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INDIA – MEASURES CONCERNING THE IMPORTATION

OF CERTAIN AGRICULTURAL PRODUCTS

FROM THE UNITED STATES

(DS430)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

July 24, 2013

TABLE OF EXHIBITS

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US-117	OIE, User's Guide (2012)
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EC – Hormones (AB)	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998

I. INTRODUCTION

1. Good morning, Mr. Chairman and distinguished members of the Panel. The United States appreciates the work of the Panel and the Secretariat assisting it in this dispute. I would like to begin by discussing an assertion made by India: that the dispute is "particularly complex."[1]

2. The United States does not agree. Rather, the U.S. case is straightforward. India maintains measures that impose import prohibitions ostensibly on account of a disease known as avian influenza. Accordingly, the measures at issue are sanitary measures within the scope of the SPS Agreement. Under the SPS Agreement, a key initial question is whether the measures at issue conform to an international standard. Here, the parties agree that the relevant standard is the World Organisation for Animal Health ("OIE") Terrestrial Animal Health Code ("OIE Code").

3. India's measures do not conform to the OIE Code. Most notably, the Code does not recommend imposing a ban on imports on account of low pathogenic notifiable avian influenza ("LPNAI"). In fact, the OIE Code explicitly provides that most of the products affected by India's measures can be safely traded with respect to avian influenza. And the Code allows for zoning in recognition of the geographic limitations of AI outbreaks and efficacy of control measures to minimize trade disruptions even further. Despite the passage of over six years since the adoption of the measures, India has still not conducted a risk assessment that would be needed to justify a departure from the OIE Code, has not adopted any measures that allow for regionalization with respect to avian influenza, and has not notified its measures.

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[1] India's Preliminary Ruling Request, para. 60.

4. What India has done during those six years is to allow its domestic producers to engage in poultry trade without any meaningful LPNAI restrictions, while imposing trade bans on foreign producers whenever a jurisdiction notifies the presence of LPNAI. And the discrimination is exacerbated when one considers the India's failure to require the sort of systematic surveillance testing used elsewhere to detect LPNAI, prompting resulting notifications to the OIE. The United States submits that these findings are fully supported by the record, and that they can and should be reached without any great deal of complexity. The central questions in this dispute, as well as the answers that result from consideration of the evidence and arguments of the parties, are as follows:

- Is there any text in the OIE Code that recommends blanket import prohibitions on account of LPNAI? No.
- Does India have a risk assessment that would justify a departure from the international standard? No.
- Does India put forward any evidence to rebut the U.S. showing that India imposes no meaningful restrictions in its own territory on account of LPNAI? No.
- Do India's measures – other than with respect to its own exports – allow for adaption to the characteristics of a country, parts of a country, or all or parts of several countries? No.
- Does India provide any valid justification for why measures – measures that have been in place in one form or another for over six years – are not properly notified? No.

In short, even after taking account of arguments and evidence in India's first written submission, the record in this dispute shows that India's measures fail to comply with some of the most basic obligations in the SPS Agreement.

II. INDIA'S MEASURES CONTRADICT THE OIE CODE

A. The United States relies on what is in the OIE Code

5. The United States and India agree that the OIE Code is the relevant international standard for purpose of applying the SPS Agreement to India's measures. An examination of the plain text of the OIE Code in comparison to India's measures shows that India's measures do not conform to the Code. India's measures prohibit the importation of products, while the OIE Code provides that these same products – with respect to the risk of avian influenza – can, in fact, be safely imported. For example, consider the treatment of day-old chicks under India's measures, S.O. 1663 (E), as compared to the treatment of day-old chicks in the OIE Code. S.O. 1663(E) states:

> the Central Government [of India] hereby *prohibits*, with effect from the date of publication of this notification, in the Official Gazette, namely:-- …
>
> (ii) *the import* into India from the countries reporting Notifiable Avian Influenza (both Highly Pathogenic Notifiable Avian Influenza and *Low Pathogenic Notifiable Avian Influenza*), the following livestock and livestock products, namely:-- …
>
> > (b) day-old chicks, ducks, turkeys and other newly hatched Avian species; …[2]

As is evident, according to the text I just read, India prohibits imports of day old chicks of poultry from countries reporting LPNAI. I also would note also the language of India's measure says "countries," not regions of countries.

6. Now, let us look at what the OIE Code says regarding day-old chicks of poultry from countries reporting LPNAI. Article 10.4.8 of the OIE Code provides with respect to day-old chicks of poultry:

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[2] Exhibit US-80.

> Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:
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> 1. the poultry [chicks] were kept in a HPNAI free country, zone or compartment since they were hatched;
>
> 2. the poultry were derived from parent flocks which had been kept in a NAI free establishment for at least 21 days prior to and at the time of the collection of the eggs;
>
> 3. the poultry are transported in new or appropriately sanitized containers;
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> 4. if the poultry or the parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.

As these excerpts show, the OIE Code explicitly contemplates that day-old chicks of poultry from a country reporting LPNAI can be imported, subject to the presentation of a veterinary certificate attesting to the use of control measures, such as container sanitization and derivation from NAI-free parent flocks. This text from the OIE Code illustrates that under the relevant international standard, import of products from countries reporting LPNAI should be allowed.

7. The United States does not understand how India could assert that the OIE Code states anything differently. To the extent that India attempts to extrapolate from OIE reporting requirements to OIE-recommended restrictions, India's approach has no basis in the text of the OIE Code, or otherwise. In fact, a delegate of the OIE at a 2007 WTO Committee meeting explained the important difference between OIE reporting requirements and OIE-recommended restrictions. Her statement noted the following:

> The representative of the OIE clarified the recommendations of the OIE and how they should be put in practice. … Findings of AI in wild birds and of LPNAI should not lead to import bans. She emphasized that there needed to be a distinction drawn between reporting and the imposition of measures. … OIE was concerned that the imposition of measures that were not scientifically based worsened the risks for spread of disease because countries were discouraged from

> proper reporting if they believed that the reporting would lead to unjustifiable measures. I[t] [sic] was of utmost importance that countries report their diseases.[3]

In short, what the OIE Code says is that while LPNAI outbreaks should be reported, products from reporting countries can be safely imported.

B. India argues based on what is absent from the OIE Code

8. Per its first written submission, India's principal, and often only, defense for most of the U.S. claims is its assertion that its measures are in conformity with the OIE Code. However, as explained above, and more fully in the U.S. first written submission, the text of the code does not support India's arguments, and in fact shows exactly the opposite.

9. Instead of basing its defense on what the OIE Code says, India imports into the Code something that is said nowhere – that it recommends bans when LPNAI is detected in poultry.[4] In other words, since the OIE Code does not expressly claim that India cannot use notifications to impose bans, its measures conform to the OIE Code and are entitled to a presumption of consistency under Article 3.2 of the SPS Agreement. As an initial matter, we think this approach puzzling. India's reading of "conform to" appears to be "is not expressly prohibited by." That reading is not in keeping with the ordinary meaning, in context, and in light of the object and purpose of the SPS Agreement. If India chooses measures that are different from, or not found in, the OIE Code, then those measures do not "conform to" the relevant international standards. From what we can discern, India's approach is based on three assumptions that frankly have no support in either the OIE Code or the SPS Agreement.

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[3] Committee on Sanitary & Phytosanitary Measures, Summary Of The Meeting Of 18-19 October 2007 G/SPS/R/46 (January 2, 2008) (Exhibit US-119).

[4] India's First Written Submission, para. 123; *see also* European Union's Third Party Submission, paras. 46-48.

10. First, India asserts the various recommendations in the OIE Code are but options by which India can decide how to best achieve its appropriate level of protection , or "ALOP."[5] Thus, according to India, it has chosen the option of a ban, which achieves a purportedly higher ALOP than the control measures that constitute most of the OIE Code chapter on avian influenza.[6] But there is nothing in the OIE Code that suggests its recommendations amount to some sort of menu that sets out options for achieving varying degrees of protection or that envisions departure from its recommendations to achieve a higher level of protection. To the contrary, the OIE Code's User Guide provides guidance on what the OIE's recommendations are designed to accomplish:

> 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.[7]

In other words, the OIE Code does not operate from the premise that a Member can arbitrarily discern that some recommendations are excellent and others subpar; the Code strives for *optimal* security, and sets out control measures to achieve this standard. If India wishes to achieve a higher ALOP than "optimal security," under the SPS Agreement India must have a scientific basis for its measures, and cannot rely on the OIE Code. In short, India cannot claim its ALOP entitles it to carve up or ignore the OIE Code as it sees fit.

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5 India's First Written Submission, paras. 116-119.

6 India's First Written Submission, para. 119.

7 User Guide, A.2 (Exhibit US-117).

11. Second, India claims each recommendation of the OIE Code should be read in isolation from the rest of the OIE Code.[8] Nothing in the OIE Code though suggests that should be the case. Indeed, the provision India cites as recommending a ban, Article 10.4.1.10, is located in a section of the avian influenza chapter whose heading is "General Provisions." As is evident from a cursory review, many of the provisions in this section are meant to impart meaning to others, such as the definitions of terms like "NAI," "poultry," or "incubation period."[9] The United States recognizes that the provisions it cites are not read in isolation either. For example, the day-old chicks recommendation I noted is with respect to an "HPNAI free country, zone or compartment." We agree that, rather than look in isolation at the day-old chicks recommendation, one would also consult Article 10.4.4 of the OIE Code which defines how it can be determined whether a territory is HPNAI free or not.

12. To justify this approach, India misconstrues the Appellate Body's findings in *EC – Hormones*.[10] India incorrectly asserts that they must be read individually because to do otherwise would somehow make them mandatory contrary to the Appellate Body findings. The Appellate Body made no findings that international standards are to be read in isolation. It found in pertinent part that "an SPS measure that conforms to an international standard … would embody the international standard completely and, for practical purposes, converts it into a municipal standard."[11]

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8 India's First Written Submission, para. 133.

9 OIE Code, Articles 10.4.1.2-4 (Exhibit US-1).

10 *EC – Hormones (AB)*, para. 133.

11 *EC – Hormones (AB)*, para. 170.

In other words, far from finding that a standard may be followed piecemeal, the Appellate Body found it must be adopted "*completely*" in order to obtain the rebuttable presumption of consistency. The United States is not arguing that India has an affirmative obligation to conform its measures with the OIE Code's recommendations – Article 3.2 of the SPS Agreement clearly does not obligate Members to do so. If India does not, though, then it cannot claim the presumption of consistency with the OIE Code.

13. Finally, India argues that the Panel should conclude that Article 10.4.1.10's admonishment not to impose bans on account of NAI in wild birds is actually a recommendation to impose bans on poultry products. India's logic is flawed. For example, a road sign that recommends driving carefully when it rains does not mean a driver is recommended to drive carelessly when conditions are dry. India's argument is particularly misplaced when one considers that the OIE Code is meant to be used practically by veterinary authorities. Clarity as to the precise recommendations is critical. Where the OIE Code recommends prohibitions, it *explicitly so provides*. For example, with respect to avian chlamydiosis, the relevant OIE Code provision provides:

> Veterinary Authorities of countries free from avian chlamydiosis *may prohibit* importation or transit through their territory, from countries considered infected with avian chlamydiosis, of birds of the Psittacidae family.[12]

In short, the OIE is perfectly capable of elucidating when import prohibitions are appropriate – and with respect to LPNAI, it has found no cause to do so.

14. In addition to having important implications for Article 3.2 of the SPS Agreement, the fact that India's measures are inconsistent with the OIE Code is also important for the

[12] OIE Code, Article 10.1.2 (2012) (emphases added) (Exhibit US-118).

application of Article 3.1 of the SPS Agreement.[13] In this instance, the failure of India's arguments to establish that its measures conform to the OIE Code also establishes that India has not based its measures on international standards, thereby breaching Article 3.1 of the SPS Agreement. Specifically, because India's arguments rely only on Article 10.1.4.10 of the OIE Code – and because India's interpretation of that provision cannot be sustained for the reasons I just noted – India has no basis for any assertion that its measures are based on the OIE Code.

III. INDIA'S MEASURES RESULT IN ARBITRARY OR UNJUSTIFIABLE DISCRIMINATION

15. I will now turn to U.S. claims under Article 2.3 of the SPS Agreement. India's first written submission reflects some fundamental misunderstandings of the U.S. claims, and addresses a number of matters that are not relevant. In response, I will highlight what, in the view of the United States, are the central points at issue with respect to the U.S. claims under Article 2.3.

16. First, the United States would emphasize that there are two basic, striking contrasts between, on the one hand, the measures that the United States has challenged—*i.e.*, the avian influenza measures that India applies to imported products—and on the other hand, those that India applies with respect to domestic products:

1) First, India imposes import bans when an exporting country reports detections of LPNAI. Yet India does not have in place surveillance mechanisms capable of reliably detecting LPNAI when it occurs in India. Hence, when LPNAI occurs in India, no restrictions on domestic trade are imposed.

[13] SPS Agreement, Article 3.1 ("To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.").

2) Second, when either HPAI or LPNAI is detected anywhere in an exporting country, India applies an import ban covering the entirety of that exporting country, even where the detection is thousands of kilometers away from the area where the exported product is produced. By contrast, when NAI is detected in India—really HPAI, as India does not detect LPNAI—India restricts trade in products only from a limited zone surrounding the detection.

17. There is no valid reason for India's disparate treatment of foreign and domestic products following NAI incidents in their country of origin. This disparate treatment breaches Article 2.3.

18. With respect to the first contrast, India argues pointedly that it does not have LPNAI.[14] However, the evidence establishes that India does have LPAI – but lacks the ability to reliably detect LPAI in its poultry flocks.

19. As the United States has shown, India has had over 90 outbreaks of the far rarer HPAI.[15] India itself acknowledges that HPAI is a product of mutations from LPAI.[16] As the United States has explained, as a matter of epidemiology it is not a reasonable or scientifically valid hypothesis to suggest that India does not have LPNAI.[17] To further support that Indian flocks have LPNAI, the United States is submitting as an exhibit with this statement a study noting the detection of H5 and H7 antibodies in domestic ducks in India.[18] Perhaps the more crucial point, however, is that India does not have in place a system for reliably detecting LPNAI. Without a valid detection system, India is not in fact applying measures to contain LPNAI when it occurs in

[14] India's First Written Submission, paras 49, 200-202.

[15] U.S. First Written Submission, para. 47.

[16] India, First Written Submission, paras. 12, 214.

[17] U.S. First Written Submission, para. 46.

[18] Parwar et. al. (Exhibit US-122).

flocks in India. On that score, India does not dispute that it has no mandatory requirement for the conduct of random laboratory tests in apparently healthy flocks for LPNAI, even though LPNAI's lack of symptoms makes visual observation inadequate for its detection. Even India's claim that it conducts routine laboratory and clinical surveillance[19] is unsupported by the document that it cites—merely a list of the numbers of samples tested by its national AI reference laboratory during a given period.[20] In fact, notwithstanding LPNAI's lack of symptoms, India's AI Action Plan[21] provides that States should not forward samples for testing to regional diagnostic laboratories, or India's national diagnostic laboratory, except where there is unusual sickness or mortality raising suspicion of AI.

20. Given that India is not even taking steps necessary to detect LPNAI when it occurs in India, it is contradictory for India to claim that the disease is so serious that it must impose import bans on poultry products from another country when that country detects LPNAI. This is particularly so because, as the United States has explained, the products that India is banning are not even vectors for transmission of the disease, and have been found by the OIE to be products that can be safely traded even after detections of LPNAI. [22] So on the one hand, we have the measures at issue, imposing import bans on products that the OIE Code says countries can safely trade. On the other hand, we have a regime for domestic products that does not detect LPNAI,

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19 India's First Written Submission, para. 203.

20 Exhibit IND-115.

21 2012 version (Exhibit US-90), p.4.

22 U.S. First Written Submission, Sections 3 and 4.

and thus does not restrict domestic trade in products on account of LPNAI. India's measures arbitrarily and unjustifiably discriminate against imported products.

21. India's measures also arbitrarily and unjustifiably discriminate against imported products with respect to HPAI. It makes no sense for India to say that, whereas it will allow trade of domestic products from areas only 10.1 kilometers from an HPAI detection,[23] its lack of knowledge of what happens in other countries prevents it from even considering whether other countries' surveillance and control systems are strong enough to contain outbreaks in those countries. If India thinks that it can control NAI, even in HPAI form, Article 2.3 requires it to at least admit the possibility that products from other countries with NAI detections can be safely traded in the same way that Indian products are traded following an HPAI outbreak there. As I'll address at more length when discussing the claims under Article 6, applying measures that are regionalized involves gathering information on an exporting Member's disease surveillance and control mechanisms, allowing the importing Member to have confidence that imported products do not pose a risk greater than the ALOP.

22. India also tries to argue that its purported absence of LPNAI gives it carte blanche to impose differential measures on domestic and imported products.[24] Its argument is simply not true.

23. This is not a situation where an importing Member has no need to worry about domestic spread of a disease because it exists only in another part of the world. Here, India itself believes that it is a country with significant risk for domestic LPNAI incidents. Indeed, India purports

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[23] India's First Written Submission, paras. 55-56.

[24] India's First Written Submission, paras 208-212.

that it does have surveillance and control measures for NAI.[25] India cannot plausibly claim, in this circumstance, that its domestic conditions are so dissimilar from conditions in the rest of the world that a lack of effective domestic surveillance and control measures, alongside measures for imported products far more stringent than recommended by OIE guidelines, simply reflect differences in disease conditions between India and elsewhere.

24. In sum, India's measures with respect to the threat of NAI in foreign products are markedly more stringent than its measures with respect to the threat of NAI in domestic products, and India has no valid justification for the distinction. The measures that it applies to imported products accordingly breach Article 2.3.

IV. INDIA'S MEASURES CONSTITUTE A DISGUISED RESTRICTION ON INTERNATIONAL TRADE

25. As the United States noted in its written submission, India's measures not only breach Article 2.3 by discriminating against imported products, they result in an additional breach of Article 2.3 because they amount to a disguised restriction on trade. Contrary to what India suggests,[26] this claim is not about just India's country-wide application of its import bans. Rather, it is about what can be inferred from the totality of how these measures operate, including the ways that India's measures discriminate against imported products—*i.e*, the forms of discrimination discussed in the context of the U.S. claim under the first sentence of Article 2.3.

26. There are, moreover, further indicia that India's discriminatory measures constitute disguised restrictions on international trade, including India's shifts in position as to whether the

[25] India's First Written Submission, paras. 41-56.

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

measures are justified by a risk assessment or the OIE Code, and India's adoption, in the document it briefly held forward as its risk assessment, of analysis but not conclusions from a New Zealand risk assessment. There is nothing unusual or innovative about relying on the facts cited in the U.S. first written submission to document the existence of a disguised restriction on trade in the SPS context. Indeed, the *Australia – Salmon* panel relied on highly similar considerations to identify a disguised restriction for purposes of a claim under Article 5.5.[27] Viewing these facts together, the Panel can be confident that India's measures are simply disguised restrictions on international trade.

V. INDIA'S MEASURES DO NOT PROVIDE FOR REGIONALIZATION

27. Turning to the U.S. claims under Article 6, the key points are as follows.

28. First, India's measures do not allow for regionalization. S.O. 1663(E) on its face precludes imports of listed products from a "country" if that country has reported NAI.[28]

29. Second, the United States has not been silent over the years about the need for India to apply its AI measures on a less-than-country-wide basis. The United States asked India to do so as early as 2007.[29] And over the years, India has refused. In 2007, India told the U.S. Foreign Agricultural Service that it would "insist on country freedom" and that its conditions for import are "uniform."[30] Over the years, India's failure to apply its AI measures on a less-than-country-wide basis has been mentioned repeatedly in meetings of the SPS Committee. India's delegate

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27 *Australia – Salmon (Panel),* paras 8.149-8.151.

28 Exhibit US-80.

29 Exhibit US-120.

30 Exhibit US-120.

has never indicated that this complaint was ill-founded and that India would consider applications from countries seeking regionalized treatment for their imports.[31] In fact, just last year, India's delegate to the OIE stated that for India "the concept of zoning looked irrelevant as far as avian influenza was concerned."[32]

30. The document that India cites in its submission for the contrary idea[33] merely indicates that, in 2010, India was willing to think about the application of the concept of regionalization to AI—not that it had decided to recognize the concept's application and accept individual Members' requests for regionalized treatment of their territories. And based on the remarks of India's delegate to the OIE in 2012, that process of consideration apparently did not result in any change in India's position on the question of regionalization

31. For this reason, contrary to what India argues, Article 6.3 is not applicable to the present dispute. The United States is not saying that India needed to recognize specific pest or disease free areas, or areas of low pest or disease prevalence in the United States in the absence of a request and supporting documentation. The issue here is even more basic. India needs to ensure that its measures are adapted to the sanitary characteristics of an area, and agree that it will consider individual applications for regional treatment.

32. This unwillingness to even "recognize the concept[] of … disease free areas" with respect to AI is what places India in breach of Article 6.2 of the SPS Agreement. Similarly, by refusing to recognize the possibility that an NAI incident anywhere in a large country like the United

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

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

33 Exhibit IND-115.

States may not warrant a ban on all products from the entire country, India is not ensuring that its measures "are adapted to the sanitary … characteristics of the area[s]" from which products originate, in violation of Article 6.1.

33. Furthermore, India argues that it need not recognize the differences in the sanitary characteristics of areas from which a product is exported while it is free to treat different areas in India differently based on the different sanitary characteristics of those areas.[34] And India justifies this position by asserting it has information about domestic disease outbreaks, but not about foreign disease outbreaks.[35] India's approach would mean that, in effect, a failure to recognize disease free areas is never discriminatory. India's approach cannot be reconciled with the text of Articles 6.1 and 6.2.

VI. INDIA CANNOT EXCUSE ITS FAILURE TO COMPLY WITH ARTICLE 7 AND ANNEX B

34. Finally, with reference to India's defense to the claim under Article 7 of the SPS Agreement, India's only response to this claim is that its measures conform to international standards.[36] First, the requirement to comply with paragraph 2 of Annex B does not hinge on conformity with international standards. Second, as the United States has discussed in detail, India's measures do not conform to international standards. As India has offered no other defense on this point, the United States respectfully requests the Panel to find that India's measures breach Article 7.

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[34] India's First Written Submission, paras. 194-198, 209.

[35] India's First Written Submission, paras. 194-198, 209.

[36] India's First Written Submission, para. 274.

35. In conclusion, as my colleague noted at the outset, when you cut to the core of the issues in this dispute, they are really quite straightforward, notwithstanding the occasional use of scientific terminology in the parties' arguments. The United States would also note that India's misuse of the OIE Code as a purported basis for trade bans has important systemic implications for worldwide animal health. As the OIE and other experts have noted, it is of utmost importance that countries report outbreaks of notifiable avian influenza ("NAI") to the OIE in order to improve scientific understanding. But, as noted by the OIE, when Members like India turn a reporting system meant to promote scientific awareness into a tool that triggers unjustified import prohibitions, they give other Members incentives to cover up their outbreaks, threatening not only the international trading system, but the effective control of avian influenza itself.

36. The United States thanks the Panel for its attention and looks forward to discussing this matter further over the coming days.