although the complaining party bears the burden of proving its case, the responding party must prove the case it seeks to make in response.").

[10] D.E. Swayne and B.L. Akey, "Avian Influenza Control Strategies in the United States of America, AVIAN INFLUENZA, Eds. Remco S. Schrijver and G. Koch (2005), p. 127 (Exhibit US-48) ("The addition of H5 and H7 LPAI to the list of 'reportable' should reduce the number of HPAI outbreaks in the future by providing governments with incentives to control LPAI before it mutates to HP. However, if trading partners use the addition of H5 and H7 LPAI as a non-tariff barrier, this will have the opposite of the intended effect by encouraging nations not to report but to hide LPAI, and this could possible [sic] lead to increased HPAI outbreaks in the future."); *see also* Australia's Third Party Submission, para. 7 ("The OIE Code does not require notification of LPAI, nor does it sanction an immediate ban on trade in poultry and poultry products following notification of LPAI in poultry.").

safe import of the very products that India prohibits.[11] There is thus a direct contradiction between India's measures and the recommendations of the OIE Code. The United States has also provided a statement from an OIE delegate made at a meeting of the SPS Committee meeting clarifying that the recommendations of the OIE Code do not support imposition of import bans on account LPNAI.[12] Against this, India has presented its conformity argument, which as detailed above, lacks any evidentiary support. Therefore, the United States believes this claim can be decided without experts as well.

The OIE Does Not Need to be Consulted Under WTO Procedures or as a Matter of Deference

8. As noted, the issue of whether the Panel should consult the OIE on the meaning of the OIE Code is a different question than whether the Panel should consult with scientific experts. Although possible consultation with the OIE presents a closer question than whether the Panel should consult with outside scientific experts, the United States – for the reasons set out above and in its submissions – is of the view that the OIE Code is sufficiently clear that the resolution of this dispute does not require a referral of questions to the OIE.

9. The United States recognizes that the Panel, even if it finds the standards clear, may be concerned with whether consultation with the OIE is nonetheless desirable, perhaps as a matter of comity with another international organization. From a purely legal standpoint, the Appellate Body has made clear that a panel is not obliged to consult another international organization even if issues in a dispute touches upon matters that relate to the international organizations:

> Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision. We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves "to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate." Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all.
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[11] *See* European Union's Third Party Statement, paras. 47-49.

[12] U.S. Opening Statement at the First Meeting of the Panel, para. 7 (citing Committee on Sanitary & Phytosanitary Measures, Summary Of The Meeting Of 18-19 October 2007 G/SPS/R/46 (January 2, 2008) (Exhibit US-119)).

> In this case, we find that the Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF. While it might perhaps have been useful for the Panel to have consulted with the IMF on the legal character of the relationship or arrangement between Argentina and the IMF in this case, we believe that the Panel did not abuse its discretion by not seeking information or an opinion from the IMF.[13]

Accordingly, there is no obligation under WTO dispute settlement rules for the Panel to consult with the OIE. It is a matter entirely within the discretion of the Panel.

10. In many SPS disputes, the United States would recognize that consultation with the relevant international standard setting body may be indeed appropriate. In this dispute, however, the United States submits there are two specific considerations unique to this dispute that militate in favor of not consulting with the OIE.

11. First, the specifics of this dispute do not implicate considerations of deference because the Panel need not opine on any matters that truly are in the province of the OIE, such as how to best execute the recommendations of the OIE Code. The parties are not debating technical requirements of a particular recommendation, but rather debating a broad legal arguments made by India. Specifically, India is essentially arguing that the OIE allows, *i.e.*, does not explicitly prohibit, what India is doing.[14] The European Union's comments on this position are worth repeating:

> One should make a distinction between what the OIE Code recommends and thus constitutes the relevant international standard, and what the OIE Code allows (as it is not imperative). 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.[15]

In short, a panel's task of determining whether party's measures are in conformity with international standards per the SPS Agreement – while always a legal question – is particularly so here because of the specific interpretation India seeks to advance. If the Panel chooses to

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[13] *Argentina – Textiles (AB)*, paras. 84-86; *see also US – Continued Suspension (AB)*, para. 439 (quoting *US –Shrimp (AB)* para. 104) ("A panel's authority includes the authority to decide not to seek such information or advice at all.")).

[14] Australia's Third Party Submission, para. 12 ("Australia respectfully suggests that, in a similar way, the panel could choose to consider the question of whether India's ALOP renders the standards embodied in the OIE Code nugatory.").

[15] European Union's Third Party Statement, para. 48.

reject it under the SPS Agreement – as it should – the Panel can do so without opining on various details of the OIE Code.

12. Second, if the Panel ultimately decides that India's interpretation of the Code is untenable without consulting the OIE, all it has done is find that India has not met its obligations under the SPS Agreement rather than declare what is sufficient under the OIE's recommendations. Thus, this would not implicate the interests of the OIE. Because of these unique circumstances, the United States believes that the OIE does not need to be consulted as in this dispute.

(ii) The possible characterization of India's Summary Document as a risk assessment

13. The United States submits that an expert is unnecessary to review the Summary Document for two reasons. First and as noted by the European Union, a necessary prerequisite – that India claim the document is the risk assessment that its measures are based upon – is missing.[16] In light of India's decision not to rely on the document, the United States finds the statement by Japan that there are conflicting views of the parties regarding the Summary Document to be puzzling.[17] The United States noted in its first written submission that it addressed the Summary Document in the interests of completeness and if India was to assert in these proceedings that the document was a risk assessment.[18] India has not done so and at this point in the proceedings, India is limited to presenting simply rebuttal evidence.[19]

14. Second, the question of whether the summary document could somehow amount to an adequate risk assessment is a legal one, involving the pertinent definition of "risk assessment" as set out in the text of the SPS Agreement.[20] And, as the United States explained in its first written submission, the document does not meet the requirements of either type of risk assessment specified in the SPS Agreement.[21] Accordingly, the United States does not see how expert scientific advice could be of assistance in addressing this issue.

(iii) India's claim that LPNAI is exotic to its territory

15. The United States begins by noting the analytical framework it identified at the outset of its response to this question: what evidence has been submitted for the claim that needs evaluation by experts in order to assist the Panel in deciding a claim. India makes the claim that

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16 European Union's Third Party Statement, para. 9.

17 Japan's Third Party Statement, para. 6.

18 U.S. First Written Submission, para. 109.

19 Panel Working Procedures, para. 8.

20 Paragraph 4 of Annex A of the SPS Agreement sets forth the definition of "risk assessment."

21 U.S. First Written Submission, paras. 110-118.

LPNAI is exotic to India in paragraphs 12, 14, 18, 202, 213, 217, 245, 248, and 250 of its first written submission; not found in any of those paragraphs, however, is any citation or supporting evidence for the proposition India seeks to advance. The United States submits India's failure to substantiate its argument is reason enough not to seek expert assistance – since there is nothing for an expert to review. However, the United States notes in this instance there is actually evidence that affirmatively undercuts India's assertion: the Pawar study supplied by the European Union and the United States. The study strongly suggests that an LPNAI H7 strain may be circulating in India.[22] Considering that India has not only failed to support its assertion, but has also failed to rebut the countervailing evidence, the United States agrees with the European Union that there would no reason to consult experts on this issue.[23]

16. Moreover, whether LPNAI is exotic to India is not a question that needs to be answered in order to resolve the United States' Article 2.3 claim. The U.S. claim can be decided simply by the evidence submitted that India's internal controls are unjustifiably disparate when compared to measures applied to imports, ***e.g.***, India applies zoning internally with respect to HPAI outbreaks but applies nationwide import bans following NAI detections in other countries; and while India imposes LPNAI-based import bans, it does not maintain surveillance adequate to reliably detect (and thus respond to) LPNAI in India.[24]

(iv) <u>the occurrence of LPNAI in internal organs, other than respiratory or digestive systems</u>

17. This issue relates to the Article 2.2. claim made by the United States. Specifically, the United States has alleged that in addition to breaching Article 2.2 consequentially as a result of its breaches of Articles 5.1, 5.2, and 5.6, India has independently breached Article 2.2 because it has maintained the measures without sufficient scientific evidence regarding LPNAI transmission in poultry meat and eggs.[25] India's entire defense to this claim is its reference to the

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[22] European Union's Third Party Statement, para. 11; U.S. Opening Oral Statement at the First Meeting of the Panel, para. 19. Of particular note, the study found the antibodies in poultry, not wild birds, which present two scenarios unfavorable to India: either India's surveillance missed the detection or India did not report it to the OIE.

[23] European Union's Third Party Statement, para. 13.

[24] U.S. First Written Submission, para. 167-181. With respect to India's surveillance, India acknowledges that LPNAI is asymptomatic (India's First Written Submission, para. 214) and India does not dispute that it has no requirement for routine random testing of sample birds in poultry flocks for NAI. The existence of unreported LPNAI in India (*see* Exhibit US-122) simply serves to underscore the U.S. point that India does not maintain surveillance adequate to reliably detect (and thus respond to) LPNAI in India.

[25] U.S. First Written Submission, para 124.

Post study to suggest that LPNAI replicates systemically.[26] But as pointed out by the European Union, the tissues in the Post study are different than the studies cited by the United States and *do not encompass meat and eggs*. Thus again, because the evidence referenced by India, even if accurate, does not address the argument, the United States believes an expert is not necessary to address this issue.

18. Further, the United States notes that the European Union states the best place to review the matter if necessary is the OIE Scientific Commission.[27] Fortunately, there is already publicly available documentation from the OIE Code Commission that addresses this exact matter. A report from a meeting by the Commission in February of 2010 notes the following: "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."[28] In light of the fact that the Code Commission has spoken and the Post Study is inapposite as a result of its different focus, the United States believes expert assistance is unnecessary on this issue as well.

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19. In sum, the United States believes the relevant considerations noted above compel the same conclusion that was reached by the European Union: that experts are unnecessary in this dispute.[29] The United States would elaborate on one final point noted by the European Union, which is that experts may unduly delay the proceedings.[30] The United States recognizes that WTO disputes often taken longer than the timeframes included in the DSU,[31] but that these timeframes exist serves to reinforce that procedures that extend the time frame of a dispute should not be taken lightly or unless there is a tangible need to do so.

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[26] Post, Jacob, Geus, E.D., Vervelde, L., Cornelissen, J.B., Rebel, M.J. *Systemic distribution of different low pathogenic avian influenza (LPAI) viruses in chicken*. Post et al. Virology Journal 2013, 10:23 (Exhibit IND-68).

[27] European Union's Third Party Statement, para. 15.

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

[29] European Union's Third Party Statement, para. 17 ("In light of the above, while fully acknowledging the utility of expert advice in SPS disputes in general, the European Union is of the view that is not necessarily needed in the present dispute and it may rather unduly delay the proceedings.")

[30] European Union's Third Party Statement, para. 17.

[31] DSU Article 20 ("Unless otherwise agreed to by the parties to the dispute, the period from the date of establishment of the panel by the DSB until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed or 12 months where the report is appealed.").

3 THE RELEVANT INTERNATIONAL STANDARD

Question 6: At paragraph 62 of its first written submission, the United States contends that the principle of zoning or regionalization is reflected within the OIE Code. Specifically, the United States avers that "the OIE Code, particularly Chapters 4.3 and 4.4, allows for a Member to establish distinct health statuses for different parts of its territory. … Per the OIE Code, importing countries should recognize zoning provided the recommendations of the Code are in place." Moreover, at paragraph 63 of the United States first written submission, the United States adds that "India has not found fault with any particular aspect of U.S. zoning measures or that of any other country":

a. Please provide a detailed description of these "zoning measures" and any other measures that the United States has taken for the purpose of "putting the recommendations of the Code in place".

ANSWER:

20. As an initial matter, the United States would note that the issue here is not that India considered U.S. AI surveillance and control measures and rejected them as inadequate. Rather, the issue in this dispute is that India maintains measures that do not even *recognize the applicability of the concept* of regionalization to AI. As India sees it, it is irrelevant what measures an exporting country has put in place to facilitate safe trade in its products following AI incidents.

21. That said, the United States is pleased to provide for the Panel's information a description of the U.S. comprehensive system of AI controls. As described below, the United States has adopted the kinds of movement-control and surveillance mechanisms that, under the OIE Code, allow for the recognition of zones and compartments. With respect to LPNAI, the United States implements these controls through its National Poultry Improvement Plan ("NPIP"), whose regulations are set out in Title 9, Sections 56 and 145-147 of the United States Code of Federal Regulations.

22. Under the NPIP, all mainland U.S. states have H5/H7 LPAI state response and containment plans submitted to USDA by state veterinary officials. In the event of a LPNAI detection, the state approved plans require:

A. Control/monitoring zones, contact surveys, and movement restrictions; and

B. Strict quarantine measures for presumptive and confirmed index cases.

HPAI incidents are handled by federal officials pursuant to the United States Department of Agriculture's HPAI response plan, which likewise provides for control/monitoring zones, contact surveys, and movement restrictions, as well as for strict quarantine measures for presumptive and confirmed index cases.

23. Further, state H5/H7 LPAI response and containment plans established under NPIP regulations must have:

A. Animal disease traceability for poultry identification, which includes National Poultry Improvement Plan (NPIP) identification requirements;

B. If vaccination is permitted, a written plan for use with proper controls and provisions for obtaining state and USDA approval;

C. Procedures for sample handling and testing, and reporting of test results;

D. Detailed plans for disposal of infected flocks, carcass disposal, disposal sites, and resources, cleaning and disinfection plans, repopulation, and monitoring after repopulation; and

E. Public awareness and education programs.

In addition, the state plans must include a biosecurity plan to be followed by all NPIP poultry producers[32] and provisions for a standing emergency disease management committee, regular meetings, and exercises.

24. NPIP flocks are subjected to the testing of sample birds at regular intervals for NAI. Frequency and number of sample birds depends on poultry type and whether the flock is a breeder flock or egg/meat production flock. NPIP monitoring resulted in over 3 million AI tests in 2012.

25. These procedures are the type called for in Chapter 4 of the OIE Code,[33] and offer confidence that the United States will detect and quickly contain both highly pathogenic and low pathogenicity avian influenza when it occurs.

26. The United States also notes that India's submission even recognizes the fact that other countries apply AI measures to the United States on a regional basis.[34] This highlights that the United States maintains a domestic surveillance regime and controls in which other countries have confidence.

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[32] Essentially all commercial poultry in the United States is in the NPIP.

[33] Exhibits US-50 & US-51.

[34] India's First Written Submission, paras. 169(e), (f), (j), 169(A)(a), (b), (e), (f), 170, 171-173.

b. Did the United States provide India with information regarding the United States' zoning measures? Please elaborate on India's reaction to these measures, including by providing documentary support to corroborate the United States' assertion that "India has not found fault with any particular aspect of U.S. zoning measures or that of any other country".

ANSWER:

27. During discussions with India about the subject of avian influenza, the United States did provide India with information on U.S. surveillance and control measures with respect to AI. However, because India was unwilling to even recognize the need to apply the concept of regionalization to AI, the United States never had an opportunity to submit comprehensive information in support of regionalization.

28. India's unwillingness to even consider regionalization with respect to NAI represents a generally applicable policy; it is not the result of considerations specific to the United States or any other Member. For example, in Exhibit 124, India explains to the United States that "Indian side would insist on country freedom as the conditions are uniform."[35]

29. Over the years, India's failure to apply its AI measures on a less-than-country-wide basis has been raised repeatedly in meetings of the SPS Committee. India's delegate has never indicated that this complaint was ill-founded, nor has India stated that it would consider applications from countries seeking regionalized treatment for their imports.[36] Moreover, at the May 2012 meeting of the OIE, 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."[37]

30. Further, despite receiving repeated requests not to apply its measures on a country-wide basis,[38] including at meetings of the WTO SPS Committee,[39] India repeatedly promulgated new

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[35] 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.

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

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

[38] *E.g.*, Exhibit US-120, p.5 (2007 U.S. correspondence to India noting that "Requiring an entire country to be HPNAI-free is not consistent with the OIE Terrestrial Animal Health Code or the SPS Agreement.").

[39] 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

iterations of its avian influenza measures that on their face applied to products from anywhere in a country reporting NAI.[40] The Notification through which India currently maintains its measures, like its predecessors, on its face applies on a country basis.[41]

c. At paragraph 119 of its first written submission, India submits:

> **Because the "condition of entry" for each poultry product stated in the OIE Code provides several options, the condition of entry that an importing country implements will depend on its appropriate level of protection (ALOP). The condition of entry an importing country chooses is a decision to be made by the importing country alone and the OIE Code provides full flexibility to an importing country to structure its regime in the manner it deems appropriate.**

Furthermore, in its comments after the opening oral statements at the first substantive meeting, India appeared to argue that the Terrestrial Code would include more than one standard for avian influenza. India appeared to read the titles (e.g. "Recommendations for importation from NAI-free country ...") as a "condition of entry", which is followed by the international veterinary certification requirements. India thus argued that it has chosen to adopt the standard for NAI-free country. At the first substantive meeting, the United States offered a different reading of the Terrestrial Code. Please provide any documentary support (guidance documents, reports of OIE meetings, etc.) for your reading of the Terrestrial Code.

ANSWER:

The Text Of The Avian Influenza Chapter

31. India is arguing that NAI-free is an ALOP and that certain recommendations reflect this ALOP. India is wrong. "NAI-free" is how an exporting territory may be classified, not the ALOP an importing country may choose to adopt. In fact, as the United States has explained, the SPS Agreement makes clear that Members may choose their ALOP, and that the selection of the ALOP is not the role of an international standard. Rather, under the SPS Agreement, Members are free to set a higher ALOP than the level of protection achieved by the international standard, so long as the Member has a risk assessment to support its measures and meets other applicable

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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[.]").

[40] S.O. 102(E) (Exhibit US-73); S.O. 228(E) (Exhibit US-74); S.O. 1892(E) (Exhibit US-75); S.O. 419(E) (Exhibit US-76); S.O. 2208(E) (Exhibit US-77); S.O. 616(E) (Exhibit US-78); S.O. 2976(E) (Exhibit US-79); S.O. 1663(E) (Exhibit US-80).

[41] S.O. 1663(E) (Exhibit US-80).

WTO rules. The text of the OIE Code likewise is clear that the OIE does not view its role – as India implies – as dictating a Member's ALOP.

32. First, there is a threshold provision, Article 10.4.2, that provides that the status of a country, zone, or department can be determined under the Code if certain conditions are fulfilled, such as having a surveillance program that is in accordance with OIE standards. If those conditions are met, then a country, zone, or compartment can be classified as either NAI free if it meets the conditions of Article 10.4.3 or HPNAI free if the conditions if it meets the conditions of Article 10.4.4. Notably, and in contrast to what India argues, there is nothing in either provision that provides that the classification is meant to serve as an ALOP or present a different level of protection.

Article 10.4.3

NAI free country, zone or compartment

A country, *zone* or *compartment* may be considered free from NAI when it has been shown that neither HPNAI nor LPNAI *infection* in *poultry* has been present in the country, *zone* or *compartment* for the past 12 months, based on *surveillance* in accordance with Articles 10.4.27. to 10.4.33.

If *infection* has occurred in *poultry* in a previously free country, *zone* or *compartment*, NAI free status can be regained:

1) In the case of HPNAI *infections*, three months after a *stamping-out policy* (including *disinfection* of all affected *establishments*) is applied, providing that *surveillance* in accordance with Articles 10.4.27. to 10.4.33. has been carried out during that three-month period.

2) In the case of LPNAI *infections*, *poultry* may be kept for *slaughter* for human consumption subject to conditions specified in Article 10.4.19. or a *stamping-out policy* may be applied; in either case, three months after the *disinfection* of all affected *establishments*, providing that *surveillance* in accordance with Articles 10.4.27. to 10.4.33. has been carried out during that three-month period.

Article 10.4.4.

HPNAI free country, zone or compartment

A country, *zone* or *compartment* may be considered free from HPNAI when:

1) it has been shown that HPNAI *infection* in *poultry* has not been present in the country, *zone* or *compartment* for the past 12 months, although its LPNAI status may be unknown; or

2) when, based on *surveillance* in accordance with Articles 10.4.27. to 10.4.33., it does not meet the criteria for freedom from NAI but any NAI virus detected has not been identified as HPNAI virus.

The *surveillance* may need to be adapted to parts of the country or existing *zones* or *compartments* depending on historical or geographical factors, industry structure, population data, or proximity to recent *outbreaks*.

If *infection* has occurred in *poultry* in a previously free country, *zone* or *compartment*, HPNAI free status can be regained three months after a *stamping-out policy* (including *disinfection* of all affected *establishments*) is applied, providing that *surveillance* in accordance with Articles 10.4.27. to 10.4.33. has been carried out during that three-month period.

33. Second, the relevance of the territorial classification goes to the precise recommendation that may be applicable for imports from that territory, but there is again no text to suggest that this means the importing country is achieving a distinct level of protection. This is most obvious in cases where the recommendations for NAI free and HPNAI free territories are identical. For example, in the case of poultry meat and meat products, Articles 10.4.19 and 10.4.20 respectively provides the exact same recommendation regardless of whether the territory is classified as NAI or HPNAI free. Accordingly in these instances, the United States fails to see how even India can claim that the OIE Code recommends disparate treatment – let alone a ban – or holds out NAI free as achieving a higher level of protection. Indeed, a report of the OIE Code Commission notes that poultry meat presents the exact same risk whether from an NAI or HPNAI free country: "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."[42]

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;

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

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.

Article 10.4.20.

Recommendations for the importation of meat products of poultry

Regardless of the NAI status of the country of origin, *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that:

1) the *commodity* is derived from *fresh meat* which meet the requirements of Article 10.4.19.; or

2) the *commodity* has been processed to ensure the destruction of NAI virus in accordance with Article 10.4.26.;

AND

3) the necessary precautions were taken to avoid contact of the *commodity* with any source of NAI virus.

34. For other recommendations, the conditions may vary depending upon the classification of the territory. But again, there is nothing in the Code to suggest that the distinctions in recommendations reflect different ALOPs as opposed to ensuring the same level of protection. The recommendations for importation of eggs is instructive in this regard.

Article 10.4.13.

Recommendations for importation from a NAI free country, zone or compartment

For eggs for human consumption

Veterinary Authorities should require the presentation of an *international veterinary certificate* attesting that:

1) the eggs were produced and packed in a NAI free country, *zone* or *compartment*;

2) the eggs are transported in new or appropriately sanitized packaging materials.

Article 10.4.14.

Recommendations for importation from a HPNAI free country, zone or compartment

For eggs for human consumption

Veterinary Authorities should require the presentation of an *international veterinary certificate* attesting that:

1) the eggs were produced and packed in a HPNAI free country, *zone* or *compartment*;

2) the eggs have had their surfaces sanitized (in accordance with Chapter 1.1.);

3) the eggs are transported in new or appropriately sanitized packaging materials.

As is evident, there is one additional condition for eggs from an HPNAI territory as opposed to an LPNAI territory: the eggs must have their surface sanitized. The history of this condition, as recorded in an OIE report, reflects that the additional condition is intended to ensure that one potential risk, fecal contamination, is mitigated in the case of HPNAI territories, not that importers of eggs from HPNAI territories are assuming greater risk:

> The Terrestrial Code Commission took into account information provided by the EU (an EFSA opinion, http://www.efsa.eu.int/science/ahaw/ahaw_opinions/1145_en.html) that there was no evidence that natural low pathogenicity avian influenza (LPAI) infections in layers had resulted in eggs containing virus internally. However, as LPAI virus was excreted in the faeces, surface sanitation was considered necessary.[43]

In other words, rather than have recommendations that created different ALOPs – in which case why bother requiring surface sanitation –the Commission is ensuring that there a condition is added to ensure the same level of safety results. In short, there is no text in the avian influenza chapter (or evidence otherwise) that supports India's interpretation that the Code's recommendations reflect different ALOPs with some recommendations providing for a higher level of protection than others.[44]

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[43] OIE, Report Of The Meeting Of The OIE Terrestrial Animal Health Standards Commission (March 2006), p. 7 (Exhibit US-49).

[44] *See e.g.*, India's First Written Submission, paras. 118-119; India's Opening Oral Statement at the First Meeting of the Panel, para. 119.

The User's Guide & Chapter 5.3 Of The OIE Code

35. As noted above, there is no indication in the avian influenza chapter of the OIE Code that the different recommendations present different ALOPs as India suggests. Other provisions of the OIE Code reinforce that India is mistaken. To begin with, the User's Guide to the OIE Code notes that the "purpose of this guide is to assist Veterinary Authorities of OIE Members to use the OIE Terrestrial Animal Health Code … in the application of animal health measures to international trade in animal and animal products." If the OIE Code is intended to assist veterinary authorities, it seems implausible that the OIE would structure its recommendations to achieve different outcomes without any explicit statement to that effect as India is suggesting. Not surprisingly, far from saying there are distinct standards, the User's Guide explains that the Code is seeking an optimal level of security that prevents introduction of a particular disease:

> 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 OIE Code.[45]

India's argument, as best the United States can discern, is that an "NAI standard" precludes entry of LPNAI and HPNAI while an HPNAI standard allows entry of LPNAI. This language contradicts India's position by noting the objective is to prevent entry of disease period.

36. India's assertion that the various recommendations of the OIE Code reflect different ALOPs is also undercut by Chapter 5.3 of the OIE, which addresses OIE Procedures relevant to the WTO SPS Agreement. Article 5.3.1 notes in pertinent part the following:

> The Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) encourages the Members of the World Trade Organization to base their sanitary measures on international standards, guidelines and recommendations, where they exist. Members may choose to adopt a higher level of protection than that provided by international texts if there is a scientific justification or if the level of protection provided by the relevant international texts is considered to be inappropriate. In such circumstances, Members are subject to obligations relating to risk assessment and to a consistent approach of risk management.
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[45] OIE User's Guide (Exhibit US-117), p. 1.

> The SPS Agreement recognises the OIE as the relevant international organisation responsible for the development and promotion of international animal health standards, guidelines, and recommendations affecting trade in live animals and animal products[46]

This provision does not suggest that the OIE drafts its recommendations to achieve various levels of protections for Members. It explains to the contrary that the OIE's role is to develop international standards and Members that wish to depart from these standards need to conduct a risk assessment. Moreover, a provision in this Chapter explicitly provides that rather than attempt to provide for distinct levels of protection, the OIE aims for *equivalence* by providing for alternative measures:

> The Terrestrial Code recognises equivalence by recommending *alternative* sanitary measures for many diseases and pathogenic agents. Equivalence may be gained, for example, by enhanced surveillance and monitoring, *by the use of alternative test, treatment or isolation procedures*, or by combinations of the above. To facilitate the judgement of equivalence, Members should base their sanitary measures on the standards, guidelines and recommendations of the OIE.[47]

Thus, while India asserts the distinct control measures for HPNAI and LPNAI must mean the OIE has created standards that have achieve different outcomes – from which India can pick and choose – the OIE itself is saying that the OIE Code reflects that alternative measures achieve equivalent levels of protection.

India's Argument is Post-hoc Rationalization

37. On a final note to this question, the United States notes that it appears that India's position is relatively novel. Specifically, India has been recorded at an OIE Session as recognizing the OIE Code does not permit import prohibitions on account of LPNAI in poultry – and HPNAI in wild birds – and criticizing it for reflecting those positions.

> The Delegate of India commented on Article 2.7.12.1., stating that HPAI in wild birds and LPAI in poultry in a country could still pose a danger to safe trading in poultry or poultry products. Therefore, the position adopted in the Code, namely that while HPNAI and LPNAI are notifiable they should not lead to the immediate imposition of trade restrictions, is contradictory. Dr Thiermann [head of the OIE Code Commission] pointed out that the Article had previously been

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46 OIE Code, Chapter 5.3, Article 5.3.1, p. 1 (Exhibit US-125).

47 *Id*., Article 5.3.3 p. 2 (Exhibit US-125) (emphasis added).

> accepted by the International Committee in 2007 and no proposal had been made to modify the text.[48]

Thus, before India had to present arguments before this Panel, India appeared to agree, albeit unhappily, that the OIE Code did not recommend trade restrictions on account of LPNAI.

Question 9: Both the United States and India recognise in their first written submissions that the Terrestrial Code constitutes the relevant "international standard" within the meaning of Article 3 and Annex A of the SPS Agreement (United States' first written submission, para. 122; India's first written submission, para. 114.). We note that, while the United States references the latest edition of the Terrestrial Code in its first written submission, i.e. the 21st edition[9], it refers to the Glossary from the 19th edition adopted in 2010 with respect to the meanings of certain terms.[10] India refers to the relevant US exhibits including the 21st edition of the Terrestrial Code in its first written submission:[11]

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[9] *See*, for example, United States' first written submission, para. 3, footnote 6, para. 62, footnote 90 referring to Chapters 4.3, 4.4 and 10.4 of the Terrestrial Code in Exhibits US-1, US-50, US-51.

[10] *See*, for example, United States' first written submission, para. 4, footnote 7 referring to the Glossary of the Terrestrial Code in Exhibit US-2

[11] *See*, for example, India's first written submission, para. 3, footnote 5, para. 20, footnote 30 referring to Exhibits US-1 and US-50.

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a. What edition of the Terrestrial Code is the relevant international standard for the purposes of this dispute?

ANSWER:

38. The relevant edition is the 21st edition. The United States regrets any confusion by the inadvertent substitution of the 19th edition's glossary. The United States notes the Dispute Settlement Body established the Panel on June 25, 2012, at which time the 21st edition of the

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[48] OIE Final Report, 76 GS/FR – PARIS, May 2008, p. 91 (para. 398) (Exhibit US–126); *see also*, Note by the Secretariat, Summary of the Meeting [of the SPS Committee] of 2-3 April 2008, G/SPS/R/49, June 19, 2008, para. 37 (Exhibit US-127) ("With respect to the OIE guidelines, India had voted against the resolution in the last annual session which proposed that low pathogenic AI was not a concern for international trade.").

OIE Code was in force.[49] As the measures at issue in a dispute are those in force at the time a panel is established, the United States notes likewise that the relevant international standards to judge those measures against should be those in force at the time that the Panel is established.[50]

b. What are the substantive differences between the editions, including the Glossaries that the parties have referred to in their first written submissions, and which of these differences provide relevant context for the present dispute?

ANSWER:

39. The United States is not aware of any substantive differences between the 19th and 21st editions, including the glossaries.[51] For the Panel's convenience, the United States is providing references from two sets of documents. First, the United States has pasted below excerpts from reports of meeting of the OIE Code Commission that confirm the changes proposed and adopted for the avian influenza chapter from the adoption of the 19th edition to the 21st are minor and primarily to enhance clarity. Second, the United States is submitting to the Panel the accompanying mark-ups of the avian influenza chapter from each of meetings reflecting any proposed changes.

- September 2010 Report[52]

  The Code Commission received comments from Australia, Brazil, the EU, and the Scientific Commission.

  The Code Commission discussed Members' comments on additional clarity for disease notification and made minor modifications to the Chapter.

  In regard to the inactivation of avian influenza:

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49 OIE, 80th General Session FR, p. 110 (para. 349), Exhibit US-88 ("The President submitted for adoption Draft Resolution No. 19 on Amendments to the OIE Terrestrial Animal Health Code. The Resolution was adopted unanimously.")

50 *EC – Chicken Cuts (AB)*, para. 156 ("[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel.").

51 The 2012 edition's glossary has a few additional terms: "captive wild animal," "euthanasia," "feral animal," "infestation", "Veterinary legislation," "wild animal" and "wild life." The United States does not believe these additions have any impact on the dispute.

52 OIE, Report of the Meeting of the OIE Terrestrial Animal Health Standards Commission, Sep. 6-17, 2010 & Annex 21 (Exhibits US-128 & US-129)

– the Code Commission was advised by the author of the cited scientific paper that the correct value in Article 10.4.25 was in fact 870 seconds, not the 256 seconds suggested by Members. The 256 seconds was, according to the author, a typographical error;[53]

– the Code Commission noted that the time cited by a Member with reference to Article 10.4.26. would achieve a 1 log reduction rather than the 7 log reduction achieved elsewhere in the chapter. Therefore, the proposal was not accepted.

The revised Chapter, which is presented at Annex XXI, is provided for Member comments.

- February 2011 Report[54]

Comments were received from Canada, the EU, South Africa and the USA.

Members' recommendations to change the text of point 9 in Article 10.4.1. and to modify point 2 in Article 10.4.33. were not accepted, because the text already covered the issue and the proposed modification did not present a significant improvement.

The Code Commission made some minor amendments following Members'' recommendations.

The revised Chapter 10.4., proposed for adoption, is at Annex 21.

- September 2011 Report (No changes to the avian influenza chapter)

- February 2012[55]

The Code Commission modified the title of Chapter 10.4. to 'Infection with viruses of notifiable avian influenza' and clarified the reporting provisions for notifiable avian influenza by repeating text from point 6 of Article 1.2.3. to Chapter 10.4. The Commission emphasised that this does not change the current notification obligations; rather, it states them more clearly.

The amended chapter proposed for adoption is at Annex XXVII.

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[53] This reference is to the time necessary to inactive AI virus in liquid egg white at 55.6 degrees centigrade. The printed version of the 2010 OIE Code reflects the 870 seconds noted here.

[54] OIE, Report of the Meeting of the OIE Terrestrial Animal Health Standards Commission, Feb. 1-11, 2011, p. 18 & Annex 21 (Exhibits US-130 & US-131).

[55] OIE, Report of the Meeting of the OIE Terrestrial Animal Health Standards Commission, February 14-23, 2012, p. 22 & Annex XXVII (Exhibits US-132 & US-133).

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As reflected in the above notations from the OIE reports and the accompanying mark-ups, the United States is unaware of any substantive changes.

4 INDIA'S MEASURES

Question 10: At paragraphs 101 and 102 of its first written submission, the United States, referring to India's Livestock Importation Act, 1898 and S.O. 1663(E), alleges that "India's measures are sanitary measures as defined under Annex A of the SPS Agreement (their objectives include those provided for in subparagraphs (a) through (c))". By relying on the text of subparagraphs (a), (b), and (c), of Annex A of the SPS Agreement, please elaborate on how the purpose of the two Indian instruments would fit within the purposes set out in Annex A of the SPS Agreement.

ANSWER:

40. The WTO Notification for S.O. 1663(E) states that its purpose is "[t]o ensure food safety and protect domestic and wild birds from avian influenza (both from highly pathogenic notifiable avian influenza and low pathogenic notifiable avian influenza)" and that the reason for the urgent action was "to prevent the ingress of this virus to protect human health as well as health of poultry in India."[56] Such measures are SPS measures under the terms of SPS Agreement Annex A paragraph 1(a), which defines an SPS measure to include "Any measure applied: (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;" and Annex A paragraph 1(c), which provides that SPS measures include measures "to protect human life or health within the territory of the Member from risks arising from diseases carried by animals, plants or products thereof[.]" Further, in its response to the "Objective and rationale," question on the Notification (Question 7), India, in addition to ticking the boxes for "animal health" and "protect humans from animal/plant pest or disease," also ticked the box for "food safety."[57] Paragraph 1(b) of Annex B defines SPS measures to include measures applied "to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs."

Question 11: According to paragraph 29 of its first written submission, India granted SIPs to the United States for imports of unprocessed turkey meat in January 2011, before entry into force of S.O. 1663(E):

a. Does the United States agree with this statement?

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56 Notification of Emergency Measures, G/SPS/N/IND/73, Oct. 11, 2011 (Exhibit US-134).

57 *Ibid*.

ANSWER:

41. At the outset, the United States would like to ensure its position regarding the relevance of India's assertion that some imports occurred is clear. First, to the extent India is arguing that it allows imports when countries are *not* reporting outbreaks of LPNAI, the United States notes it does not impact the U.S. concern which is that India maintains import restrictions on account of LPNAI – and that such measures are inconsistent with its obligations under the SPS Agreement. Second, to the extent India is arguing that the United States should have been aware when and under what circumstances it lifts its import restrictions after an outbreak of NAI has been controlled, the United States notes it posed that precise question to India in its Article 5.8 Request, which India never responded to.[58]

42. With these considerations in mind, the United States does not agree with India's statement – with either the assertion that import permits were issued to the United States or the implication that India imported turkey meat from the United States. Regarding the issuance of import permits, the exhibits India cites in support of its contention, Exhibits IND-20 & IND-21, state that the grantee of the permit for both was [[ ]].[59] Moreover, although these exhibits note the origin of the products as the Netherlands and the United States – without specifying the respective quantity or producer from either – the actual country from which the product is being exported is the United Arab Emirates.

43. Regarding whether any trade occurred, the United States notes three points. First, as noted above, the United States reiterates that the issue is that India's measures on their face ban imports into India when the exporting country is reporting NAI (including LPNAI) to the OIE. Nothing in the SIPs provided by India suggests the contrary. Accordingly, whether any shipments occurred does not change the measures under challenge.

44. Second, the SIPs themselves do not indicate whether any entries of turkey meat into India actually occurred. Indeed, included in both exhibits provided by India are *blank* veterinary certificates. It is accordingly unclear whether any veterinarian actually made the attestations requested by India and shipment and entry actually occurred.

45. Third, import statistics also appear to confirm that no imports of turkey meat into India occurred in 2011 or since. Below is an image taken from the database of World Trade Atlas, a

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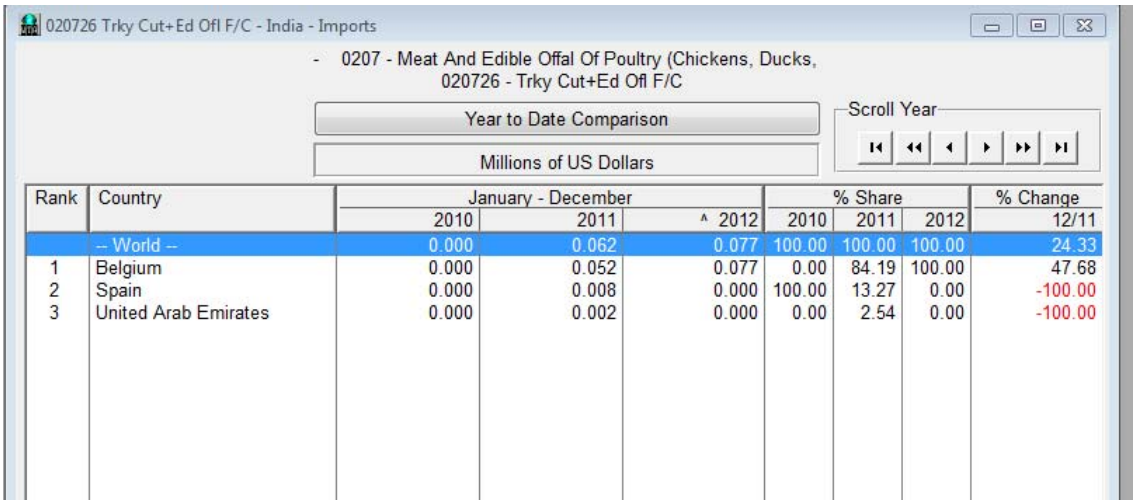
[58] Exhibit US-4, Q.7.

[59] The United States notes that India has not explained why the information in these exhibits, including the names of the importer, merits SCI protection. Indeed, the United States notes that Indian courts have adjudicated cases by Indian importers challenging the government of India's authority, including under the Livestock Act Importation Act of 1898 without any need to hide the importer's name. *Higashimaru Feeds (India) Ltd. vs Union Of India*, 2004 (3) KLT 502 (Kerala High Court Aug. 3, 2004), (Exhibit US-135); *M/S Beekey Enterprises vs. Quarantine Officer (Sr)*, (Madras High Court Mar. 5, 2008) (challenging refusal to allow entry of pig bristles from the People's Republic of China on account of avian influenza) (Exhibit US-136).

reporting service that obtains its data only from official sources in reporting countries such as customs agencies or national statistics agencies. The image reflects reported imports of turkey meat under HTS Code 0207 (Meat and Edible Offal of Poultry) into India using data reported by India.[60] As is evident from the first image, there is no data indicating India imported turkey meat directly from the United States. The only reported shipments in 2011 are USD$ 2,000 worth from the U.A.E., [61] USD$ 8,000 from Spain, and USD $52,000 from Belgium. The only country India imported turkey meat from in 2012 was Belgium and then only USD$ 77,000 worth.


020726 Trky Cut+Ed Ofl F/C - India - Imports

- 0207 - Meat And Edible Offal Of Poultry (Chickens, Ducks,
020726 - Trky Cut+Ed Ofl F/C

Year to Date Comparison

Millions of US Dollars

Scroll Year

Rank	Country	January - December			% Share			% Change
		2010	2011	^ 2012	2010	2011	2012	12/11
	-- World --	0.000	0.062	0.077	100.00	100.00	100.00	24.33
1	Belgium	0.000	0.052	0.077	0.00	84.19	100.00	47.68
2	Spain	0.000	0.008	0.000	100.00	13.27	0.00	-100.00
3	United Arab Emirates	0.000	0.002	0.000	0.00	2.54	0.00	-100.00

In short, there appears to be no evidence to support the assertion that India has issued SIPs to the United States, or U.S. producers or that any shipments actually took place.[62]

b. If so, has the United States exported turkey meat to India following the granting of the SIPs in early 2011?

ANSWER:

46. Per the answer provided to part (a) of this question, the United States does not believe it, or rather any U.S. producers, made any exports of turkey meat to India in 2011 or since.

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60 World Trade Atlas data for India extends only up to 2012. 2013 data is not yet available.

61 Although the chart reflects about $2000 worth of exports from the UAE to India, there is a discrepancy between the data and the SIP provided by India. Specifically, the SIPs indicate the HTS Code is 020724, which is meat of turkeys not cut in pieces. The only entries being reporting in the World Trade Atlas appear to be under 020726, which is cuts of turkey meat.

62 The United States notes that the European Union's Oral Statement also supports the notion that India's assertions about allowing exports appears to be inaccurate or at least incomplete. European Union's Third Party Statement, para. 19.

c. Has the United States requested/ been granted any SIPs since the entry into force of S.O. 1663(E)? If so, in respect to which products? Furthermore, having obtained the SIPs, did the United States export to India the products permitted therein?

ANSWER:

47. To avoid any confusion, the United States wishes to make clear that the U.S. Government, in particular USDA, does not make commercial exports. Accordingly, the United States has not – and would not – request SIPs. The United States is also unaware of any U.S. exporters requesting SIPs from India.

d. Have there been exports of any of the products at issue since the entry into force of S.O. 1663(E)?

ANSWER:

48. The United States has attempted to compile the relevant data into a chart, which is being submitted to the Panel as Exhibit US-137. The United States notes that it has been unable at this time to obtain data for 2013, and for certain products: pathological material and biological products from birds, products from animal origin intended for animal feeding or for agricultural or industrial use, semen, and processed poultry meat. The United States can follow up on this matter to see if the data subsequently becomes available if the Panel is so inclined. The United States also notes that the data for poultry eggs and egg products would also include products such as liquid or dried egg albumin, which is why no quantity is provided for that entry in the chart.

e. In paragraph 15 of India's opening oral statement, India appears to argue that the United States' claims are only concerned with fresh meat of poultry products and eggs from LPNAI countries. Please confirm whether this is correct and whether if so, your claims will not concern any of the other products listed in S.O. 1663(E).

ANSWER:

49. India is incorrect. As the United States clearly stated in its first written submission – and as the Panel recognized in its Ruling on India's Preliminary Ruling Request – "[t]he measures at issue are those that constitute and support an import ban of various agricultural products, purportedly on account of NAI."[63]

50. The United States takes this opportunity to note the precise argument India is making and why it is misplaced. Specifically, India is arguing that because the United States explained that

[63] Preliminary Ruling of the Panel, DS430 (May 22, 2013), para. 3.21 (citing U.S. First Written Submission, para. 88).

the Summary Document would flawed as a risk assessment since it only referenced two products – instead of all the product s India prohibits – somehow the U.S. claim is limited to those two products. The United States' point remains as straightforward as in its opening submission: India lacks a risk assessment for any of its restrictions.

51. To confirm the above point, the United States notes India's argument in paragraph 137 of India's first written submission. India states in that paragraph the following:

> It [the United States] has adduced claims starting with Article 5.1 and 5.2 and 2.2 specifically alleging that as far as fresh meat of poultry and eggs are concerned there is no scientific basis to maintain a temporary import suspension of the type maintained by S.O. 1663(E).[182] Thus, by agreeing that compliance with international standards amounts to maintenance of measures in accordance with Article 2.2 and by limiting its arguments of India's alleged violation under Article 5.1, 5.2 and 2.2 to eggs and fresh meat of poultry,[183] the United States *ipso facto* accepts that India is in compliance with the OIE Code as far as other products under S.O. 1663(E) are concerned.
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>
> [182] Paragraphs, 111, 116, 118, 119 of the United States FWS
>
> [183] The United States has provided arguments/evidence for eggs and fresh meat of poultry under paragraphs 11, 57, 58, 59, 111, 116, 118, 119 of the United States FWS
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But the references India provides are to the U.S. discussion of the Summary Document and whether it could constitute a risk assessment.[64] As mentioned above, the United States in those paragraphs, far from suggesting that it was limiting it challenge, noted that a flaw in the Summary Document – if it was to be considered a risk assessment – was that it *only addressed poultry meat and eggs rather than all the products prohibited*:

> Although India bans numerous products, the only two products referenced are poultry meat and eggs, presumably for human consumption. The majority of products that India prohibits, such as hatching eggs, poultry semen, feathers, etc., are not referenced at all. Even with respect to poultry meat and eggs, the Summary Document fails to note any actual likelihood of transmission, including with respect to LPNAI.[65]

In short, it appears India's assertion is based on a gross distortion of U.S. arguments.

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64 The discussion takes place in paragraphs 115 to 123 of the U.S. First Written Submission.

65 United States, First Written Submission, para. 117.

Question 21: Please clarify which agricultural products are covered by the import prohibition imposed by India's AI measures, and whether the list of such products is limited to or extends beyond the products referenced in S.O. 1663(E).

ANSWER:

52. The United States understands that the products covered by India's AI measures include, at a minimum, those listed in S.O. 1663(E). In particular, under paragraph 1(i) of S.O. 1663(E), imports of wild birds (except those raised in captivity) are prohibited from all countries. And imports of the products listed in paragraph 1(ii) are prohibited if they come "from the countries reporting Notifiable Avian Influenza[.]" The products listed in paragraph (ii) are: domestic and wild birds; day-old chicks, ducks, turkeys, and newly-hatched Avian species; unprocessed meat and meat-products from Avian species, including domesticated, wild birds and poultry; hatching eggs; eggs and egg products (except Specific Pathogen Free eggs); unprocessed feathers; live pigs; pathological material and biological products from birds; products of animal oroigin (from birds) intended for use in animal feeding or for agricultural or industrial use; semen of domestic and wild birds, including poultry. The United States would note that processed poultry products are covered by the import prohibitions imposed under paragraph 1(ii) because the terms of paragraph 1(ii)'s language on processed poultry products,[66] effectuate a prohibition, contrary to the recommendations of the OIE Code,[67] on the importation of processed poultry products from an NAI positive country absent a "conformity assessment."

[66] S.O. 1663(E) (Exhibit US-80), para. 1(ii) ("provided the Central Government may allow the import of processed poultry meat after satisfactory conformity assessment of the exporting country.").

[67] OIE Code (Exhibit US-1), Art. 10.4.20.

5 CLAIMS UNDER THE SPS AGREEMENT

Question 28: At paragraph 108 of its first written submission, the United States argues that "a WTO Member that picks and chooses those standards and recommendations it prefers is not entitled to the presumption" of consistency set out in Article 3.2 of the SPS Agreement. India, at paragraph 145 of its first written submission, states that "the part of the domestic measure which adopts the international standard should have the presumption of 'conforming' to the international standard and be presumed to be consistent with the SPS Agreement." With reference to the Appellate Body's findings in *EC – Hormones*, that both parties have referred to in their first written submissions (United States' first written submission, paragraph 108; and India's first written submission, paragraph 144):

a. Must a Member's measure conform to all the relevant international standards in order to benefit from the presumption of consistency in Article 3.2? If so, are there any relevant standards in this dispute other than the Terrestrial Code? Does a Member need to conform to the relevant international standards for all the products concerned in order to benefit from the presumption in Article 3.2?

ANSWER:

The Member Must Conform To The Entire Relevant Standard

53. The Appellate Body in *EC – Hormones* was clear that the presumption under Article 3.2 is available only if the Member adopts all elements of the international standard:

> Under Article 3.2 of the SPS Agreement, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard *completely* and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the SPS Agreement and of the GATT 1994.
>
> Under Article 3.1 of the SPS Agreement, a Member may choose to establish an SPS measure that is based on the existing relevant international standard, guideline or recommendation. *Such a measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2* ….but, as earlier observed, the Member is not penalized by exemption of a complaining Member from the normal burden of showing a prima facie case of

> inconsistency with Article 3.1 or any other relevant article of the SPS Agreement or of the GATT 1994.[68]

In other words, a Member must transpose the international standard *in toto* when adopting its measure in order to enjoy the presumption of Article 3.2.

54. In paragraph 145 of its first written submission, India argues the part of the domestic measure that adopts part of the international standard should enjoy the presumption of consistency while the portion that does not must be justified under other provisions of the SPS Agreement. That reading, however, is directly rejected by the findings of the Appellate Body noted above. Moreover, it would run afoul of a finding made by the Appellate Body in *US – Continued Suspension*: "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." India's argument – which allows Members to maintain measures that achieve higher ALOPs than international standards to invoke Article 3.2 – thus runs afoul of multiple findings of the Appellate Body.

55. India has not explained what aspects of its measures reflect an adoption of the OIE Code and what aspects do not. Considering that no text in the OIE Code whatsoever recommends the imposition of import prohibitions on account of avian influenza, India's position is flatly wrong. Even under India's argument, 3.1 would retain validity for those subdivisions that do not.

The OIE Promulgates The Relevant Standard

56. As a preliminary matter, it appears the parties are in agreement that the relevant international standard is promulgated by the OIE, including in particular the OIE Code.[69] Indeed, India when it notified S.O. 1663(E) identified the OIE Code, although not the particular provisions, as the relevant international standard.[70] The reason the OIE Code is the relevant standard is that paragraph 3(b) of Annex A of the SPS Agreement defines international standards "for animal health and zoonoses [to be] the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics," *i.e.*, the OIE. Accordingly no other international organization's standards are relevant for purposes of animal health and zoonoses.

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[68] *EC – Hormones (AB)*, paras. 170-171 (emphasis added).

[69] The United States notes that other OIE documents may be relevant. For example, as noted in the U.S. First Written Submission, the OIE Handbook on Import Risk Analysis contains the OIE's techniques for a risk assessment and would be relevant to determining whether India took them into account pursuant to Article 5.2 of the SPS Agreement. *See* U.S. First Written Submission, para. 122. Additionally, Chapter 2.3.4 of the OIE Manual of Diagnostic Tests and Vaccines for Terrestrial Animals contains guidelines for diagnostic techniques and vaccination.

[70] G/SPS/N/IND/73 (Exhibit US-134).

The Presumption of Conformity Relates to Measures

57. The United States notes that the presumption of consistency under Article 3.2 relates to whether a *measure* conforms with an international standard. To the extent that the complete international standard is drawn with respect to particular a product, the United States agrees that is possible a measure could be crafted where it embodies that standard completely and is thus entitled to the presumption of conformity provided for in Article 3.2.

b. Does a Member's measure that adopts only elements of the relevant international standard benefit from the presumption of consistency in Article 3.2?

ANSWER:

58. The United States refers to its response to part (a) of this question.

Question 29: What are the elements of the Terrestrial Code that would need to be adopted into India's AI measures for them to be considered to be "based on" the Code?

ANSWER:

59. The United States notes the definition to "base something on" is "use as the foundation for."[71] Whether or not a particular measure is based on an international standard is necessarily a case-by-case evaluation. The United States generally would expect that for a measure to be "based on" a standard in the OIE Code, the measure must adopt the basic structure of the recommendation, and not contain elements that contradict the standard. On the facts of this dispute, India's measure is so inconsistent with the OIE Code that under no possible interpretation of "based on" could India's measure be seen to meet the condition in the Article 3.1. For example:

- India does not allow the importation of the products that the OIE Code explicitly recommends can be safely imported from countries that are NAI or HPNAI free if the exporting countries satisfies the conditions met in the OIE Code. By rejecting the OIE Code's recommendations in favor of import prohibitions, India is clearly contradicting and undermining the OIE Code.

- India does not recognize that countries, zones, and compartments can be designated as NAI or HPNAI free as provided for throughout the avian influenza chapter of the OIE Code. Accordingly, India besides imposing import restrictions that have no basis in the Code is also imposing measures on a scale beyond that provided for in the OIE Code.

[71] Concise Oxford Dictionary, p. 110 (Exhibit US-139); *see also* Shorter Oxford Dictionary, p. 187 ("make or act as a foundation for".) (Exhibit US-140).

In short, while determining whether a measure is based on international standards is a case by case inquiry, it is clear here that India's measures, in light of their inherent contradiction with the OIE Code, cannot be considered to be somehow "based on" it.

Question 31: With reference to paragraph 111 of United States' first written submission, please clarify the use of the terminology "pest risk assessment" in the particular context of animal health.

ANSWER:

60. Paragraph 4 of Annex A of the SPS Agreement defines two types of risk assessment:

> [1] The evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences; or [2] the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

The United States when utilizing the term "pest risk assessment" is referring to the first type of risk assessment.[72] The panel in *Australia – Salmon* found that that:

> The first set of definitions deals with risks arising from the entry, establishment or spread of pests or diseases. The second addresses risks arising from specific substances in food, beverages or feedstuffs.[73]

Australia in that particular dispute asserted that its measures were intended to protect salmonids and other aquatic animals from 24 disease agents.[74] The panel in that dispute found that since the measure at this dispute was a sanitary measure under paragraph 1 of Annex A (measure applied "to protect animal … life or health…"), the applicable risk assessment was the first one specified in paragraph 4 of Annex A.[75] The Appellate Body agreed with the panel's finding in that regard.[76]

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[72] The United States notes the Appellate Body has used the nomenclature of "pest risk assessment" as well. *See generally Australia – Apples (AB)*.

[73] *Australia – Salmon (Panel)*, para. 8.68.

[74] *Australia – Salmon (Panel)*, para. 8.32.

[75] *Australia – Salmon (Panel)*, para. 8.69.

[76] *Australia – Salmon (AB)*, para. 120.

Question 32: In its first written submission, the United States, after arguing its claim under Article 2.3 of the SPS Agreement, contends "[i]n the Alternative, India Could be Viewed as Having Breached Its Obligations Under Article 5.5 of the SPS Agreement with a Resulting Consequential Breach of Article 2.3". Please clarify whether your claim under Article 5.5 must be examined by the Panel as an alternative to your claim under Article 2.3 of the SPS Agreement.

ANSWER:

61. The United States believes that Article 2.3 and Article 5.5 provide two different conceptual frameworks through which India's discriminatory practices could be analysed. The United States believes that it is most appropriate to view India as having enacted measures that discriminate between India and other Members in responding to the risk of transmission of NAI in the products covered by S.O. 1663(E), and accordingly to view India as having breached the first sentence of Article 2.3. Likewise, the United States believes that it is more appropriate to consider India as having one ALOP for LPNAI (reflected in its domestic surveillance and control measures), than distinct ALOPs with respect to transmission of LPNAI through foreign and domestic products.

62. While the United States believes that India's measures are more properly analysed under Article 2.3 than under Article 5.5, the United States advances the Article 5.5 claim for the Panel's consideration in the event that the Panel were to consider that transmission of AI in imported products and transmission of AI in domestic products should be viewed as "different situations" under Article 5.5. In that case, India would be in breach of Article 5.5, because it maintains arbitrary or unjustifiable distinctions in the levels of protection that it considers appropriate with respect to imported and domestic agricultural products with respect to AI risks.

Question 33: At paragraph 209 of its first written submission, India argues 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." 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 view of this statement, please explain the distinction, if any, between India's application of the same ALOP to the domestic and imported products, and the application of the same measures to the domestic and imported products.

ANSWER:

63. India's remark is telling, for purposes of the United States' claims under Articles 2.3 and 5.5, as it reveals that India appears to view culling of its entire poultry flock in response to an NAI outbreak as the domestic equivalent of the measures (complete import bans) that it has imposed with respect to imported products following NAI detections in their country of origin.

64. Further, India is incorrect when it claims the United States is arguing that India should be required to cull its entire poultry flock in response to an NAI outbreak. The United States is

seeking changes in the measures that India applies to imported products—the products at issue in this dispute—not the measures that India applies to domestic products. Rather than suggesting that India should cull its poultry flocks, the United States has explained that the SPS Agreement requires India to apply AI measures with respect to imported products on a similar basis as for domestic products. In particular, India should not apply bans on trade in products following LPNAI detections; and following HPNAI outbreaks, India should restrict trade in products only if those products are from affected zones or compartments—just as India applies its measures for containment of AI outbreaks in domestic flocks only to products from small and defined areas.

65. Moreover, there is a significant difference between application of the same ALOP to domestic and imported products, and the application of the same measures to domestic and imported products. The SPS Agreement is about addressing risks, and tailoring any SPS measures to those risks. The measures applied to achieve an ALOP will depend on the risks presented by the products to which the measures apply. Measures could vary due to different risks presented by different products, even though the measures are designed to achieve the same ALOP.

Question 35: Concerning the Terrestrial Code:

a. What is the ALOP reflected in Chapter 10.4 of the Terrestrial Code?

ANSWER:

66. The OIE Code is premised on reaching a certain level of protection (as contrasted with an ALOP, which is determined by each Member). The OIE Code provides recommendations for the safe trade of various products in light of the terrestrial animal diseases addressed in the Code. The OIE Code's User's Guide explains that its recommendations "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."[77]

b. Is there more than one ALOP reflected in Chapter 10.4 of the Terrestrial Code?

ANSWER:

67. No. Chapter 10.4, like the rest of the OIE Code's chapters on the handling of different diseases, lays out one set of recommendations that "are designed to prevent the disease in question being introduced into the importing country." The recommended requirements to achieve this goal vary based on the specific product being traded and the disease status of the exporting country, but they all are designed to achieve this goal. Nowhere does the Chapter

[77] OIE Code, User's Guide (Exhibit US-117), para. A.2.

identify different levels of risk of introduction of NAI that importing countries might be willing to tolerate and then lay out alternative recommendations that could achieve such different risk tolerances with respect to the risk of introduction of NAI.

c. Is/are this ALOP or these ALOPs explicitly stated in any OIE documents?

68. As noted above, the ALOP is selected by the Member adopting the measure. However, OIE Code's standards are set to achieve a certain level of protection. The User's Guide explains that its recommendations "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."[78]

5.5 ARTICLE 5.6

Question 36: India asserts, at paragraph 255 of its first written submission, that "[the United States] suggests that India would not need to carry out other inspection or controls to make sure that the consignment itself is not contaminated but should place full faith on the United States attestation and import the products without other controls." In view of India's assertion, kindly describe in greater detail the "measures based on the OIE Code" referred to in paragraphs 134-140 of the United States' first written submission.

69. India's argument reflects a misreading of both the U.S. position and the OIE Code. The United States is not arguing that India is not entitled to conduct customs measures, but that there are alternatives to an outright ban and that the recommendations in the OIE Code constitute precisely such an alternative. The United States noted in first written submission that for almost all of the products that India bans, there is a specific recommendation in the OIE Code that provides for safe importation.[79] For example, for fresh poultry meat, OIE Code Article 10.4.19 provides that a veterinary certificate should be provided that attests that poultry from which the meat was derived has been kept in a country, zone, or compartment free from HPNAI since they were hatched or at least 21 days and have been slaughtered and subject to inspection. Article 10.4.14 provides that eggs for human consumption from an HPNAI free country requires a certificate attesting they produced or packed in an HPNAI free territory, have had surface sanitation, and are transported in new and appropriately sanitized materials.

70. Moreover, the OIE Code does not simply require an importing country to accept imports carte blanche. It also requires the exporting country, per Article 10.4.30, to provide evidence that it maintains an effective surveillance program. This information can confirm that the territory is indeed the status – *e.g.* HPNAI free of LPNAI free – that it purports to be.[80] Article

78 OIE Code, User's Guide (exhibit US-117), para. A.2.

79 U.S. First Written Submission, para. 128.

80 OIE Code, Articles 10.4.2, 10.4.3, and 10.4.4 (Exhibit US-1).

10.4.31 requires further evidence after an outbreak to establish that the country, zone, or compartment has regained freedom from NAI or HPNAI.[81]

Question 37: At paragraph 255 of its first written submission, India states that "[t]he risk of contaminated products is all the more possible given that poultry and poultry products from areas of LPNAI outbreak in the United States are not exterminated but are commercially traded as part of a 'controlled marketing' system." Please describe what is meant by the "controlled marketing system", explaining how it works.

ANSWER:

71. The United States observes that India's citation to the U.S. controlled marketing system is not to an Indian government document that noted any potential concerns with the program, but an article submitted by the United States with its first written submission that discusses U.S. control measures.[82] Accordingly, it does not appear that India has had any concerns with the U.S. controlled marketing system until this dispute arose. With that observation, the controlled marketing system can be explained as follows.

72. In the United States, LPNAI infection can be resolved through two methods. First, the affected flock can be "stamped out" which means that it is culled and disinfection procedures are implemented. Alternatively, and used less frequently, is controlled marketing, which is governed by a regulation issued by the U.S. Animal Health and Plant and Inspection Service. Under controlled marketing, the flock is contained for 21 days. As noted in Article 10.4.1.4 of the OIE Code, the incubation period for avian influenza is 21 days. Accordingly, the time period is intended to ensure that the infection has subsided. Then, seven days before the flock is slaughtered, the flock is retested. Only if the test results confirm no infection can the poultry proceed to slaughter. So essentially, the United States contains the flock for a period of time that should ensure the infection has passed and then retests the flock to confirm that it is free of infection. Provided such is the case, the meat is slaughtered. The United States notes that Articles 10.4.3 and 10.4.19 of the OIE Code explicitly provide that in case of LPNAI infections, poultry may be kept for slaughter and notably – the United States is allowing it to be served to its own citizens.

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[81] Moreover, the United States does not understand precisely what India means when it says "full faith." To the extent India is arguing that it cannot rely on veterinary certificates as provided for in the OIE Code, the United States would find such an assertion puzzling as India apparently maintains and requires veterinary certificates under its present measures. U.S. First Written Submission, para. 92, Exhibits US-52-55, 71.

[82] India's First Written Submission, para. 255.

Question 39: As already noted, the three elements of this test under Article 5.6 are that there is an SPS measure which:

(1) is reasonably available taking into account technical and economic feasibility;

(2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and

(3) is significantly less restrictive to trade than the SPS measure contested.

What should be the order of analysis that the Panel should follow under the three-pronged test of Article 5.6 of the SPS Agreement?

ANSWER:

73. As noted by the panel in *Australia – Apples*, there have been varying approaches by WTO panels regarding the order of analysis in Article 5.6 claims.[83] The United States suggests the Panel adopt the order of analysis adopted by that panel as well as the compliance panel in *Australia – Salmon*: (1) is there a measure that achieves the Member's ALOP; (2) is that measure reasonably available; and (3) is it significantly less trade restrictive.

74. The United States submits this approach is appropriate here because resolution of this issue, particularly if the Panel finds that India's ALOP is low as the United States suggests, should facilitate review of the subsequent elements. In particular, the United States notes it should not be difficult to ascertain that the OIE Code recommendations are available (since numerous countries already practice them) and is less trade restrictive than outright import prohibitions.

[83] *Australia – Apples (Panel)*, paras. 7.1106 & 7.1107.

Question 40: At paragraph 248 of its first written submission, India defines its ALOP in the following terms: "to prevent ingress of an exotic disease through products that are clearly identified as risk factors even by the OIE". We note, however, that, at the first substantive meeting, India redefines its ALOP as "NAI-freedom". At paragraph 241, India argues that its ALOP was incorrectly identified by the United States as "quite low", because "[t]he ALOP is not to be discerned from domestic control measures [i.e., NAP 2012] but from the measure which is challenged as being more trade restrictive than required, which in this case is S.O. 1663(E)". Does the SPS Agreement permit a Member to adopt different ALOPs, i.e. one for its domestic measures and another for its imported measures?

ANSWER:

75. An ALOP is made with respect to a particular risk, not with respect to a product. Accordingly, assuming that the Panel's question is premised on the domestic product and the imported product having the same risks, and assuming that the different ALOPs result in a more restrictive measure on imports, then the answer is: no, a Member may not adopt different ALOPs under the SPS Agreement. To do so would amount to unjustifiable discrimination under Article 2.3 of the SPS Agreement. In the present case, as the United States has explained, India's measures involving agricultural products involve the same domestic and imported products, and the same type of AI risks. In addition, where there are "different situations," in the terms of Article 5.5, then a Member may adopt different ALOPs, but also must meet the requirements set out in Article 5.5. But to adopt different ALOPs based simply on the product is imported would not be consistent with Article 5.5. Accordingly, the application of a higher ALOP to imported products amounts to a breach of the WTO Agreement.

5.6 ARTICLE 6

Question 41: At paragraph 148 of its first written submission, the United States alleges that "India has required country-level certification despite requests by the United States dating back to at least 2006 that India adjust its required certification to recognize the concept of disease free regions or zones":

a. Taking into account the Guidelines to further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures adopted by the SPS Committee (G/SPS/48), has the United States requested recognition of a disease-free area from India, in accordance with Articles 6.2 and 6.3 of the SPS Agreement?

ANSWER:

76. As an initial matter, the United States would note that the Guidelines do not add to or diminish Members' rights and obligations under the SPS Agreement, as they themselves make clear in paragraph 2.

77. Turning to what the Guidelines suggest, the United States notes that the first step in the process laid out in the Guidelines is one that India has not taken. The Guidelines provide 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."[84]

78. Even so, as noted above in response to question 6(b), even though India did not publish the basis for recognition of relevant areas and a description of the general process used, both the United States and the European Union did request that India recognize the applicability of regionalization to AI. But these efforts were unsuccessful: India was unwilling to even recognize the need to apply the concept of regionalization to AI. For these reasons, the United States was never able to get to the stage of submitting an application for recognition of specific disease free areas.

b. Please comment on the following statements in paragraph 142 of India's first written submission:

> **The United States does not identify the obligation contained in either the OIE Code or in the SPS Agreement which obligates India to adopt either zoning or compartmentalization over country freedom. As explained by India in its arguments under Article 6 of the SPS Agreement, importing countries are not under any obligation to *suo moto* recognize zones or compartments in the absence of any information from the exporting country.**

ANSWER:

79. The United States is not suggesting that countries have an obligation to recognize *particular* zones or compartments. To the extent that India views the United States as asserting this, India misunderstands the U.S. position.

80. However, to the extent that India is arguing that it is free to refuse any and all requests for regionalization as a matter of principle, the WTO Agreement says otherwise. Under Article 6.1 of the SPS Agreement, Members must ensure their measures are adapted to regional characteristics. Furthermore, under Article 6.2 of the SPS Agreement, Members are required to recognize the concepts of pest- or disease-free areas. Where, as here, a Member's measures impose country-wide bans and do not provide for the possibility of different treatment of regions with respect to a disease that can be safely regionalized, given the appropriate surveillance and control measures, the Member breaches both obligations.

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

81. As the United States has noted, India's measures are written on a country basis, and despite requests India was unwilling to accept the concept of regionalized application of AI measures. Had India done so, the two sides could have proceeded to discussion of the specifics of U.S. measures, and whether India could apply its measures to products from the United States on a zone or compartment basis as a result of the surveillance and control measures maintained by the United States.

Question 44: Article 6.1 of the SPS Agreement requires Members to adapt their SPS measures to the sanitary characteristics of the area from which a product originates. Articles 6.2 and 6.3 address recognition of pest- or disease-free areas:

a. What are the differences between the two concepts, i.e. between adaptation of SPS measures to the SPS characteristics of an area (Article 6.1) on one hand, and recognition of pest- or disease-free areas (Article 6.2 and 6.3) on the other hand?

ANSWER:

82. Article 6.1 lays out a general obligation to account for the sanitary or phytosanitary characteristics of an area. The United States understands Article 6.2 to address a specific aspect of that obligation—Members must recognize the concepts of pest- or disease-free areas or areas of low pest or disease prevalence. Both, however, require Members to respond to differences in conditions.

b. Article 6.3 clarifies the obligations of exporting Members claiming that areas within their territories are pest- or disease free. Are these obligations of the exporting Member (i.e. providing the necessary evidence etc.) also relevant in the context of Article 6.1?

c. What are the roles of the exporting and importing Members with respect to the concept in Article 6.1, i.e. the adaptation of SPS measures to the SPS characteristics of an area? Does this adaptation need to be explicitly requested by the exporting Member or does the importing Member have the obligation to adapt its measures, on its own initiative, to the SPS characteristics of the area from which a product originates?

ANSWER:

83. The United States would offer the following answer to questions 44(b) and 44(c):

> Each of the 3 paragraphs under Article 6 should be read together. That is, each paragraph provides context for the other, and Article 6 must be read so that it works as a coherent whole, while the language in each of the three paragraphs is respected.

Under Article 6.1, Members have an obligation to ensure that their measures are adapted to the conditions of the region from which products originate. This will require the importing Member to take certain steps on its own, such as ensure that it adopts measures that take into account relevant differences in the sanitary or phytosanitary characteristics of different areas. The question of whether a particular area presents characteristics of one type or another is a different issue – that question may only be able to be resolved based on information supplied by the exporting Member.

84. Under Article 6.2 of the SPS Agreement, Members are required to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Article 6.3 sets out obligations of an exporting Member seeking recognition of its pest or disease-free areas, or areas of low pest or disease prevalence.

85. A breach of Article 6.1 can arise, not only from an importing Member's adoption of measures that fail to take into account relevant differences in the sanitary or phytosanitary characteristics of different areas, but also from a failure to recognize particular disease-free areas where an exporting Member has made the necessary demonstration. Article 6.2 requires recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. A breach occurs when the importing Member does not recognize the concept (as is the case with India here).

86. Article 6.3 applies once the importing Member has ensured that it recognizes the concepts of pest and disease free areas and areas of low pest and disease prevalence. Once the importing Member recognizes these concepts, as applied to the relevant pest or disease, the burden falls on the exporting Member that is seeking recognition of its pest- or disease-free areas. In this sense, the obligations in Article 6.3 can be relevant in the context of Article 6.1, but in general they will only be relevant for those instances where a complaining party is claiming that the importing Member failed to recognize a particular area as having the requisite disease-free or pest-free or low prevalence characteristics.

d. Are the Guidelines to further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures adopted by the SPS Committee (G/SPS/48) relevant in the context of Article 6.1? Why, or why not?

ANSWER:

87. The United States views the Guidelines as informative with respect to the process that Members should follow when requesting and considering recognition of pest- or disease-free areas under Article 6.2. In particular, we note that the process contemplated under those Guidelines begins with the importing Member publishing 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.[85] India has not published a process and basis for recognizing NAI-free and HPAI-free areas and the information required to evaluate such a request, demonstrating that India's measures do not follow the Guidelines.

Question 45: What is the difference, if any, between the term "area" referred to in the first sentence of Article 6.1 and the term "region" referred to in the second sentence of that provision?

ANSWER:

88. The Oxford English Dictionary (OED) defines "area" as "[a] particular extent of ground or of another surface." The OED defines "region" as "A large tract of land; a country; a definable portion of the earth's surface, *esp.* one distinguished by natural features, climate, fauna or flora, etc."[86] The Vienna Convention on the Law of Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[87]

89. The use of the term "area" in the first sentence of Article 6.1, and the use of the term "region" in the second sentence, was intentional, and the terms have different meanings, as their definitions in the OED make clear. In particular, an "area" need not have any particular size or defining features. By contrast, a "region" would be a larger area that could have distinguishing natural characteristics.

90. Article 6.2 also sheds light on the interpretation of Article 6.1. Article 6.2 refers to "pest- or disease-free areas and areas of low pest or disease prevalence" (emphasis added), and provides that "[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 adoption 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.

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85 G/SPS/48, para. 4.

86 Shorter Oxford English Dictionary, pp. 2527-2528 (Exhibit US-140).

87 Vienna Convention on the Law of Treaties, Art. 31.1.

Question 46: The Terrestrial Code employs the terms "zoning" and "compartmentalisation" while the SPS Agreement refers to the term "regionalisation", "adaptation to regional conditions", and "pest- or disease free areas". Please comment on the relationship between these terms. Please also explain how they are used in your domestic legislation.

ANSWER:

91. The SPS Agreement contains a requirement to "ensure that … sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area … from which [a] product originated,"[88] as well as a requirement to "recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence."[89] With respect to animal diseases, application of measures on the basis of an exporting country's zones or compartments is a means of recognizing the concepts of disease free areas and areas of low disease prevalence, and of ensuring that sanitary measures are adapted to the areas from which products originate.

92. U.S. regulations with respect to control of avian influenza in the United States do not use the terms zone or compartment. However, as discussed in the U.S. response to question 6(a), the United States maintains the types of surveillance and control measures that permit the application of zoning to the United States. Indeed, as mentioned above, India's submission even recognizes the fact that other countries apply AI measures to the United States on a less-than-countrywide basis.[90]

Question 47: At paragraph 29 of the United States' opening oral statement at the first substantive meeting, the United States refers to discussions held with India in 2007 concerning compartmentalization and zoning. In addition to the information included in Exhibit IND-121, please describe the content of those discussions.

ANSWER:

93. The United States had exchanges with India about regionalization in the context of correspondence concerning the content of India's required veterinary certificates. In 2006, the United States proposed to India that India replace its poultry meat certificate attestation regarding AI—which at that time demanded only country-wide HPAI freedom—with a required attestation consistent with the OIE Code. India responded in early 2007 that "Indian side would insist on country freedom as the condition is uniform"[91] It its April 2007 response, the United

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[88] SPS Agreement, Article 6.1.

[89] SPS Agreement, Article 6.2.

[90] *See* India's First Written Submission, paras. 169(e), (f), (j), 169(A)(a), (b), (e), (f), 170, 171-173.

[91] 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-

States explained that "Requiring an entire country to be free of HPNAI is not consistent with the OIE Terrestrial Animal Health Code or the SPS agreement."[92] India did not send a response to the April 2007 U.S. comments until 2010.[93] India's response to the 2007 comments also responded to comments that the United States sent India in 2009 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.[94] [[[95] [96]]] Over six years have passed since the U.S. communication in 2007. India still has not indicated that it has concluded its internal debate and actually decided to apply the concept of zoning or compartmentalization with respect to avian influenza.

94. As the United States has explained, both before and after India's 2010 response to USDA's correspondence of April 2007, India's failure to apply its AI measures on a less-than-country-wide basis was mentioned in meetings of the SPS Committee. In those meetings, India's delegate never indicated that this complaint was ill-founded and that India would consider applications from countries seeking regionalized treatment for their imports.[97] Moreover, at the May 2012 meeting of the OIE, 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."[98] Additionally, India repeatedly promulgated new iterations of its avian influenza measures that on their face applied to products from anywhere in a country reporting NAI.[99] S.O. 1663(E), the Notification through which India currently maintains its measures, like its predecessors, on its face applies on a country-basis.[100]

124, p.3, box 7) makes clear that "uniform" refers to the fact that the requirement is applied to all countries.

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

93 Exhibit IND-121, p.1.

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

95 Exhibit IND-121, pp. 23 & 24.

96 *See* Exhibit IND-121, p. 12, box 6 [[ ]]; Exhibit IND-121, p. 14, box 1 [[ ]]; Exhibit IND-121, p. 20, box 5 [[ ]]; Exhibit IND-121, p. 21, box 6 [[ ]]; Exhibit IND-121, p. 25, box 12 [[ ]]; Exhibit IND-121, p. 26, box 13 [[ ]]; Exhibit IND-121, p. 28, box 14 [[ ]].

97 Exhibits US-81, US-82, US-83, US-84, US-85, US-86, and US-87.

98 OIE, 80th General Session FR (Exhibit US-80), para. 231.

99 S.O. 102(E) (Exhibit US-73); S.O. 228(E) (Exhibit US-74); S.O. 1892(E) (Exhibit US-75); S.O. 419(E) (Exhibit US-76); S.O. 2208(E) (Exhibit US-77); S.O. 616(E) (Exhibit US-78); S.O. 2976(E) (Exhibit US-79); S.O. 1663(E) (Exhibit US-80).

100 S.O. 1663(E) (Exhibit US-80).

5.7 ARTICLE 7 AND ANNEX B(2) and (5)(a)-(d)

Question 48: The United States does not appear to have argued its claim under Annex B(5)(c) in its first written submission. Please confirm whether the United States is withdrawing this claim.

ANSWER:

95. The United States has not separately articulated a breach by India of paragraph 5(c) of Annex B because India's breaches of paragraphs 5(a) & (b) left the United States unaware of India's measures until they became final, thereby preventing the United States from requesting copies of them when they remained in non-final form.

Question 50: What should be the order of analysis that the Panel must follow when examining the United States' claim under Article 7 and Annex B(2) and (5)(a)-(d)of the SPS Agreement, in particular concerning the relevant paragraphs in Annex B?

ANSWER:

96. The United States would recommend that, based on the facts of this dispute, the following would be a convenient ordering for the Panel's analysis of Annex B:

> The United States would recommend starting with examination of the claims under paragraph 5. Consideration of the claims under subparagraphs (a) and (b) prior to consideration of the claim under subparagraph (d) would likely be most efficient, as India's failure to allow reasonable time for comments (subparagraph (d)) follows from India's failure to publish any advance notice of its regulations or to provide any advance notice to other Members of covered products. The United States would recommend consideration of paragraph 2 after consideration of paragraph 5, because, once the panel establishes that India published no notice of S.O. 1663(E) before its entry into force, in breach of paragraph 5(a), little further analysis will be required to conclude that India breached its obligation to "[e]xcept in urgent circumstances … allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force."

Question 51: With respect to the "reasonable interval" between the publication of an SPS measure and its entry into force, the Doha Decision on Implementation-Related Issues and Concerns (Doha Ministerial Decision) defines this phrase to mean "normally a period of not less than six months". It further recognizes that "timeframes for specific measures have to be considered in the context of the particular circumstances of the measure and actions necessary to implement it". Does the Panel need to take into account any particular circumstances of India's AI measures when examining this claim? If so, which ones?

ANSWER:

97. The United States believes that the Panel does not need to define what constitutes a "reasonable interval" for purposes of this dispute. Whatever a "reasonable interval" is, it is at least some interval. India has never provided for *any* interval of time between publication of the Notifications at issue here and their entry into force.

98. Under paragraph 2, the only instance in which a Member need not provide a "reasonable interval" is when there are "urgent circumstances." The Doha Ministerial Decision does not purport to, and could not, alter this feature of Annex B of the SPS Agreement. From 2007 up to and including the promulgation of S.O. 1663(E), India was issuing Notifications that, with or without slight modification, merely renewed similar or identical Notifications with set expiration dates. As these expiration dates were known from the time the expiring Notification had been promulgated, the need for a new Notification can hardly be considered an "urgent circumstance[]" that would justify the lack of any interval between the dates of publication and entry into force.

Question 52: When is a SPS measure "substantially the same" as an international standard within the meaning of the chapeau of Annex B(5)? Please provide the relevant criteria the Panel needs to consider to make such a determination.

ANSWER:

99. The dictionary defines "substantially" as "[e]ssentially, intrinsically," and "[i]n essentials, to all intents and purposes, in the main."[101] Interpreting the phrase "substantially the same" as used in GATT Article XXIV, the Appellate Body has explained that "something closely approximating 'sameness' is required."[102] Accordingly, the requirements of paragraph 5 of Annex B apply when a Member's regulation is not essentially the same as an international standard.

100. The United States believes that here, there is no need for the Panel to elucidate criteria for evaluating whether measures are "substantially the same" as international standards for purposes of paragraph 5 of Annex B. As discussed above, India's measures provide for trade bans

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

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

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.[103]

[103] The United States would also recall that, with respect to live pigs (covered under S.O. 1663(1)(ii)(g)), there is no international standard that India's measures could be substantially the same as.

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Question from India: During the first substantive meeting the United States stated that poultry slaughtered under controlled marketing system is not exported. Can the United States clarify why this might be the case?

ANSWER:

101. The United States has utilized controlled marketing on a very limited basis and the United States is unaware of any exports of such products. The United States refers back to its response to Question 37 as well, which noted that Articles 10.4.3 and 10.4.19 of the OIE Code explicitly provide that in case of LPNAI infections, poultry may be kept for slaughter.