INDIA – MEASURES CONCERNING THE IMPORTATION

OF CERTAIN AGRICULTURAL PRODUCTS

FROM THE UNITED STATES

(DS430)

COMMENTS OF THE UNITED STATES ON THE RESPONSES OF INDIA TO THE PANEL'S QUESTIONS FOLLOWING THE SECOND PANEL MEETING

February 14, 2014

TABLE OF CONTENTS

TABLE OF EXHIBITS

US-161	Chapter 16 of the Indian Trade Clarification (Harmonized System) Code
US-162	OIE Terrestrial Animal Health Code, Chapter 10.4 (2008)
US-163	Note by the Secretariat, Summary of the Meeting of 29-30 June 2010 (23 Aug. 2010), G/SPS/R/59

TABLE OF REPORTS

SHORT FORM	FULL CITATION
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999

INDIA – MEASURES CONCERNING THE IMPORTATION OF

CERTAIN AGRICULTURAL PRODUCTS FROM THE UNITED STATES

(WT/DS430)

U.S. Comments on India's Responses to the Questions from the Panel to the Parties Following the Second Substantive Meeting of the Panel

GENERAL:

1. The United States appreciates this opportunity to comment on the Responses of India to the Questions of the Panel to the Parties Following the Second Substantive Meeting of the Panel. Many of the points that India raises have already been addressed by the United States in its prior written and oral submissions or are not relevant to the claims raised by the United States and the Panel's resolution of this dispute. In the comments below, the United States focuses principally on points or statements that India raises that have not been addressed in prior U.S. submissions. The absence of a U.S. comment on an aspect of India's response to any particular question should not be understood as agreement with India's response.

THE DISEASE

Question 54: In his response to Panel question No. 3, Dr Honhold states that the results of the Pawar *et al.* study "should have triggered a strong follow up activity to attempt to detect and isolate the virus." In his response to Panel question No. 4, Dr Honhold states: "A response to this serological finding would be expected to attempt to find circulating LPNAI virus. Article 10.4.29 of the OIE TAHC also indicates this as a requirement during surveillance". In paragraphs 80 and 82 of its comments on the experts' responses, India indicates that no such follow-up tests were done, which according to India is a major limitation of the Pawar et al. study.

a. At the second meeting of the Panel with the parties, India confirmed that they were aware of the Pawar et al. study. When did India's veterinary authorities become aware of the results of the Pawar study?

b. Was any targeted follow-up investigation carried out by India's veterinary authorities on the same flocks that were the subject of the Pawar study? If so, please describe the sampling methodology, the types of tests conducted, and the results. If not, please explain why not.

U.S. Comment on India's Response:

2. The Pawar *et al*. study reported H7 positive serology findings in domestic ducks in West Bengal, casting serious doubt on India's assertions that LPNAI is "exotic" to India, and that H5N1 is the only form of NAI in India.[1] India has attempted to dismiss this study by noting that

[1] *E.g.*, India's First Written Submission, paras. 12, 14, 18, 202, 206, 207, 213; India's Second Written Submission, para. 82.

follow-up virological testing was not conducted on the ducks from which the H7 positive samples were taken, and that accordingly there was never an H7 positive virology test requiring a report of H7 infection to the OIE.[2] But India's answer, rather than refuting the import of the Pawar *et al*. study, in fact confirms that no other follow-up surveillance was conducted. Thus, India's answer does not constitute a reason to dismiss the results of the Pawar study. Rather, the lack of follow-up surveillance instead constitutes further evidence of the deficiency of India's LPNAI surveillance regime.

3. Three specific aspects of India's answer warrant further comment. First, India's answer confirms that as early as April 2011, the month after completion of sample collection for the Pawar study and well prior to the 2012 publication of the study's results, the government of India was aware of the results of the Pawar study – which showed H7– positive serology results for domestic ducks in certain districts – but nonetheless did not conduct follow-up surveillance in these districts as a result of the H7 findings in the Pawar study.

4. Second, instead of providing evidence of follow up to the Pawar study, India refers to certain tests conducted in West Bengal. This information, however, does not establish the existence[3] of a systematic surveillance program capable of reliably identifying any LPNAI infection that was occurring. In particular, there is no indication in the record that such sampling involved the collection of samples in a systematic way according to a sampling design with appropriate numbers of samples selected from appropriate locations in appropriate ways, to document an absence of H7 AI. Indeed, India appears to acknowledge that some of the surveillance activities conducted in this area at the time were post-operative surveillance conducted following outbreaks of H5N1 HPAI. Thus, these activities would have been specifically targeted at areas near HPAI outbreaks and designed to ascertain whether HPAI containment and eradication activities had been effective—instead of being designed to ascertain whether entire districts were free from LPNAI infection.[4] Because there is no indication that the activities India describes were conducted as part of a systematic surveillance program capable of reliably identifying any LPNAI infection, the fact that they did not result in further H7- positive test results is not capable of establishing that no H7 LPNAI infection had occurred in the districts where the activities were conducted.

5. Third, the United States notes that India's assertion that the authors of the Pawar *et al.* study did not maintain information concerning specific flocks from which the samples were collected is not supported by any evidence in the record. For example, India has provided no

---

[2] India's Response to Panel Question 24.

[3] Some of the testing described in India's answer was conducted in2008, before the Pawar study even commenced in October 2009 (*see* Exhibit US-122 pp. 1-2).

[4] For example, Exhibits IND-148 and IND-149 are clearly marked as reporting results from post-operative surveillance. Similarly, Exhibit IND-157 explicitly states that the results being reported are only whether samples were positive for H5. Further, Exhibit IND-150 describes surveillance conducted on wild birds, and hence reports surveillance that by definition could not result in a finding of LPNAI.

evidence that it reached out to the authors of the Pawar study, and no evidence that the authors did not maintain all of their underlying data. And in an event, even if India had sought and failed to obtain such information, this would simply highlight the need for follow-up surveillance to be conducted in the specific districts in which the H7-positive samples were identified.

Question 55: Please provide an update of the description of India's poultry population contained in Exhibit IND-8.

U.S. Comment on India's Response:

6. At the meeting of the Panel with the parties and the experts, Dr. Brown and Dr. Honhold explained the importance of knowing the poultry population and demography of a country in order to be able to design a systematic sampling regime that will reliably detect LPNAI. India's answer to Panel Question 55 shows that it cannot even describe its poultry sector in a way, and with a level of detail, that would permit the design of effective, active surveillance systems for LPNAI. In Exhibit IND-218, India has provided only general state and national level population figures for "fowls," "ducks" and "total poultry," as well as figures for "fowls," "ducks," "turkeys and others poultry" [sic.] and "total poultry" divided by the categories "Urban" and "Rural." This information is an insufficient starting point for designing a systemic sampling regime. In particular, India has provided no updated information on the kinds of poultry production systems that are present in different locations, or the types of production (egg, meat, breeders, etc). Exhibit IND-218 does not even provide separate population statistics for chickens—indeed, ducks are the only poultry type for which India offers separate population statistics.

Question 56: The Panel notes your responses to Panel question No. 24. However, at the Panel's meeting with the experts, and in response to a question from the Panel, Professor Brown explained that "exotic" may mean a number of things; it may signify that a disease has not occurred for 5, 10 years, or even more, or less. He added that not only is there no clarity on this, but "exotic" is also not an officially accepted term, since the OIE operates with the term "freedom". According to Professor Brown, the term "freedom" is quite clear; it means that you have got the evidence confirming that a disease is absent from your territory.

Furthermore, Dr Honhold explained that "free" means that a virus is not present on a particular territory. However, he added that this would refer to the situation today, because tomorrow that territory might be not free. In other words, "freedom" exists in particular periods of time. With respect to the word "exotic" Dr Honhold noted that it has a bit of a different connotation. In his view "exotic is something you haven't had in many years."

Dr Guan also advised that "exotic" means that it is not ordinarily seen.

In light of these statements by the experts, please explain what is meant by India's assertion that "LPNAI is exotic to poultry in India".

7. U.S. Comment on India's Response: India has asserted in this proceeding that "poultry in India is free of LPNAI, i.e. H5 or H7 variant which is notifiable to the OIE. This particular type of avian influenza is exotic to poultry in India."[5] India's answer to Panel Question 56 appears to be asserting a right to claim LPNAI freedom, and to claim that LPNAI is "exotic," because the government of India has never confirmed and reported an LPNAI incident.[6] However, a claim of disease freedom, and in particular, a claim of long-term disease freedom of the type that the term "exotic" implies, necessitates, not just a failure to detect the disease, but affirmative evidence that it is not present.

8. As Professor Brown explained, a claim of disease "freedom" implies an ability to show that the disease is absent,[7] which in turn requires a showing, not just that some surveillance activities have been conducted, but that those are activities designed in a way that they would identify the disease if it were present.[8] Contrary to what India suggests in its answer, it is not the case that this is true only with respect to diseases for which the OIE recognizes a country's disease status. Indeed, with respect to NAI, the OIE guidelines state explicitly that "a Member declaring freedom from NAI or HPNAI for the entire country, or a zone or a compartment should provide evidence for the existence of an effective surveillance programme."[9]

9. The United States recalls that it has shown, based on record evidence, that India did not and does not have a surveillance regime capable of reliably detecting LPNAI or confirming its absence from Indian soil. Moreover, as the United States has explained, whether India in fact has such a surveillance regime, and not whether India has in fact experienced LPNAI infections, is the key question for purposes of the U.S. claims under SPS Articles 2.3 and 5.5. Absent surveillance able to effectively and reliably detect LPNAI, measures will not be applied to domestic products when LPNAI infections do occur in India. In that context, India breaches Article 2.3 by applying measures to imported products in the event of LPNAI detections in their country of origin.

10. The United States has noted the likelihood of LPNAI infections occurring, and having occurred, in India, not (as India implies) because this is an ultimate fact that the United States must establish. Rather, the United States has noted this because India's non-notification of LPNAI infections is likely to be a product of, and evidence of, the surveillance deficiencies that

---

[5] India's First Written Submission, para. 12.

[6] *See also* India's First Written Submission, para. 18 (stating that "India has not detected LPNAI in poultry" and that until it does, "LPNAI remains exotic to India").

[7] Transcript of the Panel meeting with the experts and the parties, para 1.321 (Dr. Brown: "If you are saying free, that means you've got evidence that you are free for a defined time-period, or on a regular basis.").

[8] *See generally*, Transcript of the Panel meeting with the experts and the parties.

[9] OIE Code (Exhibit US-1), Art. 10.4.30 (emphasis omitted).

lie at the core of one of the two forms of discrimination that give rise to the U.S. discrimination claims. Indeed, not only does the Pawar study's report of H7 positive antibodies highlight this likelihood,[10] but over the course of the expert session, the experts noted facts that point towards the likelihood of LPNAI infections in India – including India's domestic duck population, its backyard poultry sector, and the detection of non-notifiable forms of LPAI in India.[11] That said, the United States has, independently of whether or not India has actually experienced LPNAI infections, established that India lacks a surveillance regime capable of reliably detecting LPNAI, or confirming its absence from Indian soil. And, India has failed to rebut this showing, despite the fact that any evidence that such a surveillance system exists would be in the possession of the government of India.

THE MEASURE

Question 57: In response to Panel question No. 15(a), India explained that the term "processed poultry meat" in the last paragraph of Section (1)(ii) of S.O. 1663(E) is not synonymous with the term "meat products from Avian species" used in Section (1)(ii)(c), as the term "meat product from avian species" includes processed and unprocessed poultry meat products.

a. Can India define the term "processed poultry meat" in the last paragraph of Section (1)(ii) of S.O. 1663(E)?

b. Does the term "processed poultry meat" necessarily mean that the meat has been heat-treated?

c. Is any of the products listed in Section (1)(ii) covered by this term? Could you provide some examples of products that would qualify as "processed poultry meat"?

Question 58: With reference to your response to Panel question No. 16(b):

a. Please provide a copy of the "conformity assessment questionnaire".

b. When was it published?

c. Is it publicly available? And, if so, where is it available?

---

[10] Exhibit US-122.

[11] *See, e.g.*, Transcript of the Panel meeting with the experts and the parties, para. 1.216 (Dr. Honhold: "Does it mean that they must have had LPNAI? I would say, well you can't say, "well you must have had it", *I'm pretty sure*, well I know you've had LPAI because you found H9, H4, H11 and I think now an H6, so you've had four different types of LPAI, why wouldn't you then be worried that you might have had LPNAI?" (emphasis added)), para 1.222 (response of Dr. Guan); para. 1.312 (same).

U.S. Comments on India's Responses:

11. Because India's responses to Panel Question 57 and 58 raise overlapping issues, the United States provides the following integrated comments.

The Definition of "Processed Poultry Meat"

12. In India's response to these questions, India asserts that the term 'processed poultry meat,' as used in India' measures, does not need to be sourced from poultry. India defines "processed poultry meat" as meat subject to "a treatment resulting in irreversible modification of its organoleptic and physiochemical characteristics." India lists as examples of "processed poultry meat" products such as ham and salami, which are pork products.[12] India, however, presents no documentary or other support for why the term should be ascribed the meaning India puts forward in its response. There is not a single document put forward by India that even references "organoleptic and physiochemical characteristics" or products such as ham and salami. Indeed, the response provided by India appears to run counter to the definitions in the conformity assessment document provided by India in response to Panel Question 58.[13]

13. That document defines poultry as "chicken, duck, turkey, quail, and goose" and poultry meat as "processed poultry meat."[14] "Processing" in turn is defined in the conformity assessment document as a "[m]ethod to keep the core temperature of 70 degree C for thirty minute[s] at the centre of the poultry meat and its products; or to offer equivalent guarantee on the microbiological safety of the products."[15] Accordingly, at least from the Indian government documents submitted to the Panel, there is no reason – other than India's response to these questions – to be aware that India considers "processed poultry meat" to encompass items such as pork products like ham and salami. In short, if India's response to Panel Question 57 is correct, than it appears India applies its avian influenza restrictions on a broader range of

[12] India, also, without reference to any documentation, asserts that processed poultry meat includes items that "fall under chapter 16 of the Indian Trade Clarification (Harmonized System) code." According to Chapter 16 of India's Code, "Food preparations fall in this Chapter provided that they contain more than 20% by weight of sausage, meat, meat offal, blood, fish, crustaceans, molluscs or other aquatic invertebrates, or any combination thereof. *See* India, Chapter 16 Introduction Sheet (Exhibit US-161), accessed at http://www.cbec.gov.in/customs/cst2012-13/cst1213-idx.htm.

[13] Exhibit IND-219. The United States notes that while India claims that this conformity assessment is publicly available, what it does not do is point to any WTO notification that would explain the nature of the restrictions in the conformity assessment document and to what products it might apply. A U.S. review of notifications made by India failed to locate any.

[14] *Id.*

[15] Exhibit IND-219. The United States notes the contrast between inactivation under the conformity assessment document and the OIE Code. Whereas India's standard is 30 minutes of heating at 70C (see IND-219, para (e)), the OIE Code provides that heating a product at 70 degrees Celsius for 3.5 seconds is sufficient to inactivate the virus. OIE Code, Art. 10.4.26 (Exhibit US-1).

products than previously known – because India's response also confirms that processed poultry meat is subject to restrictions on account of avian influenza.

Processed Poultry Meat (and Other Meat Products) are Subject to Avian Influenza Restrictions

14. S.O. 1663(E), after listing various products subject to import restrictions, states the following: "[p]rovided that the Central Government may allow the import of processed poultry meat after satisfactory conformity assessment of the exporting country." India's response to Question 58 clarifies that this statement does not mean that the broad category of products India considers to be "processed poultry meat" are exempt from avian influenza restrictions.[16] To the contrary, the conformity assessment document provided by India establishes that "conformity assessment" constitutes another set of avian influenza restrictions.[17]

15. With regard to whether these restrictions are on account of avian influenza, the title of the conformity assessment document speaks for itself: "Animal Health requirements for conformity assessment on import of processed poultry meat and meat products into India from the Avian influenza positive countries." Additionally, the terms of this document also make clear that it imposes conditions on the import of products on account of avian influenza.[18] One point the United States would clarify is that these restrictions appear to apply to LPNAI as well.[19] Although the restrictions in the Conformity Assessment document reference Highly Pathogenic Avian Influenza (HPAI),[20] India defines HPAI in that document as the "[a]vian influenza virus causing influenza as defined in the OIE Terrestrial Animal health Code, 2008" *or* "Avian Influenza of H5 or H7 subtype."[21] Under either definition, LPNAI would be covered.[22]

---

[16] The United States notes that Question 2 of its Article 5.8 request asked India that "[t]o the extent India maintains import restrictions on account of avian influenza that are not reflected in S.O. 1663(E), please identify and provide copies of those measures." (Exhibit US-4). As is known to the Panel, India did not respond to the questions in the Article 5.8 request.

[17] Exhibit IND-219.

[18] *See id*., para. 2 et. seq.

[19] Besides the text of the measures itself, India's delegate at the WTO SPS Committee proffered a similar interpretation. Note by the Secretariat, Summary of the Meeting of 29-30 June 2010 (23 Aug. 2010), G/SPS/R/59, para. 41 ("Furthermore, the import of processed poultry and poultry meat products were allowed from avian influenza-positive countries subject to conformity assessment for both low and high pathogenic avian influenza (LPAI and HPAI).") (Exhibit US-163).

[20] Exhibit IND-219, para. 2(i) ("It is produced in a farm where no out break of HPAI has been confirmed for at least 21 days before the slaughter date").

[21] *Id*.

16. As is evident from the face of the conformity assessment document, it contains numerous and onerous conditions on entry of products, purportedly on account of avian influenza.[23] As a point of contrast, it is worth noting what the OIE recommends for poultry meat and its products (which are products one typically associates with poultry).[24]

> Article 10.4.19.
>
> **Recommendations for importation from either a NAI or HPNAI free country, zone or compartment**
>
> For fresh meat of poultry
>
> *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that the entire consignment of *fresh meat* comes from *poultry*:
>
> 1) which have been kept in a country, *zone* or *compartment* free from HPNAI since they were hatched or for at least the past 21 days;
>
> 2) which have been slaughtered in an approved *abattoir* in a country, *zone* or *compartment* free from HPNAI and have been subjected to ante- and post-mortem inspections in accordance with Chapter 1.1. and have been found free of any signs suggestive of NAI.

[22] OIE Terrestrial Animal Health Code Chapter 10.4, Article 10.4.1.1 (2008 version) (Exhibit US-162) Article 10.4.1.1 states "avian influenza in its notifiable form (NAI) is defined as an infection of poultry caused by any influenza A virus of the H5 or H7 subtypes or by any AI virus with an intravenous pathogenicity index (IVPI) greater than 1.2 (or as an alternative at least 75% mortality) as described below." The provision goes on to subdivide between HPNAI and LPNAI.

[23] *Id.*

[24] The OIE defines poultry as "all domesticated birds, including backyard poultry, used for the production of meat or eggs for consumption, for the production of other commercial products, for restocking supplies of game, or for breeding these categories of birds, as well as fighting cocks used for any purpose'…" OIE Code, Art. 10.4.1.3 (Exhibit US-1).

> 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.

The OIE Code thus only requires a few limited requirements that appear directly related to the control of avian influenza for *meat products of poultry*. In contrast, India, per its response and the conformity assessment document, imposes more than 16 conditions, not only on what would be considered poultry meat under the OIE Code, but apparently on products for which the OIE Code has no recommendation whatsoever such as ham and salami.[25]

17. Accordingly, even where the "processed poultry meat" subject to the restrictions in the conformity assessment document might overlap with the products covered by OIE Code Article 10.4.20, India's restrictions cannot be said to conform to or be based on international standards. The conformity assessment document imposes far more restrictions on imports, e.g., requiring authorities of the exporting country to make a monthly reporting of the country's AI status directly to India.[26] And where India's conformity assessment document applies restrictions for products not subject to OIE recommendations in the Code – as would be the case with pork products like ham and salami – India cannot even attempt to make an argument that such restrictions are somehow based on or conforming to international standards.[27]

---

[25] For example, one of the requirements is that authorities in foreign countries notify Indian authorities in advance before any establishments make modifications to their premises. Exhibit IND-219, para. 2 v.

[26] *Id.*, para. 2 xvi.

[27] As confirmed by the OIE Responses in this dispute, "[a]ll standards for avian influenza relating to products are in Chapter 10.4." OIE Response to Panel Question 5 (p. 13).

Scope of the Dispute

18. Although India's response to Questions 58 and 59 have injected further ambiguity in what products may be subject to India's avian influenza measures, it does not impact the scope of this dispute. As this Panel has already noted:

> we are not persuaded that India's ability to defend itself is prejudiced by this absence of precision of product coverage because India has been provided with sufficient notice of the measures at issue, namely, India's avian influenza measures that prohibit the importation of various agricultural products into India from those countries reporting NAI. This is sufficient to enable India to begin preparing its defence, as required by Article 6.2 of the DSU.[28]

India may continue to argue – without any legal basis,[29] including in the current responses to the Panel's questions[30] – that the scope of this dispute must be limited on a product basis, and that those products are supposedly only poultry meat and eggs. But the fact remains that India presents no reason for why the Panel should revisit its finding or why the Panel must decide the "product scope" of India's measures rather than whether those measures are consistent with India's WTO obligations.

19. Finally, the United States notes that to the extent India complains of product ambiguity, the cause – and solution – appear to be within India's hands. For example, while India now in its response to the Panel notes pork and salami are "processed poultry meat" and thus subject to the avian influenza restrictions in the conformity assessment document, India previously indicated to its trading partners that it had lifted any avian influenza related restrictions on pork products:

> The Indian Department of Animal Husbandry had reviewed its sanitary conditions and removed avian influenza related restrictions for the import of pork products (raw and processed pork). India reported that presently there was no ban on the import of pork products (raw and processed pork) from avian influenza-positive countries. However, the import of live pigs continued to be prohibited from avian influenza-positive countries.[31]

The United States notes that statement was made by India in June 2010 before the WTO SPS Committee. India noted in its response to Panel Question 58 that the conformity assessment was

---

[28] Preliminary Ruling of the Panel, para. 3.119.

[29] Article 6.2 of the DSU requires identification of measures, not products.

[30] *See e.g.*, India's Response to Panel Question 60.

[31] *See* Note by the Secretariat, Summary of the Meeting of 29-30 June 2010 (23 Aug. 2010) G/SPS/R/59, para 41 (Exhibit US-162).

issued in 2009, which would be *after* the restrictions in the Conformity Assessment Document were in place.

CLAIMS UNDER THE SPS AGREEMENT

Article 5.1

Question 59: In its response to Panel question No. 31, India told this Panel that "it is clear that India is not required to conduct a risk assessment, as it measures for eggs and fresh meat of poultry under S.O. 1663(E) conform with the OIE Code." The Panel requests India to confirm whether India's AI measures are based on a risk assessment. Please respond with a "yes" or "no". If the response is "yes", please provide the risk assessment to the Panel.

Question 60: With respect to the S.O. 1663(E) provisions on live pigs, are India's measures based on a risk assessment? Please respond with a "yes" or "no". If the response is "yes", please provide the risk assessment to the Panel.

U.S. Comment on India's Response:

20. Because India's responses to Panel Questions 59 and 60 raise overlapping issues, the United States provides the following integrated comments.

21. The short and narrow of India's response is that India still refuses to answer the Panel's questions regarding whether India takes the position that its measures – for any products – are supported by a risk assessment. India's refusal to respond to the Panel's question further supports a finding that India's measures are not based on a risk assessment within the meaning of SPS Article 5.1. In addition, the United States notes that it has provided record evidence that fully supports a finding that India has not based its measures on a risk assessment:

- India's disavowal of the Summary Document both in the SPS Committee and in these proceedings – and the absence of any other document – leaves nothing else to suggest the measures are based on a risk assessment.

- India had opportunities before the WTO SPS Committee in response to Member inquiries to present a risk assessment.[32] India's last statement on the matter was in October 2011 that a risk assessment "would take some time." [33] That statement strongly suggests India lacked a risk assessment at a time when India's measures were already in place.

[32] *See generally*, U.S. First Written Submission, para. 80.

[33] U.S. First Written Submission, para. 82, citing Committee on Sanitary and Phytosanitary Measures, Summary of the Meeting of 30 June - 1 July 2011, Note by the Secretariat (12 September 2011) G/SPS/R/63.

- India had an obligation to answer whether it had a risk assessment in response to the U.S. Article 5.8 request, which was made in January 2012. India's failure to respond creates a strong presumption that no such assessments exist.[34]

- India had an incentive to provide a risk assessment in its written submissions in order to refute U.S. arguments.

  - An argument that measures both conform to international standards and are based on a risk assessment is not inconsistent. To the contrary, one would hope them to be aligned. Accordingly, it would be seem to be in India's interest to present a risk assessment.

  - Since the United States brought an independent Article 2.2 claim – and since India would like that claim addressed before the Article 5.1 and 5.2 claim[35] – it would seem logical that India would want to present all evidence, including a risk assessment, that would show relevant scientific authorities.

- India had an incentive to provide a risk assessment in response to the OIE response. The OIE Responses[36] noted that the standards presented the results of a risk assessment. India had every incentive to provide a risk assessment that would suggest the OIE's interpretation of the Code or the risk assessment relied upon by the OIE was misplaced.

In short, the evidence shows that India had opportunity, incentive, and obligation to present a risk assessment both before and during this dispute. The fact that India still refuses to take a position on whether its measures are supported by a risk assessment, or to provide any information regarding such a risk assessment, leads to the conclusion that its measures are not based on a risk assessment.

22. Regarding India's statement in response to Panel Question 60 that the U.S. claims regarding live pigs are outside the scope of this dispute, the United States notes, again, that the

---

[34] Exhibit US-4, Q.5; see also *Japan – Agricultural Products II (AB)*, para. 137 ("The United States could have requested Japan, pursuant to Article 5.8 of the SPS Agreement, to provide 'an explanation of the reasons' for its varietal testing requirement, in particular, as it applies to apricots, pears, plums and quince. Japan would, in that case, be obliged to provide such explanation. The failure of Japan to bring forward scientific studies or reports in support of its varietal testing requirement as it applies to apricots, pears, plums and quince, would have been a strong indication that there are no such studies or reports.")

[35] India's First Written Submission, para. 110.

[36] OIE Responses, Response to Q. 2, Section 2.4.4., p. 6.

Panel has already decided this issue against India.[37] The United States reiterates that in its prior submissions, it explained that India inexplicably continues to make the claim on the basis that the United States explained that the Summary Document would be deficient as a risk assessment precisely because it only references poultry meat and eggs – and not all other products.[38] That point – which India has not responded to in these proceedings – reinforces the U.S. position that India's measures are deficient because there is no risk assessment for anything whatsoever.

Article 5.5

Question 61: In its response to Panel question No. 35(b), India indicates as follows:

> **Paragraphs 40-57 in India's First Written Submission pertain to domestic control measures which are put into effect to contain the establishment and spread of NAI within India. India's goal is to eradicate NAI within its territory. Thus the NAP achieves this objective by prescribing measures that (i) limit spread through extermination of poultry flock. This is preventive culling, meaning even if the poultry is not infected it is destroyed to prevent any possibility of spread of the infection. There are several other measures employed such as restriction of movement of poultry and poultry products beyond a zone and restriction of trade for 3 months from the surveillance area. It also achieves the objective by (ii) preventing establishment of a disease through surveillance measures.**

Please confirm whether the eradication of NAI within India's territory is India's ALOP for its domestic situation. If it is not, please state what the ALOP is.

U.S. Comment on India's Response:

23. India has once again refused to identify an ALOP. It has stated that the eradication of NAI from India's territory is its "goal." However, a goal is different from an ALOP, which is defined as "the level of protection deemed appropriate by the Member establishing [an SPS] measure."[39]

24. In any event, India's lack of a surveillance regime capable of reliably detecting LPNAI indicates that the level of protection India deems appropriate for itself with respect to that risk is low. In other words, the absence of a surveillance regime capable of reliably detecting LPNAI shows that India is willing to accept, and is accepting, a high level of risk of LPNAI infection and spread within India.

---

[37] Preliminary Ruling of the Panel, paras. 3.33-3.39.

[38] U.S. Second Written Submission, para. 33, U.S. Response to Panel Question 11(e), paras. 50-51.

[39] SPS Agreement, Annex A, para. 5.

Question 62: In India's response to Panel question No. 35(c), India explains that:

> **India's level of protection as reflected in S.O. 1663(E) is to prevent ingress of LPNAI and HPNAI from disease notifying countries through imports of products that are clearly identified as risk factors even by the OIE. India's ALOP is met by maintaining import restrictions against countries notifying HPNAI or LPNAI and hence product specific recommendations in the OIE Code which provides for imports of poultry products from countries free of NAI achieve India's ALOP.**

At paragraph 167 of its first written submission, India states as follows:

> **[I]ndia has clearly established that the OIE Code enables countries to impose temporary import restrictions upon occurrence of HPNAI or LPNAI in poultry commodities in view of threat posed by international trade in these commodities. In accordance with the same, India suspends imports of poultry products listed in clause 1 (ii) (A) to (j) of S.O. 1663(E) from countries reporting HPNAI or LPNAI until such time as these countries notify freedom. Once freedom from either infection is notified to the OIE, imports are permitted into India.**

At paragraph 8 of India's opening statement at the first meeting of the Panel, India states:

> **The other relevant issue stems from the United States claims that even though the recommendations of the OIE Code permit the imposition of a country wide prohibition from an LPNAI notifying country, an importing country must nonetheless unilaterally permit trade from an area of the country which is geographically distant from the epicentre of the outbreak. The suggestion amount to reading out entire recommendations of the OIE Code and the SPS Agreement and is untenable.**

However, in India's response to Panel question No. 43(a), India provides the following explanation:

> **Section 3 and 3A of the Livestock Act, 1898 enable the recognition of zones or compartments….**
>
> **…**
>
> **In this respect it should be noted that Section 3 and 3A of the Livestock Act do not mandate that an import restriction such as the one provided under S.O. 1663 (E) has to be implemented on a country wide basis. In fact the provisions provide the power to the Central Government to regulate, restrict or prohibit in such manner and to such extent it may deem fit by issuing a notification. However the Central Government while enacting S.O. 1663(E) imposed the import prohibition on a country wide basis as no exporting country had at the time of the enactment of S.O.**

1663(E) provided any proposal to India for the recognition of its zones or compartments.

Should an exporting country provide a proposal to India with respect to the recognition of its zones or compartment, the same would be considered by the Central Government and if approved, such zones or compartment would be recognized by the issuance of a notification under Section 3 and 3A of the Livestock Act, 1898 as may be relevant.

The Panel notes that, as shown above, India contends, on the one hand, that its ALOP, as reflected in S.O. 1663(E), "is met by maintaining import restrictions against countries notifying HPNAI or LPNAI and hence product specific recommendations in the OIE Code which provides for imports of poultry products from countries free of NAI achieve India's ALOP". On the other hand, India submits that "[s]hould an exporting country provide a proposal to India with respect to the recognition of its zones or compartment, the same would be considered by the Central Government".

a. Could India explain how the Panel should reconcile the above statements?

U.S. Comment on India's Response:

25. In its response, India fails to reconcile its statements in this dispute about its ALOP and its assertion (made for the first time in the context of this dispute) that it would consider applying its AI measures on a regionalized basis if presented with a zoning or compartmentalization proposal that achieves its ALOP. At the first Panel meeting, India asserted that its ALOP is "NAI country freedom" of the exporting country from NAI.[40] India has also asserted in this dispute that "India's level of protection as reflected in S.O. 1663(E) is to prevent ingress of LPNAI and HPNAI from disease notifying *countries* through imports of products that are clearly identified as risk factors even by the OIE"[41]—an assertion that, particularly in light of India's statement of its ALOP at the first Panel meeting, further indicates that India somehow considers exporting country disease freedom to be a core component of, or an essential requirement of, its ALOP. By definition, no proposal for regionalization could satisfy the requirement of country freedom of the exporting country from NAI, thus demonstrating the illusory nature of India's purported newfound willingness to consider regionalization.

26. Further, it is worth noting that even in India's response to Panel Question 62(a), India stated only that it would be willing to *consider* a proposal for regionalization if the Member making the proposal had "demonstrate[d] to India that its level of protection would also be achieved" by the proposal. However, if it has been demonstrated to India that a proposal for

[40] India's Opening Statement at the First Panel Meeting, para. 28.

[41] India's Response to Panel Question 35(c) (emphasis added).

regionalization does in fact achieve India's ALOP, India is required under the SPS Agreement to accept that proposal instead of maintaining a more trade restrictive country-wide import prohibition. That even here, India will only state that it will *consider* a hypothetical proposal that, by its own acknowledgement achieves its ALOP, only underscores the fact that India's current measures do not allow for regionalization.

27. Moreover, the fact that no exporting country has come forward with a proposal for the recognition of specific zones and compartments is further evidence of India's categorical unwillingness to consider regionalization. India's measures, and the statements of its officials, have left other WTO Members with no reason to believe that India's response to a proposal would be anything but categorical rejection.

b. Could India explain which provision of S.O. 1663(E), that requires country-wide AI freedom, would allow for recognition of AI-free zones and compartments in countries that have reported LPNAI?

U.S. Comment on India's Response:

28. India's response does not identify a provision of S.O. 1663(E) – which on its face requires country-wide AI freedom – that would allow for recognition of AI-free zones and compartments in countries that have reported LPNAI. Rather, India appears to take the position that its Livestock Act, by allowing India's central government to restrict livestock imports in the way that it deems fit, would allow India's central government to promulgate a new measure recognizing zones or compartments. Here, where India was clear that it was not in fact willing to apply AI restrictions on a sub-national basis, the existence of an ability to restrict livestock imports as India's central government deems fit does not suffice to satisfy India's obligations under SPS Article 6 to "recognize the concepts of pest- or disease-free areas" or to "ensure that [its] sanitary … measures are adapted to the sanitary… characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined."

29. India's unwillingness to apply its AI restrictions on a sub-national basis has been clearly established in this dispute. The United States has established that nothing in the text of India's measures (including sections 3 and 3A of the Livestock Act and S.O. 1663(E)), provides reason to believe that India's response to an application for regionalization would ever be to adjust its measures to apply the concept of regionalization to the Member making the application. The responses of Indian officials to inquiries from the United States and other Members about the possibility of sub-national application of India's measures, as well as the 2012 statement of India's delegate to the OIE about regionalization with respect to AI, are not only similar in offering no reason to think that India would do so, but they confirm India's unwillingness to consider sub-national application of its measures.[42]

[42] U.S. Responses to the Panel's Questions Following the First Panel Meeting, paras. 27-30, 93-94; U.S. Second Written Submission, paras. 69-72.

Article 6

Question 66: With reference to *both* sentences of Article 6.2 of the SPS Agreement:

a. Should there be an explicit normative basis in a Member's domestic law to comply with the obligation to "recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence". Please provide reasons for your answer;

U.S. Comment on India's Response:

30. As the United States has explained in its prior submissions, Members have obligations under SPS Articles 6.1 and 6.2 that exist independently of, and that are antecedent to, any proposal to recognize specific zones or compartments, and India cannot rely on Article 6.3 as a defence to the U.S. claims under Articles 6.1 and 6.2.[43] India's response to Panel Question 66(a) presents no new arguments on these issues, and it fails to rebut U.S. explanations of the proper interpretation and application of Article 6.

b. In the absence of an explicit pre-existing normative basis, are there other means that would allow a Member to comply with this obligation? Please provide reasons for your answer.

U.S. Comment on India's Response:

31. India's response to Panel Question 66(b), like its response to Panel Question 66(a), devolves into a reiteration of its unsupported assertion that Members do not have obligations under Article 6.2 of the SPS Agreement, and cannot breach that article, in the absence of a formal and documented proposal for the recognition of specific pest- or disease-free areas, or areas of low pest or disease prevalence. The United States has amply explained in prior submissions why this is not the case.[44] Accordingly, here the United States will only comment on three minor components of India's response to Panel question 66(b).

32. First, contrary to India's assertions, the United States is not arguing that the United States was "not clear or certain about the Indian law." To the contrary, as the United States has shown based on the evidence submitted in this dispute, India has been more than clear in explaining that its measure did not and does not allow for regionalization. India's AI measures on their face apply on a country basis, and there is no other provision in Indian law which states that India will

[43] *See* U.S. Opening Statement at the First Meeting of the Panel, paras. 27-33; U.S. Second Written Submission, paras. 66-81, U.S. Responses to the Panel's Questions Following the First Panel Meeting paras. 76-94; U.S. Opening Statement at the Second Meeting of the Panel, paras. 50-58.

[44] *See* U.S. Opening Statement at the First Meeting of the Panel, paras. 27-33; U.S. Second Written Submission, paras. 66-81, U.S. Responses to the Panel's Questions Following the First Panel Meeting paras. 76-94; U.S. Opening Statement at the Second Meeting of the Panel, paras. 50-58.

apply its SPS measures on a sub-national basis. Further, Indian officials did not inform the United States that sub-national application would be considered in the event that the United States submitted certain information; rather, Indian officials stated that India uniformly requires country freedom.[45] India *still* continues not to give any indication outside of these proceedings that there is any way to seek sub-national application of its AI measures, and not surprisingly, India continues to receive no requests from trading partners to recognize any specific zones or compartments.[46]

33. Second, contrary to what India argues, whether an importing Member will be able initiate a process of seeking recognition for a particular area as disease-free area depends, not on the obligations set out in the SPS Agreement, but on what has been communicated about the possibility of regionalization by the importing Member. Where, as here, an importing Member has communicated to trading partners that it categorically will not consider such requests and there is also no published guidance or regulation indicating that there is a procedure available for making one, an importing Member will *not* as a practical matter be able to initiate the regionalization process.

34. Third, the OIE Code's recommendations, in Article 5.3.7, for the steps to be taken to have a particular zone or compartment recognized do not in any way suggest, as India seems to be arguing, that a WTO Member is always in compliance with its obligation under Article 6.2 to recognize the concept of disease-free areas, so long as no proposal for recognition of a specific area has been presented to the Member. The OIE Code in no way indicates that where a WTO Member has, like India communicated categorical unwillingness to consider regionalization, it is still in compliance with the obligation to "recognize the concept[] of … disease-free areas."[47]

Question 67: With respect to G/SPS/48, and in particular paragraphs 1, 4, and 13 thereof, please provide your views with regard to the roles of exporting and importing countries in the recognition process?

U.S. Comment on India's Response:

35. India's answer does not refute the U.S. explanation of the support that the guidelines set out in G/SPS/48 provide to the U.S. position with respect to the relationship between Articles 6.1 and 6.2 of the SPS Agreement, on the one hand, and Article 6.3 on the other. Indeed, India's position appears to be that the Panel should simply ignore portions of the guidelines outlining importing Member actions prior to the submission of a request for recognition of specific pest- or disease-free areas.

---

[45] Exhibit US-124, p.3; U.S. Responses to the Panel's Questions Following the First Panel Meeting, paras 27-30, 93-94; U.S. Second Written Submission, paras. 69-72.

[46] *See* India's Response to Panel Question 66(b).

[47] The United Stats also notes, that although the issue does not arise here, nothing in the OIE Code could amount to a modification or amendment of the WTO Agreement.

36. Unable to offer a coherent explanation of G/SPS/48 that supports its interpretation of Article 6, India points – as it did in response to Panel Question 66b – to provisions of the OIE Code on the process for recognizing zones or compartments. Yet as the United States has explained, nothing in the OIE Code could, or does, indicate that an application for recognition of specific zones or compartments is necessary in order to trigger importing Member obligations under the SPS Agreement. India additionally points again to its Livestock Act and asserts that it "communicated [a] willingness to engage in bilateral discussions with the United States on this subject matter." As the United States has explained, however, the Livestock Act is simply a general grant of authority to regulate livestock importation. And, contrary to the impression India tries to give with its answer, India never communicated a willingness to accept and evaluate a request for sub-national application of AI measures with respect to U.S. exports. Indeed, Exhibit IND-121, to which India cites its statement, does not support this proposition at all. To the contrary, the statements in that document reveal unwillingness to accept that the concept of regionalization is applicable to AI,[48] just as both earlier and later statements by Indian officials reject the concept's applicability with respect to AI measures.[49]

Article 7

Question 68: With reference to India's response to Panel question No. 50, we note that in your notification of S.O. 1663(E) to the SPS Committee (G/SPS/N/IND/73), the nature of the urgent problem and reasons for urgent action are described in the following terms: "[u]rgent action has been taken to prevent the ingress of this virus to protect human health as well as health of poultry in India". Given that similar measures prohibiting the importation on account of NAI had periodically been in place for several years, please explain why such an urgent action was required in 2011.

U.S. Comment on India's Response:

37. India's answer would suggest that India believes that any sanitary measure is an emergency measure. This is obviously not the case. Indeed, the contents of India's answer, along with the record in this dispute, show that S.O. 1663(E), in particular, was not promulgated in response to any "urgent problem[] of health protection."[50]

38. India has failed to identify any legitimate emergency that would justify issuance of S.O. 1663(E) as an emergency measure. India had maintained import prohibitions on account of avian influenza for several years by the time it promulgated S.O. 1663(E). Accordingly, prior to issuing S.O. 1663(E), Indian officials had ample time to study what measures would be

[48] *See* U.S. U.S. Responses to the Panel's Questions Following the First Panel Meeting paras. 93-94; U.S. Second Written Submission, paras. 69-70.

[49] *See* U.S. Responses to the Panel's Questions Following the First Panel Meeting, paras 27-30, 93-94; U.S. Second Written Submission, paras. 69-72.

[50] SPS Agreement, Annex B, para. 6.

appropriate to address issues surrounding AI, and to promulgate measures through processes that comply with paragraphs 2 and 5 of Annex B of the SPS Agreement.

39. The United States notes, moreover, that even if there had been an emergency justifying issuance of an emergency measure, India did not comply with the requirements of paragraph 6(a) of Annex B. India would have been required to meet these requirements in order to bypass the requirements of paragraph 5 in the event of urgent actual or threatened health problems.[51]

Question 69: According to notifications to the SPS Committee, S.O. 419(E) would have lapsed in August 2009. Please explain what import measures on account of NAI, if any, were in place between August 2009 and the entry into force of S.O. 1663(E). Please provide documentary support for your response.

U.S. Comment on India's Response:

40. India's answer is consistent with the chronology of notifications outlined by the United States in paragraph 194 of its First Written Submission. As paragraph 194 explains, between the lapse of S.O. 419(E) and the issuance of S.O. 1663(E), India issued three legal instruments, S.O. 2208(E),[52] S.O. 616(E),[53] and S.O. 2976(E),[54] each with a six-month duration, through which it maintained its import measures on account of AI. These legal instruments do not appear to have ever been notified to the WTO.

41. Further, as the United States has explained,[55] between expiry of S.O. 419(E) and the promulgation of S.O. 1663(E), there were periods when India maintained its import measures even though the most recent legal instrument to embody them had expired, and no new legal instrument embodying the prohibitions had yet been promulgated. India's maintenance of unpublished measures on account of AI during these gap periods breached a number of India's obligations under the SPS Agreement.[56]

---

[51] A further explanation of India's failure to comply with paragraph 6(a) of Annex B can be found in the U.S. First Written Submission, para. 201.

[52] Exhibit US-77.

[53] Exhibit US-78.

[54] Exhibit US-79.

[55] U.S. First Written Submission, para. 194.

[56] *See* U.S. First Written Submission, paras. 198-200.