****** AS DELIVERED ******

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

(DS430)

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

December 18, 2013

TABLE OF EXHIBITS

EXHIBIT NUMBER	DOCUMENT
US-159	Note by the Secretariat, Summary of the Meeting of 24-25 June 2008, G/SPS/R/51 (27 Aug. 2008)
US-160	Chart: Total avian influenza virus HA GenBank submissions by country as of Dec. 3, 2013

TABLE OF REPORTS

SHORT FORM	FULL FORM
Argentina – Footwear (EC) (AB)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
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
Turkey – Rice	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion Resistant Carbon Steel Flat Products From Japan*, WT/DS48/AB/R, adopted 9 January 2004.
US – Countervailing Measures on Certain EC Products (AB)	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – Countervailing Measures on Certain EC Products (Panel)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report WT/DS212/AB/R
US – Poultry	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted on 25 October 2010

I. INTRODUCTION

1. Good morning Mr. Chairman and members of the Panel. The United States would like to thank the Panel, and the Secretariat staff assisting you, for your continued hard work in this dispute.

2. In the U.S. first written submission and at the first substantive meeting, the United States demonstrated that India's measures breach a number of provisions of the SPS Agreement.[1] Since then, India has provided a rebuttal submission that largely repeats its positions in its first submission, and the Panel has conducted a consultation process with the World Organization for Animal Health (OIE) and individual experts. In our statement today, we will summarize why India has no valid response to the U.S. claims, and will address the results of the expert consultation process.

3. The expert consultation process, including Monday's meeting with the individual experts, helps to confirm that India's measures breach its WTO obligations. The United States would recall that in its first written submission, the United States provided extensive record evidence concerning the proper interpretation of the OIE Code, and the inadequacy of India's domestic surveillance program. This evidence includes:

– *With respect to the OIE Code,* the text of the OIE Code,[2] reports from the OIE Terrestrial Animal Health Standards Commission,[3] the OIE User's Guide,[4] statements by an OIE representative and other commentators;[5] and

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1 Agreement on the Application of Sanitary and Phytosanitary Measures.

2 Exhibits US-1, US-50, US-51.

3 *See, e.g.*, U.S. First Written Submission, paras 51 & 58 citing Exhibits US-46 & US-49; U.S. Response to Panel Question 1 and 3(c), paras. 18 and 33 citing Exhibit US-143.

4 *See, e.g.* Exhibit US-117; U.S. First Opening Statement, para. 10; U.S. Response to Panel Question 6(c), para. 35.

– *With respect to India's surveillance*: India's National Action Plan (NAP) for avian influenza; the OIE Code provisions on surveillance[6] and the scientific authorities and methodologies that were compiled and applied by two veterinary epidemiologists.[7]

4. The input from the OIE and the individual experts provides further support that this record evidence establishes the following points:

– *First*, the OIE Terrestrial Animal Health Code ("OIE Code" or "Code") does not recommend import prohibitions in response to a notification of notifiable avian influenza, including low pathogenic notifiable avian influenza (LPNAI) – instead it provides that products India bans can be safely imported from countries or zones even if they are reporting LPNAI outbreaks;[8]

– *Second*, the recommendations in the OIE Code can be applied on a regional basis – which is another reason why mandatory country-wide prohibitions are not in accord with the OIE Code;[9] and

– *Third*, India does not have an active surveillance program capable of reliably detecting the presence of LPNAI in India.[10]

In short, the expert consultation process provides further confirmation that our proposed understanding of this evidence is indeed the correct one.

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5 *See, e.g.* U.S. First Written Submission, para. 51 n.83, 87 (citing Exhibits US-43, US-47, US-48); U.S. First Opening Statement, para. 7 (citing Exhibit US-119).

6 U.S. First Written Submission, para. 179 (citing OIE Code. Art. 10.4.29).

7 Statement of Emi Kate Saito (Exhibit US-92), Statement of Rebecca D. Jones (Exhibit US-106).

8 *See, e.g.*, Letter from Dr. Bernard Vallat, Director General of the OIE, to Dr. Christiane Wolff, Liaison Officer to the Panel, dated November 15, 2013 and enclosure (hereinafter "OIE Response(s)"), Response to Panel Questions 7(b), 16, 17(b).

9 *See, e.g.*, OIE Response to Panel Question 18(a) (p.31); *see also* EU's Third Party Submission, para. 33.

10 *See, e.g.*, Dr. Guan, Response to Panel Question 5; Dr. Honhold, Response to Panel Question 5, Dr. Brown, Response to Panel Question 5.

5. We will note that today we will not address today each and every point made by India but focus on the principal arguments it has emphasized in its second written submission and since then. We begin with India's principal defense in this dispute: its assertions regarding the OIE Code.[11]

II. INDIA'S MEASURES ARE NOT JUSTIFIED BY THE OIE CODE

A. India's Measures Are Not in Conformity with (Art. 3.2) or Based on International Standards (Art. 3.1)

6. At the outset of this discussion, let me suggest we take a look again at India's measures and contrast them against the OIE Code. On one hand, S.O. 1663(E) is a brief, one page notice that imposes blanket prohibitions on an entire *country.* The prohibition applies irrespective of whether the outbreak is of HPNAI or LPNAI. And the prohibition makes no distinctions among the affected products. On the other hand, the OIE Code includes a nearly 20 page avian influenza chapter that provides particularized recommendations that take into account the disease situation of the exporting country, zone, or compartment and the precise product in order to arrive at a mitigation measure that allows for trade with an "optimal level of security."[12] Unlike S.O. 1663(E), the OIE Code does not recommend the imposition of a blanket import prohibition when a country reports Notifiable Avian Influenza.

7. In short, India's measures prohibit the importation of products that the OIE Code says can be imported safely. Thus, India's measures cannot be said to be based on the relevant international standard; rather, India's measures are in contradiction. As a result, India cannot

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[11] OIE Terrestrial Animal Health Code (*See e.g.*, Exhibits US-1, US-50, US-51, US-56, US-57, US-58, US-125).

[12] OIE's User's Guide (Exhibit US-117), p.1; OIE Responses to Panel Question 2 (p.6) and Question 7 (p.16).

assert SPS Article 3.2 as a defense, and it its measures breach SPS Article 3.1. We will address three of India's responses to these *prima facie* breaches of the SPS Agreement, and explain why they are untenable.

1. Notification Under the OIE Code Does Not Require Import Prohibitions

8. First, India argues that both the United States and the OIE are wrong to explain that notification of an LPNAI outbreak is not a basis to impose import prohibitions.[13] But India's assertion has no basis in the Code's text. To the contrary, the OIE Code notes that the importation of products from countries reporting LPNAI is possible regardless of the exporting country's disease status.[14] Indeed, if India's position was correct, the OIE recommendations for avian influenza could be turned into a single sentence: impose a prohibition on a country as soon as it reports notifiable avian influenza.

9. India argues its interpretation is supported by Article 5.1.2 of the OIE Code and the User's Guide. India misstates both documents.[15] With respect to Article 5.1.2,[16] India argues that this article means that "countries *should* impose restrictions on imports to prevent the introduction of diseases not present in its territory or if present, only if such diseases are subject to internal controls and containment."[17] It does not. Rather, that provision reads in pertinent part:

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[13] India's Second Written Submission, paras. 2-3, 13-14; India's Comments on Responses by the Individual Experts and the OIE, paras. 37; India's Response to Panel Question 29 (b) (p.30); OIE Responses to Panel Question 11(a) (p.24).

[14] OIE Responses to Question 11(c) (p.24-25) and 17(a) (p.30).

[15] India's Second Written Submission, para. 14.

[16] Exhibit US-155.

[17] India's Second Written Submission, para. 14.

> The international veterinary certificate should *not* include requirements for the exclusion of pathogens or animal diseases which are present in the importing country and are not subject to any official control programme. The measures imposed on imports to manage the risks posed by a specific pathogen or disease should not require a higher level of protection than that provided by measures applied as part of the official control programme operating within the importing country.[18]

In other words, Article 5.1.2 is an admonition to an importing country not to ban an imported product to protect against a disease already present in that country and not to impose requirements that are stricter than what the country applies to domestic products.[19] Accordingly, this provision undermines the case for India's restrictions since India does not have a surveillance program for LPNAI.

10. Similarly, the User's Guide does not support an import ban due to Notifiable Avian Influenza.[20] The Guide provides that "[t]he recommendations in … the Terrestrial Code are designed to prevent the disease in question being introduced into the importing country, taking into account the nature of the commodity and the animal health status of the exporting country." This text affirms that the control measures in the OIE Code can prevent entry of the disease and thus there is no reason to turn notification into grounds for the imposition of import prohibitions.

11. In trying to defend its untenable arguments, India describes the responses by the OIE as "evasive, highly ambiguous and contradictory."[21] In particular, India purports not to understand why the OIE said notification helps countries address "diagnostic and management challenges of

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[18] OIE Code, Art. 5.1.2.2 (Exhibit US-155) (emphasis added).

[19] OIE Response to Question 7(a) (pp. 14-15).

[20] OIE User's Guide (Exhibit US-117).

[21] India's Comments on Responses by the Individual Experts and the OIE, paras. 26-27; OIE Responses to Panel Question 11(a) (p. 24).

avian influenza" and why the OIE did not instead explain that notification should result in trade consequences.[22]

12. This criticism reflects why India's position is so misguided. India fails to recognize that notifications may be used to advance scientific understanding and not just protectionist objectives. For example, a record of LPNAI outbreaks could improve management and diagnosis by informing countries that certain times of the year tend to be more likely for outbreaks, perhaps because of seasonal migration patterns – and that precautions should be taken as a result – or that certain establishments may be more prone to outbreaks and warrant further investigation. As we explained in our first written submission and consistent with what the OIE Responses note, providing this information can help governments control low pathogenic avian influenza before it mutates into highly pathogenic forms. And, imposing trade barriers based on these notifications would undermine these efforts by creating disincentives to notify.[23] India's position thus is not only legally wrong, but – if adopted by the international community – would frustrate scientific understanding by discouraging countries from accurately reporting their disease situation.

2. The Proper Understanding of the OIE Code

a. The U.S. Proposed Understanding of the OIE Code is Not Nugatory

13. India argues that the plain reading of the OIE Code, as set out in the first U.S. submission, cannot be accepted because it results in "entire sections of the Code relating to NAI

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22 *Id*.

23 U.S. First Written Submission, para. 51 (citing 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)).

freedom being redundant…"[24] This argument is without foundation – indeed, India does not explain what provisions would be rendered redundant. To the extent India's position is discernable, it appears to argue that the plain reading of the OIE Code, as explained by the United States, would vitiate (1) Article 10.4.1.10's admonishment not to impose bans in respect to NAI detections in wild birds; (2) the Code's notification provisions; and (3) the language – which India calls "NAI freedom" – at the beginning of various control or mitigation measures.

14. Upon examination, however, all three provisions serve a clear purpose when, as is proper, the OIE Code is read as not recommending import bans in response to AI notifications. First, Article 10.4.1.10 is an affirmative statement not to impose bans on account of wild birds.[25] Nothing about this affirmative statement is rendered redundant by a proper reading of other provisions of the OIE Code.

15. Indeed, the facts of this dispute show precisely why Article 10.4.1.10 is important. India has claimed previously that its ban was warranted because of outbreaks in wild birds. For example, in the SPS Committee, the European Union delegate is reported in the minutes as saying the following:

> The representative of the European Communities reported that India continued to apply a ban on the imports of poultry, swine, and their products, from areas that had reported outbreaks of either low or high-pathogenic avian influenza *in wild bird populations only*. In addition, India restricted the importation of products also from areas where low pathogenic avian influenza had been found, disregarding the OIE standards….[26]

This is what is reported as India's response:

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[24] India's Second Written Submission, para. 5.

[25] *See* OIE Response to Panel Question 10(a) (p. 22).

[26] Note by the Secretariat, Summary of the Meeting of 24-25 June 2008, G/SPS/R/51 (27 Aug. 2008), para. 31 (emphasis added).

> The representative of India clarified that India did not allow the importation of poultry and pork products, including processed meats, from areas where outbreaks of avian influenza had been reported. India was equally concerned about low and highly pathogenic avian influenza, as well as with avian influenza found in *wild birds only*.[27]

In light of positions such as the one by India I just referenced, Article 10.4.1.10 appears very relevant. To note a metaphor we've used previously, it is generally a good idea that there are road signs that remind people to drive carefully when it rains, even when people are already not permitted to drive recklessly when conditions are dry.

16. Second, with respect to the Code's notification provisions, they remain significant even if they do not result in trade bans. As we explained, notifications are important because they further our scientific understanding and help lead to the appropriate mitigation measures. The OIE Responses support this understanding.[28]

17. And third, with respect to the control or mitigation measures for particular products in the OIE Code, most certainly there is a purpose for these types of targeted measures where a notification does not lead – as India proposes – to a blanket ban. The Code has captions – not what India incorrectly labels ALOPs[29] – such as "Recommendations for importation from a NAI free country, zone or compartment,"[30] "Recommendations for importation from a HPNAI free country, zone or compartment"[31] and in some cases introductory language stating "Regardless of the NAI status of the country of origin …." These provisions address different scenarios and are

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27 *Id*., para. 35 (emphasis added).

28 *See* OIE Response to Panel Questions 11(a) (p.24) and 14(a) (p.27).

29 *See* India's Response to Panel Question 36 (a)-(c); India's Second Written Submission, paras. 25-26; OIE Response to Panel Question 8 (p. 17).

30 *See, e.g.*, OIE Code Articles 10.4.7, 10.4.10, 10.4.12 (Exhibit US-1).

31 *See, e.g.*, OIE Code Articles 10.4.11, 10.4.14, 10.4.17 (Exhibit US-1).

intended to provide appropriate mitigation measures that allow for safe trade.[32] For example, if a country is reporting LPNAI, it may need to apply the mitigation strategies for HPNAI free territories rather than for NAI free territories. And in some cases, the mitigation strategy may be sufficiently effective that the status of the exporting country is irrelevant (for example, Art. 10.4.19 for fresh meat).[33] In short, under the proper reading where notifications do not result in blanket import bans, the Code has a purpose for each and every recommendation.

18. Thus, India errs in arguing that the United States seeks to read anything out of the OIE Code. The understanding proposed by the United States and other Members, and confirmed by the OIE Responses, ascribes meaning to every provision. India's distortion of the OIE Code would require nothing more than one line of text recommending import restrictions in response to LPNAI. That is not the case.

b. India's Proposed Understanding Does Not Comport With its Own Practice

19. That India is ignoring significant – indeed most – of the OIE Code is established by contrasting its arguments against its own veterinary certificates. India, in claiming conformity under Article 3.2, explains the risk mitigation conditions in the OIE Code as two-fold. First, one ensures that imports originate only from a country that is NAI free, which is purportedly the level of protection certain recommendations achieve. Second, one imposes the veterinary certificate requirements in the applicable OIE recommendation as an additional failsafe.[34]

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[32] *See, e.g.*, OIE Response to Question 7(b) (p. 16).

[33] OIE Responses to Panel Question 21 (p.33).

[34] India's Second Written Submission, para. 19; *see also* India's First Written Submission, paras. 119(A)-120; India's First Closing Statement, para. 6.

20. India's veterinary certificates do not actually conform to OIE guidelines the way India says they should. For example, consider Exhibit US-52, India's certificate for chicken and quail meat. That certificate requires an attestation that the "Country is free from Avian Influenza (Highly Pathogenic Avian Influenza and Low Pathogenic Avian Influenza)."[35] However, this is not what the OIE Code calls for. The analogous OIE Code recommendation, Article 10.4.19, has a less onerous condition: one attests that the source poultry were kept in a country, zone or compartment free from HPNAI since the birds were hatched or for at least the past 21 days and that they were slaughtered in an HPNAI free abattoir.

3. The Purported Positions of Other Members

21. India also seeks support for its reading of the OIE Code by referring to purported positions and measures of the United States and some other Members. India errs with respect to the United States. There is no reason to believe it is any more accurate with respect to other Members. Indeed, Australia has already affirmatively explained that India mischaracterizes its risk assessment.[36]

22. Furthermore, to the extent that India is arguing that the measures of other Members help establish the meaning of the OIE Code, India's argument has fundamental problems. First, interpretation of the OIE Code does not, as India suggests, involve an application of the customary rules of treaty interpretation.[37] The OIE Code is an international standard adopted by an international organization, not a treaty. In any event, even taking these types of principles as guidance, they would not support India's reading of the OIE Code. Article 31(c) of the Vienna

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35 Exhibit US-52, para 5(a).

36 *See* Australia's Oral Statement, para. 7.

37 India's Comments on Responses by the Individual Experts and the OIE, paras. 2-3, 25, 34-36, 57.

Convention requires that in order to take into account "any subsequent practice in the application of the treaty," that practice must *establish the agreement of the parties* regarding its interpretation, not simply any practice whatsoever. India's characterization of a handful of measures adopted by certain WTO members cannot be said as establishing the agreement of the OIE membership regarding the OIE Code.

B. India's Measures Are Not Justified by a Risk Assessment or Otherwise Maintained with Sufficient Scientific Evidence

23. With respect to the question of a risk assessment, the record continues to show that India has no risk assessment within the meaning of the SPS Agreement. To recap, the question has been posed repeatedly to India regarding whether its measures are based on a risk assessment:

- in the SPS Committee;[38]
- in the U.S. Article 5.8 request (January 17, 2012);[39]
- by the Panel orally at the first meeting; and
- by the Panel in Question 31 to the parties following the first meeting.

Despite these opportunities, not once has India responded that it has a risk assessment.

24. When India notified S.O. 1663(E) to the WTO, its notification form stated that the purpose of the measure was (1) food safety, (2) animal health, and (3) to protect humans from animal pest or disease.[40] Accordingly, India's avian influenza measures require both types of risk assessments provided for in paragraph 4 of Annex A of the SPS Agreement. Specifically, the SPS Agreement requires what has been described as a "pest risk assessment" that comports

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38 U.S. First Written Submission, paras. 80-82.

39 Exhibit US-4.

40 U.S. First Written Submission, para. 101; G/SPS/N/IND/73, box 7.

with the first sentence of paragraph 4 and a "food safety risk assessment" that comports with the second sentence of that provision.[41] Thus, India breaches Articles 5.1 and 5.2 of the SPS Agreement because it was required to base its measures on both types of risk assessments provided for in paragraph 4 of Annex A and its measures are based on neither.

25. Consistent with the Appellate Body's prior findings, Articles 5.1 and 5.2 are specific applications of the basic rights and obligations enshrined in Article 2.2.[42] Accordingly, India has consequentially breached Article 2.2 by failing to base its measures on a risk assessment.

III. INDIA'S MEASURES ARE MORE TRADE RESTRICTIVE THAN NECESSARY TO ACHIEVE ITS ALOP

26. India's second written submission, in contrast to its opening statement at the first meeting of the Panel,[43] acknowledged that the OIE Code product-specific recommendations are different from the measures India presently applies.[44] Nonetheless, India posited three reasons why application of the OIE Code would not result in a less trade-restrictive measure that would achieve its ALOP. Each of these grounds is legally or factually incorrect.

27. First, India submits that reliance on the control measures would not achieve its ALOP.[45] Moreover, India claims, citing the panel report in *US – Poultry*, that we cannot ascribe to it the ALOP we would prefer. We are not attempting to do so. The facts in *US – Poultry* were fundamentally different. In *US – Poultry*, the U.S. ALOP was specifically set forth in a U.S.

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41 U.S. First Written Submission, paras. 110-111.

43 India's Opening Statement at the First Panel Meeting, para. 50.

44 India's Second Written Submission, para. 90.

45 *Id.*

federal statute.[46] The issue there was that the complaining party argued that the United States had adopted an ALOP than was different than set out in written measure. The issue here is inapposite. We still do not know what India's ALOP is. Remarkably, in responding to the Article 5.6 claim, India never identifies what its actual ALOP is.

28. As explained in our submissions, and further confirmed by the consultation process with the experts, India is not controlling for LPNAI at home, and its domestic restrictions for HPNAI contain limitations such as zoning.[47] At best, India's ALOP can be described as very modest. Measures based on the OIE Code would achieve a high ALOP. In particular they would ensure that trade in products is *safe*.[48] We know that application of these measures will prevent entry of the disease.[49] Accordingly, while it appears India's ALOP is modest, even a high one would be achieved by application of the OIE Code.

29. The second point India raises is that such measures would be technically infeasible since India cannot trust the veterinary certificates – and that would mean more work for its authorities since there would actually be imports entering India.[50] This is interesting because India claims that it allows imports if countries are free from NAI for three months.[51]

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46 *US – Poultry*, paras. 7.333-7.334.

47 U.S. First Written Submission, paras 157-159, 178-180.

48 OIE Response to Panel Question 2 (p.6) and 7(a) and (b) (pp. 15-16).

49 OIE Response to Panel Question 12 (p. 25).

50 India's Second Written Submission, paras. 91-92.

51 *See, e.g.*, India's First Written Submission, paras. 29-33, 195.

30. Mr. Chairman, members of the Panel, you have seen the veterinary certificates India maintains through which imports are supposedly being made.[52] They require an attestation by a veterinarian that an entire country is free of LPAI. If India is willing to accept that a veterinarian can make an attestation regarding the entire LPAI situation in the exporting country, then India should be prepared to rely on a veterinarian attesting to things that might actually be in that person's personal knowledge such as that the eggs were packed in an HPNAI free territory, had their surfaces sanitized, and were shipped in new containers.[53] The OIE Code is applied throughout the world – and is subject to comments from Members every year regarding any potential problems. Yet India has provided not provided a single instance where it has proven technically infeasible for any other Member.

31. The last point India raises is that the OIE Code is more trade restrictive than the import prohibitions it maintains now.[54] India claims that would be the case because it would take it longer to confirm that other countries maintain adequate surveillance systems than to accept imports from a country if it does not report NAI for three months.

32. India's position has no basis in fact or common sense. There would be far less potential disruptions to trade by adopting the OIE Code, rather than leaving it perpetually to the possibility of suspension. In short, India cannot claim that only import prohibitions can achieve its ALOP when it is clear that its ALOP is modest and the OIE Code, a scientifically validated approach that would achieve a high ALOP, exists and has been subject to global use.

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52 *See, e.g.*, Veterinary Certificate for Import of Chicken/Quail Meat Into India (Exhibit US-52).

53 OIE Code, Art. 10.4.14 (Exhibit US-1).

54 India's Second Written Submission, paras. 94-95.

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

33. The parties and the Panel's experts have spent substantial time exchanging views related to the U.S. claims under Article 2.3. These exchanges have confirmed that India's measures discriminate against imported products without justification.

34. Before turning to the matter of India's AI surveillance, the United States recalls that there are in fact two separate ways that India's measures discriminate against imported products. One of these forms of discrimination exists independently of India's surveillance deficiencies. As the United States has explained, 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. India's measures do not offer the opportunity to limit the import prohibition's coverage to a smaller area. By contrast, when NAI is detected in India—and in practice that means HPAI, as India does not detect LPNAI—India restricts trade in products only from a limited zone surrounding the detection. Even if India had the capacity to reliably detect LPNAI, which it does not, this would amount to discrimination between domestic products and products imported from other Members.

35. Surveillance *is* at the core of the second manner in which India's measures discriminate against imported products. India imposes import bans when an exporting country reports detections of LPNAI, but does not have in place surveillance mechanisms capable of reliably detecting LPNAI when it occurs in India. When LPNAI cannot be detected, it obviously cannot lead to any restrictions on the trade of domestic products.

36. The inadequacy of India's domestic surveillance regime to reliably detect LPNAI is at this point crystal clear. It is clear from the NAP and from the other evidence reviewed by the Panel's experts, as those experts' answers confirmed. And there is nothing to the contrary in the 76 new exhibits that India belatedly submitted with its comments on the experts' answers. Indeed, none of the experts indicated on Monday that anything in these new exhibits constitutes evidence of an active, systematic surveillance regime capable of reliably detecting LPNAI. In fact, as experts Dr. Brown and Dr. Honhold explained, India's failure to produce such evidence after the experts noted its absence from the record only serves to confirm that an active, systematic surveillance regime capable of reliably detecting LPNAI does not exist in India.

37. From the beginning of these proceedings, the United States has explained, and put forward evidence to confirm, that LPNAI cannot be reliably detected through surveillance that looks only for clinical signs of infection.[55] This is because, as India has acknowledged, "LPNAI is largely asymptomatic in poultry."[56] The Panel's experts have confirmed that systematic active surveillance involving laboratory testing of samples from apparently-healthy flocks is therefore necessary to reliably detect LPNAI.[57] India does not appear to be disputing this point.

38. The United States has explained that India's NAP sets out a surveillance regime that relies on clinical signs for the detection of avian influenza, and that does not require any routine laboratory testing of samples from apparently healthy flocks for AI.[58] Indeed, apart from

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[55] Exhibit US-92; Exhibit US-106; Exhibit US-112, p.1; Exhibit US-95, p. 186. *See also* Exhibit US-1 (OIE Code, art. 10.4.29).

[56] India's First Written Submission, para. 214; *see also* Exhibits US-6; Exhibit US-8; Exhibit US-92; Exhibit US-102; Exhibit US-106; Exhibit US-112, p.1.

[57] Dr. Brown, Response to Panel Question 4; Dr. Honhold, Response to Panel Question 4(a).

[58] Exhibit US-90.

"physical/clinical" surveillance, routine surveillance in accordance with the NAP involves only the use "where possible" of *virological* testing[59]—a form of testing used to follow up on suspected cases of AI already identified through other means, such as clinical events or positive results on serological tests.[60] In its instructions on "Guidelines for Collection, Packing and Transportation of Samples," the NAP instructs that samples should be forwarded to a Regional Disease Diagnostic Laboratory or to HSADL Bhopal "[o]nly in case of unusual sickness/ mortality raising suspicion of AI."[61]

39. In response to the U.S. *prima facie* case, India submitted a variety of documents which provide figures on numbers of AI tests conducted by certain laboratories in India, without stating why the tests were conducted,[62] or which relate to surveillance for or response to clinical events.[63] India's documents do not demonstrate that India actually conducts routine testing of apparently-healthy flocks for LPNAI, let alone that such testing is conducted nationwide as part of a program or programs under which it is required.

40. The independent experts reviewed the evidence and agreed. As Dr. Brown explained: "The evidence provided does not support a conclusion that India is conducting surveillance activities that would reliably detect LPNAI in poultry."[64] Or as Dr. Honhold put it: "[N]o evidence was found support a conclusion that India is conducting surveillance activities that

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59 Exhibit US-90, section I.2.1, p.2.

60 Exhibit US-1, OIE Code Art. 10.4.29.

61 Exhibit US-90, section I.3, p.4.

62 *E.g.*, Exhibits IND-15, IND-115.

63 *E.g.*, Exhibits IND-50, IND-51, IND-54,

64 Dr. Brown, Response to Panel Question 5.

would reliably detect LPNAI in poultry."[65] And when asked whether India's evidence shows that it is conducting surveillance activities that would reliably detect LPNAI in poultry," Dr. Guan was able to answer in one word: "No."[66]

41. Although India attempted to challenge the experts' conclusion and belatedly add to the record 76 new exhibits,[67] these new exhibits make no difference at all. As the session on Monday confirmed, India's new exhibits simply contain more of the same kinds of evidence that India submitted previously, and that is not illustrative of an active, systematic surveillance regime capable of reliably detecting LPNAI – reinforcing the fact that India does not have one.

42. Dr. Brown's and Dr. Honhold's remarks accurately captured the nature of the new exhibits. Some of India's new exhibits are requests to test small numbers of samples of different types collected in individual Indian states, districts, and localities for unknown reasons.[68] There are similar requests explicitly referencing HPAI surveillance,[69] as well as reports of surveillance following HPAI outbreaks.[70] There are reports of projects to monitor for AI in migratory birds in certain isolated locations.[71] There are four letters from long ago, predating India's NAPs, its AI-based import prohibitions, and even the notifiability of LPNAI, simply requesting that, in light of

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65 Dr. Honhold, Response to Panel Question 5.

66 Dr. Guan, Response to Panel Question 5.

67 India's Comments on Responses by the Individual Experts and the OIE, pp. iii-viii; India's Comments on Responses by the Individual Experts and the OIE, paras 65-99.

68 Exhibits IND-178, IND-179, IND-180, IND-181, IND-184, IND-186, IND-188, IND-189, IND-190, IND-191, IND-192, IND-194, IND-196, IND-197, IND-198, IND-200, IND-202, IND-203, IND-204, IND-205, IND-207, IND-208, IND-209, IND-210, IND-211, IND-212, IND-214.

69 Exhibits IND-181, IND-185, IND-191, IND-192, IND-196, IND-206, IND-213.

70 Exhibits IND-149, IND-149.

71 Exhibits IND-150, IND-176.

HPAI, states collect some samples for routine testing, but specifying nothing more about number of samples, number of flocks to sample, or frequency of collection.[72] And there are a handful of documents requesting tests on, or reporting results of tests on, small numbers of samples collected in individual districts or localities as part of routine surveillance performed in them at particular times.[73] These documents evidence nothing more than temporally and geographically sporadic, ad hoc surveillance testing activities.

43. In sum, the record, including India's new exhibits, shows that India lacks nationwide requirements or plans for ongoing systematic, active surveillance testing capable of reliably detecting LPNAI, and that India is not in fact conducting, on a systematic and nationwide basis, active surveillance testing capable of reliably detecting LPNAI.

44. In its Comments on the Expert Responses, India cites the fact that it has submitted a handful of gene sequences for non-reportable AI strains to GenBank—a Genetic sequence database run by the U.S. National Institutes of Health.[74] India misplaces its reliance on these submissions. Contrary to India's arguments, the submission of some gene sequences to GenBank does not indicate the existence of adequate AI surveillance. For example, the record does not explain how or why Indian researchers identified these particular strains—they could have done so as a result of private academic studies or tests on birds following HPAI outbreaks. In fact, many of the submissions were H9 sequences,[75] which, as we heard on Monday, produce

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72 Exhibits IND-158, IND-161.

73 Exhibits IND- 155, IND-156, IND-182, IND-183, IND-195, IND-199.

74 India's Comments on Responses by the Individual Experts and the OIE, para. 89.

75 India's Comments on Responses by the Individual Experts and the OIE, para. 89.

noticeable clinical signs[76] and therefore can be detected through passive surveillance. India's number of submissions, moreover, pales in comparison with those from vastly smaller countries like Germany, the Netherlands, Hong Kong, or Israel. The United States, which has had only 1 HPAI outbreak in this century, has submitted over 100 times the number of non-H5 or H7 AI genetic sequences to GenBank as India has.[77]

45. Lacking reliable surveillance, India has focused on an issue slightly different from surveillance: India's disease status. While this issue is interesting, and while India's position on this issue too is unsupported by the facts, it is the adequacy of India's surveillance to reliably detect LPNAI, and not India's disease status, that is ultimately the fundamental question for purposes of determining whether India's imposition of LPNAI-based import bans constitutes discrimination in breach of Article 2.3. If India has no means to reliably detect LPNAI, and thus to restrict trade in domestic products in the event that poultry in India becomes infected with LPNAI, it would be discriminatory to restrict the trade in imported products due to detections of LPNAI in exporting countries.

46. Having said this, as the Panel's experts noted on Monday, India has no surveillance basis on which to claim that it has never had cases of LPNAI. And in fact, the Pawar study[78] provides strong evidence that domestic ducks in India have been infected with a type of LPNAI known as H7, either at the time of the study or in the past.[79] India's failure to perform virological follow-up testing meant that there was no way to know definitively that the ducks were infected *at the*

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[76] *See* Exhibit US-148, p. 190 (describing clinical signs associated with H9N2 incident in Pakistan).

[77] Exhibit US-160.

[78] Exhibit US-122.

[79] *See* Exhibit US-6, p.171 (explaining serology).

time of testing,[80] which would trigger an obligation to inform the OIE of an ongoing LPNAI incident. But this failure confirms that India is not taking the surveillance steps that would be necessary to reliably detect and report LPNAI.[81] In fact, as Dr. Honhold noted on Monday, Exhibit IND-156, which reports positive serology results in ducks while indicating only that they are non-H5, provides further evidence that India does not conduct follow-up surveillance following detections of non-H5 AI in order to ascertain whether the detection stems from LPNAI. India protests that Pawar's methodology could not distinguish between H7 HPAI and H7 LPNAI.[82] But if, instead of LPNAI, a *more* virulent AI form had circulated in India undetected, that would only serve as even more powerful proof of even greater deficiencies in India's surveillance.

47. As the United States has explained, this strong evidence of LPNAI infections in India is entirely expected, because India lies in the flyways of wild birds coming from places with LPAI, including H5 or H7 LPAI.[83] For example, Pakistan, Sri Lanka, and China have experienced LPNAI.[84] India has a large backyard poultry population[85]—opening an avenue for AI transmission from wild birds to poultry. India had 35 million domestic ducks in 2007,[86] and as

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80 *See* Exhibit US-143, para 6.

81 *See* Exhibit US-143, para 8; Dr. Honhold, Response to Panel Question 3.

82 India's Comments on Responses by the Individual Experts and the OIE, para. 82.

83 *See* Exhibit US-144, para. 12; Exhibit US-147 (generally and charts on p. 386); Dr. Guan, Response to Panel Question 2; Dr. Honhold, Response to Panel Question 1.

84 Exhibit US-144, para. 12; Exhibit US-146; Exhibit US-147; Exhibit US-151; Exhibit US-152; Exhibit US-147; Exhibit US-148; Exhibit US-153; Exhibit US-154; Exhibit US-160; Dr. Honhold, Response to Panel Question 1.

85 *See* Exhibit US-90, p.2.

86 Exhibit IND-8, p.3.

Dr. Guan observed on Monday, ducks are a key host species for preservation and perpetuation of LPNAI.[87] Moreover, India has experienced non-notifiable LPAI strains,[88] and there is no reason to believe that they circulate differently from notifiable LPAI strains.

48. India has highlighted that some other countries around it have not *reported* LPNAI. But that is far from an indication that LPNAI is absent from South Asia. Indeed, India's argument about its neighbors rests on the same flawed premise as many of India's points concerning its disease status: that all other countries have surveillance capable of reliably detecting LPNAI. As the Panel's experts noted on Monday, many countries do not have surveillance capable of doing so, and India has not shown that countries around it do have surveillance programs which are likely to detect LPNAI.

49. In sum, India bans imported products due to LPNAI even though it does not have surveillance requirements or plans capable of reliably detecting LPNAI and is not otherwise conducting such surveillance systematically on a nationwide level. Accordingly, at the same time that India imposes bans on imported products due to LPNAI, India will not impose measures on domestic products on account of LPNAI. Moreover, despite restricting trade in domestic products from only a limited zone following an outbreak of AI in India, India insists on restricting imports from an entire foreign country whenever that country reports any form of NAI. The measures that it applies to imported products accordingly breach Article 2.3.

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87 *See* Exhibit US-147, p.384.

88 Exhibits IND-162-170; India's Comments on Responses by the Individual Experts and the OIE, para. 89.

V. INDIA'S MEASURES DO NOT PROVIDE FOR REGIONALIZATION

50. Turning to the U.S. claims under Article 6, the United States would note that India continues trying to shift the focus away from its measures and onto the United States. But ultimately India's measures are what matter for purposes of resolving this dispute.

51. India's defense to these claims appears to rest on the fundamental premise that Article 6 obligations can be triggered only by an application for recognition of specific zones or compartments.[89] In the context of this dispute, involving a measure that explicitly requires application of import bans on a country-wide basis,[90] India's theory would mean that the United States and other exporting Members had an obligation not to accept the plain meaning of the words of India's measure. India's theory, moreover, suggests that the United States had an obligation not to believe the statements of India's own officials, who made clear that regionalization simply was not an option for countries exporting to India the products covered by S.O. 1663(E).[91] Yet Members must be able to take the text of other Members' measures and the statements of their officials at face value. And nothing in the SPS Agreement suggests that they cannot.

52. India's insistence that Article 6 obligations can be triggered only by an application for recognition of specific zones or compartments ignores the phrasing of that article. Article 6.1 does not provide for Members to "adapt their sanitary or phytosanitary measures" to the sanitary characteristics of an area at some point in the future. Rather, it provides that "Members *shall ensure* that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary

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89 *See* India's Second Written Submission, para. 55-79.

90 Exhibit US-80.

91 Exhibit US-124, p.3, box 6; Exhibit US-120, p.5; Exhibit US-88, para. 231.

characteristics of the area … from which the product originated" (emphasis added). This wording would make no sense if the paragraph was not intended to require maintenance of an ability (existing independently of and antecedent to any regionalization request), to account for the disease conditions of sub-national areas from which traded products originate.

53. Similarly, Article 6.2 requires that "Members shall, in particular, recognize *the concepts* of pest- or disease-free areas and areas of low pest or disease prevalence" (emphasis added). It does not require recognition of specific areas, but rather of concepts: those of pest- or disease-free areas. It would make no sense for an obligation to recognize these *concepts* to be triggered only in the event of a request to recognize specific compartments or zones.

54. The United States has amply explained why India's measures on their face do not allow for the application of import bans on a less-than-country basis.[92] And the United States has explained how India rebuffed various requests that it accept the possibility of applying its measures not on a countrywide basis.[93] For this reason, India's argument that the United States should have inquired "on its laws and procedure that India might adopt to recognize an exporting country's zones or compartments"[94] is disingenuous at best.

55. As the United States explained, it explicitly asked that India apply its measures on a less-than-country basis with respect to products from the United States. India's response was not to provide information on laws and procedures that could be used to secure the recognition of zones and compartments. Rather, India's response was that its requirement of country-freedom "is

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92 U.S. First Written Submission, paras 145-147; U.S. Second Written Submission, paras 72-74.

93 U.S. First Written Submission, para 148; U.S. Opening Statement at the First Panel Meeting, paras. 29-30; U.S. Responses to the Panel's Questions Following the First Panel Meeting, paras 93-94; U.S. Second Written Submission, paras 69-71.

94 India's Second Written Submission, para. 67.

uniform."[95] Indeed, India's erroneous assertions in this dispute that it has an ALOP of "NAI country freedom" of the exporting country from NAI,[96] 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,"[97] and that "India's ALOP is met by maintaining import restrictions against *countries* notifying HPNAI or LPNAI,"[98] thoroughly belie its contention that it would consider recognizing zones and compartments if only another country submitted a properly documented request.

56. Before concluding the discussion of regionalization, the United States would note two further points in India's argument that simply do not make sense. First, the United States has highlighted the statement of India's representative to the OIE that for India "the concept of zoning looked irrelevant as far as avian influenza was concerned."[99] India tries to argue that the statement "was only with reference to wild life and its epidemiological role in spread of disease."[100] As India's delegate was clearly aware, however, zoning is a concept applicable to traded products—it allows for the limitation of trade restrictions following disease outbreaks. It is not a concept applied to wildlife that could be vectors for transmission of a disease or pest.

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95 Exhibit US-124, p.3, box 6; Exhibit US-120, p.5.

96 India's First Opening Statement at the First Panel Meeting, para. 28.

97 India's Response to Panel Question 35(c) (emphasis added).

98 *Id*. (emphasis added).

99 Exhibit US-88, para. 231.

100 India's Second Written Submission, para. 73.

57. Second, in its regionalization argument, India urges the Panel to presume that the United States must not have procedures in place that would allow for the limitation of trade restrictions on U.S. products to a limited zone around the outbreak.[101] As the United States has explained, while the U.S. does have such procedures,[102] U.S. procedures are irrelevant to the question of whether India recognizes "*the concepts* of pest- or disease-free areas and areas of low pest or disease prevalence" (emphasis added), and is "*ennsur[ing]* that [its] sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area … from which [a] product originated" (emphasis added). But it is noteworthy that, at the same time it insists the United States must not have such procedures, India repeatedly points, in defense of its LPNAI-based trade bans, to arrangements between the United States and certain other countries to allow for the restriction of products from only limited areas in the United States following AI incidents.[103] Of course, U.S. efforts to minimize the impact of trade restrictions imposed by other countries do not in any way represent U.S. agreement that these trade restrictions are legitimate. The point is simply that India's own arguments belie its contention that the United States does not have these procedures in place.

58. In sum, the plain language of India's measures, which makes clear they apply on a country-basis, and India's responses to inquires about them, which rejected non-country-based application of AI restrictions, both demonstrate the same thing: that contrary to the OIE Code and Article 6 of the SPS Agreement, India will not recognize "the concepts of … disease-free

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101 India's Second Written Submission, para. 55.

102 U.S. Responses to the Panel's Questions Following the First Panel Meeting, paras 20-26.

103 India's First Written Submission, paras. 169(e), (f), (j), 169(A)(a), (b), (e), (f), 170, 171-173; India's Comments on Responses by the Individual Experts and the OIE, para. 57.

areas and areas of low … disease prevalence" as applied to AI, nor will it ensure that its sanitary measures are adopted to the characteristics, with respect to AI, of sub-national areas from which products originate.

VI. THE UNITED STATES HAS NOT LIMITED ITS CLAIMS

59. Before concluding, we will address one last point in India's submissions. India alleges that the United States has limited its claims to poultry meat and eggs. The Panel has already heard a variant of this argument – and rejected it in the Preliminary Ruling.[104]

60. India's argument makes no sense – the presentation of certain examples regarding some of the products covered by a measure is no indication of a withdrawal or limitation of a claim. And more generally, India does not – because it cannot – identify any legal basis to require a complaining party to repeat every product covered by a measure at every portion of its submissions in order to maintain a challenge to the entire scope of a measure.

61. Further, what India points to does not suggest any intent to limit the scope of the U.S. challenge. In order to avoid expending too much time, the United States briefly takes three examples.

- *Paragraph 36 of the U.S. First Written Submission*: India takes issue with the fact that in our section on the biology of avian influenza, we note that certain commodities such as meat and eggs do not contain LPAI.[105] Elucidation of a scientific fact is not a limitation of a legal claim.

- *Paragraph 124 of the U.S. First Written Submission*: India takes issue that when discussing the Summary Document, we addressed that LPAI is not present in poultry meat and eggs.[106] India omits that the only two products

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104 Preliminary Ruling of the Panel, paras. 3.36-3.38.

105 India's Second Written Submission, para. 97.

106 India's Second Written Submission, para. 98.

addressed *by India* in the Summary Document were poultry meat and eggs.

- *Paragraph 11 of the U.S. First Written Submission*: India takes issue with the explanation given by the United States regarding why the OIE recommends surface sanitation for eggs from countries reporting LPNAI.[107] We simply explained how the OIE Code took into account science into devising recommendations and that science is reflected in the different recommendations.

In short, India has no legal or other basis to assert that U.S. claims are addressed to less than the full scope of the products covered by India's measures.

VII. CONCLUSION

62. Members of the Panel, this dispute boils down to a few simple points:

- India's measures are not based on either type of risk assessment prescribed by the SPS Agreement;
- India's measures are maintained without sufficient scientific evidence because the evidence does not support prohibitions on account of LPNAI;
- India's measures are more trade restrictive than necessary to achieve its appropriate level of protection because measures conforming to the OIE Code are reasonably available;
- India's measures unjustifiably discriminate as India does not have a surveillance regime capable of reliably detecting LPNAI yet bans imported products on account of LPNAI; and since India restricts trade in domestic products from only a very limited area following a domestic HPAI outbreak, yet whenever a trading partner reports LPNAI or HPAI, India bans importation from the entire country;
- India's measures do not take into account the possibility of regionalization; and
- India has no justification for its failure to properly notify and publish its measures.

In short, this dispute is about precisely what the SPS Agreement was intended to address: a Member misusing safety concerns in order to fulfill protectionist objectives.

[107] India's Second Written Submission, para. 99.

63. The United States thanks the Panel for its attention today and at Monday's meeting with the Panel's experts. We look forward to our further discussion over the next two days, and hope that our comments and answers will be of assistance to the Panel.