INDIA – MEASURES CONCERNING THE IMPORTATION

OF CERTAIN AGRICULTURAL PRODUCTS

FROM THE UNITED STATES

(DS430)

EXECUTIVE SUMMARY OF THE
SECOND WRITTEN SUBMISSION
OF THE
UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The key issues in this dispute remain straightforward. India prohibits the importation of various agricultural products from countries that report outbreaks of NAI, but has offered no risk assessment in support of its measures. India's response is a contorted and untenable interpretation of the relevant standards in the OIE Code. Contrary to India's arguments, its measures simply ban trade in a situation where the Code provides no basis for a ban. The Panel should thus find India in breach of the WTO obligations at issue in this dispute.

II. LEGAL ARGUMENT

A. India's Measures Do Not Conform To The OIE Code And Therefore Do Not Fall Within Article 3.2 Of The SPS Agreement

2. India's defense is its assertion that its measures conform to the OIE Code. India asserts that the OIE recognizes its prerogative to set its ALOP and has drafted the OIE Code with options that satisfy India's chosen ALOP. But India's measures fundamentally depart from the OIE Code by imposing import prohibitions. With respect to the SPS Agreement, India asserts that it is entitled to a presumption of conformity with its obligations because its measures incorporate those ALOP-consistent aspects of the OIE Code. This assertion is also incorrect.

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

3. The United States notes that India's assertion that the OIE Code seeks to achieve different ALOPs is at odds with the OIE's own guidance regarding the use of the OIE Code contained in the User's Guide. This guidance indicates that (1) the recommendations are designed to prevent the disease from entering into the country and thus to achieve an optimal level of security; (2) the recommendations may take into account the nature of the product, as seen throughout OIE Chapter 10.4 where there are distinct recommendations for different products; and (3) the animal health status of the exporting country may be a factor to be taken into account with respect to the various recommendations, but the exporting country's animal health status is not an ALOP. In short, the recommendations in the OIE Code are designed to achieve a single, consistent ALOP, *i.e., an optimal level of animal health security*.

4. India alleges that the OIE Code (i) recognizes India's prerogative to sets its own ALOP; (ii) that the exporting status of a country is an ALOP; and (iii) the admonition in a particular recommendation, Article 10.4.1.10, *not* to impose import prohibitions in poultry products on account of NAI detections in wild birds somehow also means ban should be undertaken when NAI is detected in poultry. India cannot substantiate any of these allegations.

5. With respect to India's first assertion, the WTO recognizes the rights of Member to set their own ALOP; international organizations do not have that role. Where a Member chooses measures that achieve a higher ALOP than international standards provide, the Member has the obligation to ensure that the measure is supported by scientific evidence. The User's Guide to the OIE Code takes a similar approach. For the second assertion, India does not explain how it can be reconciled with the specific text in the OIE Code. India's so-called condition of entry is not an ALOP, but rather a factor to be taken into account in applying any measure. With respect to

India's third assertion, India cannot reconcile its position against the text of Article 10.4.1.10. Moreover, it is also legally untenable for India to pick only certain aspects of OIE recommendations and successfully invoke SPS Article 3.2.

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

6. India asserts conformity with the OIE Code on the basis that its measures incorporate some elements of the OIE Code. This argument has no merit. Simply because the Code does not specifically forbid certain aspects of India's measure cannot amount to "conformity": international standards generally recommend control measures, *not* what should be avoided. India – rather than adopting portions of the OIE Code – has measures that explicitly contradict it. Second, the United States does not agree with India's stated legal position regarding the meaning of "conform to international standards" under Article 3.2.

7. India is incorrect in asserting that its measures may "conform" for the purposes of Article 3.2 with the relevant international standard when the measure is not fully consistent with it. The Appellate Body in *EC – Hormones* found that anything less than total adoption precludes the Member from obtaining the rebuttable presumption of consistency under Article 3.2.

8. India's argument that international standards under the SPS Agreement are "recommendatory" and not binding is a *non sequitur*. If a Member chooses not to adopt the international standard, then the Member must comply with all relevant SPS disciplines, including having a risk assessment to justify the measure. Thus, whether or not a measure conforms to the international standard does not determine whether or not the measure may be adopted. Rather, it determines whether a Member must have a scientific basis. India does not argue that its measure is aligned with any particular conduct put forward in the OIE Code, but simply that its measures are not prohibited under the OIE Code. India's position contradicts the Appellate Body's finding in *EC – Hormones*. There are also product specific recommendations for importation in the rest of Chapter 10.4 of the OIE Code that contradict India's measures. India's position erroneously conflates SPS Articles 3.2 and 3.1; a position the Appellate Body has rejected.

9. In claiming consistency with the OIE standard, India also relies on the proposition that India has the sovereign right to decide its ALOP. This is not the issue. The issue is that, where a Member decides to adopt a measure that departs from an international standard (for reason of a higher ALOP or other), it must have a scientific basis. India's position – disparate measures due to differing ALOPs are still in conformity with international standards – finds no support in the SPS Agreement. Indeed, the Appellate Body has found the contrary.

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

10. India argues that if the Panel does not find India's measures to conform to international standards under SPS Article 3.2, then it should find that India's measures are based on international standards under SPS Article 3.1. India's assertion that its measures are based on international standards is flawed because India is still not pointing to actual recommendations that its measures embody.

C. India's Failure To Base Its Measures On A Risk Assessment Result In A Breach Of Articles 5.1, 5.2, And 2.2

11. India has urged the Panel to consider two threshold positions in reviewing U.S. claims, neither of which have any merit. First, India urges the Panel to commence its analysis with Article 2.2 and then proceed to Article 5.1 and 5.2. However, any inquiry regarding Article 2.2 will normally examine the obligations in Articles 5.1 and 5.2, because the latter provisions are specific applications of the more general principle elucidated in Article 2.2.

12. Second, India claims it is "apparent" that the United States has limited its challenge under these provisions to fresh meat of poultry and eggs from countries reporting LPNAI. To the contrary, the United States is challenging India's AI measures in their entirety. The Panel has already recognized in its findings on India's First Preliminary Ruling Request that the *measures* at issue are those that constitute and support an import ban of various agricultural products, purportedly on account of NAI. As explained in its response to Panel Question 11(e), India's unsupportable position is premised on the U.S. observation that the Summary Document was inadequate because it only referenced fresh meat and eggs.

13. India's only response to the U.S. claims involving the absence of a risk assessment is that the "non-existence of a risk assessment is of no consequence when India's measure is in conformity with the OIE Code." Accordingly, if – as the record fully supports – the Panel finds that India's measures are not in conformity with the OIE Code, then the United States respectfully request the Panel to find that India's measures are in breach of India's obligations under SPS Articles 5.1, 5.2, and 2.2.

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

14. India's measures breach Article 2.2 because they are maintained without scientific evidence. The measures impose import prohibitions on products that scientific evidence indicates can be safely imported with proper precautions, specifically products from countries reporting only LPNAI.

15. The scientific evidence this U.S. claim draws upon includes the evidence supporting the OIE Code and the studies referenced in the U.S. First Written Submission. In defense, India cites (i) its assertion that its measures conform to international standards; (ii) the purported practice of other countries; (iii) a study by Jacob Post (the "*Post*" Study) (iv) a risk assessment by Australia, (v) a paper by Van den Berg, (vi) a paper by Ziegler, (vii) a paper by Cobb, and (viii) its assertions regarding the import of certain studies submitted by the United States. Not a single one of these authorities even references import prohibitions in connection with LPNAI. To the contrary, some explain that OIE recommendations can mitigate any potential threat. Additionally, the U.S. Article 5.8 Request provides important context. Per the Appellate Body, India's failure to respond creates a presumption that its measures lack scientific support.

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

16. India has breached Article 5.6 because there (1) are reasonably available measures – the OIE Code recommendations – that (2) would achieve India's ALOP since they provides a high level of protection and (3) are less trade restrictive since they allow for trade in instances that India presently prohibits and are applied in a more tailored fashion.

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

17. In evaluating a claim under Article 5.6, the ALOP of the responding Member should be identified. India has not identified a true ALOP. India has described its ALOP alternatively as "to prevent the ingress of LPAI and HPNAI from disease notifying countries through imports of products that are clearly identified as risk factors even by the OIE" or "NAI freedom." Neither are true ALOPs. The first is an objective or characterization of India's measure. The second is the status of an exporting territory under the OIE Code.

18. The United States and the Panel have no option other than to infer an ALOP based on the record evidence in this dispute. India takes exception to examining its domestic measures arguing it, the NAP 2012, is not an SPS measure under the SPS Agreement. The NAP 2012 is a measure that falls squarely within the definition of an SPS measures as set out in paragraph 1 of Annex A and a reliable indicator of India's ALOP with respect to AI. Accordingly, India's ALOP is relatively modest with respect to HPNAI and negligible with respect to LPNAI since surveillance is unlikely to detect it.

2. Measures Based on the OIE Code Would Achieve India's ALOP

19. As explained in the User's Guide to the OIE Code, the OIE's recommendations are "designed to prevent the disease in question being introduced into the importing country" and allow for trade "with an optimal level of animal health security, based on the most up to date scientific information and available techniques." These recommendations accordingly achieve a high ALOP. Indeed, not only would the achieved ALOP be higher than the one inferred from India's domestic measures, it would be high enough to achieve whatever ALOP India could choose from, since it precludes entry of the disease into the importing country.

20. India's response to why the OIE recommendations cannot achieve its ALOP is a *non-sequitur*. Specifically, India claims that the OIE recommends an import ban on a country-wide basis because there are risks such as contamination. To eliminate confusion, the United States has identified the pertinent recommendations in the OIE Code, which show the contrary. India has not asserted that these recommendations would result in entry or establishment of LPNAI.

21. The OIE Code also has recommendations with respect to zoning and compartmentalization. A Member rather than apply its trade measures broadly against a country as a whole can apply them simply to an affected area without unnecessarily disturbing trade elsewhere. India's only response is that it is under no obligation to recognize zones on its own

authority. But no one is asking it to do so. India's measures on their face impose country-wide bans rather than considering the possibility of regionalization.

3. The Recommendations in the OIE Code Are Reasonably Available

22. The OIE Code's product specific recommendations are reasonably available. Countries around the world already employ the recommendations to protect themselves from the risks of AI. The OIE Code recommendations present no additional burden upon India. India already requires veterinary certificates for import; the key distinction is what is being attested to.

23. India makes the puzzling assertion that the recommendations in the OIE Code are not reasonably available because it requires India to put its "full faith" on U.S. attestations. As explained in its response to Panel Question 36, the United States is not making such a request. Additionally, India's response to Panel Question 21 notes that India "relies on a country's self-notification to the OIE to ascertain if a country is free of NAI." If India is willing to accept representations from a country that its surveillance has not detected NAI, India cannot contend that attestations in OIE consistent veterinary certificates are somehow less reliable.

24. Zoning and compartmentalization is also reasonably available. Countries around the world practice it. The OIE's recommendations for zoning and compartmentalization recognize that the "exporting country should be able to demonstrate, through detailed documentation provided to the importing country, that it has implemented the recommendations in the Terrestrial Code for establishing and maintaining such a zone or compartment."

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

25. India contends that application of the OIE Code's recommendations is not less trade restrictive than India's present measures because the latter may only block trade for 3 months at a time. But prohibiting trade for any period is more trade restrictive than allowing trade. The same principle applies with respect to zoning. It is less trade restrictive to ensure that controls are applied only on the areas where they are necessary rather than on an entire country.

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

26. India asserts that a breach of Article 5.6 is precluded because it does not reference Article 2.2. This misses the point which is the provisions implicate similar obligations. A measure that is more trade restrictive than necessary to achieve an ALOP under Article 5.6 also implicates the obligation in Article 2.2 to apply measures only to the extent necessary to protect human, animal or plant life or health. Article 5.6 can be a specific application of Article 2.2. The distinction appears to be that Article 2.2's obligation to apply measures to the extent necessary to protect human, animal, or plant life or health may encompass more situations than ALOPs.

27. The facts here support such a finding. Application of the OIE Code will achieve India's ALOP. India does not appear to dispute that its ALOP is with respect to animal health or life. India's measures are thus measures that are applied beyond the extent necessary to protect animal or human health. India's breach of Article 5.6 results in a breach of Article 2.2.

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

28. India argues that it had no need to comply with SPS Articles 6.1 and 6.2 because no other Member presented a proposal, and supporting information, for the recognition of specific disease-free areas. After refusing over many years to apply the principle of regionalization to AI, giving no indication that requests to recognize disease-free areas would be entertained, India cannot rely on the failure of other Members to conclude that "no" really means "yes" and to submit applications that India had made clear it would reject out of hand.

1. Articles 6.1 and 6.2 Impose Obligations that Exist Independently of Any Request to Recognize a Specific Disease-Free Area or Area of Low Disease Prevalence

29. Articles 6.1 and 6.2 impose obligations that exist independently of any request to recognize any specific pest- or disease-free areas. That Article 6.1 requires Members to "ensure that their" SPS measures are adapted to the characteristics of an area, not just to adapt their SPS measures to particular areas, is significant. It requires Members to take measures that account for the fact that different exporting areas may have different characteristics. By failing to "ensure that" a sanitary measure can reflect regional conditions, a Member breaches its obligations independent of whether any Member requested special consideration of the characteristics prevailing in any region or area. The obligation under Article 6.2 likewise applies regardless of whether another Member has ever requested the Member to accept that any particular area is disease-free. Article 6.2 requires recognition of "concepts" – specifically, the "concepts of pest- or disease-free areas and areas of low pest or disease prevalence."

2. India Has Not Been Willing to Adapt Its Measures to the Sanitary Characteristics of Areas From Which Products Originate or to Recognize the Concepts of Disease-Free Areas

30. In this dispute, India has purported to be willing to recognize the "concepts" of disease-free areas with respect to AI, but the statements and conduct of Indian officials over the past seven years belie India's contentions. In 2007, in response to a U.S. proposal for a new veterinary certificate for poultry meat, India informed the United States that the "Indian side would insist on country freedom as the condition is uniform." India's failure to apply its AI measures on a less-than-country-wide basis was raised in meetings of the SPS Committee. India's delegate never indicated that this complaint was ill-founded. At the May 2012 OIE meeting, the Indian delegate criticized the OIE Code's AI chapter, asserting that for India "the concept of zoning looked irrelevant as far as avian influenza was concerned."

31. Despite requests not to apply its measures on a country-wide basis, India repeatedly promulgated new iterations of its measures that on their face applied to products from anywhere in a country reporting NAI. S.O. 1663(E) on its face applies on a country-wide basis. India has continued to require that shipments of products covered by S.O. 1663(E) be accompanied by veterinary certificates with a required attestation about the AI status of the exporting *country*. The text of India's measures thus does not allow for the application of import prohibitions on less than a country-wide basis. And India's responses to requests that it recognize the

applicability of the concept of disease-free areas to AI make clear that India is not overlooking the text of its Notifications and applying the concept through some other means.

32. India has claimed that its Livestock Act gives it the power to recognize zones and compartments, pointing to broad provisions that simply delegate to its Central Government the power to "restrict or prohibit … as it may think fit, the import" of livestock and livestock products. These provisions do not modify the measures at issue in the dispute so as to recognize the concept of disease-free areas, nor do they themselves reflect the concept of disease-free areas. The measures at issue here—those found in S.O. 1663(E)—apply on a country basis, and hence are not adapted to the characteristics of the areas from which products originate. The Livestock Act appears to give India the power to promulgate additional measures, and does not undermine the fact that the measures at issue do not meet India's obligations under Article 6.1.

33. That India has not complied with Articles 6.1 and 6.2 is confirmed by its failure to follow the first step outlined by the SPS Committee for consideration of applications to recognize specific areas as disease-free. India has not published information explaining the basis for recognition of disease-free areas with respect to LPNAI or HPAI, a description of any process that would be used to evaluate a request for recognition of such an area, the information that India would need to evaluate such a request, or a contact point for such requests.

34. In combination, the facts that (i) India has never published information explaining the basis for recognition of disease-free areas with respect to LPNAI or HPAI, (ii) in response to requests to regionalize, India has categorically refused, and (iii) India's measures on their face apply to entire countries, make clear that India is in breach of its obligations to "ensure that [its] sanitary … measures are adapted to the sanitary … characteristics of the area … from which [an imported] product originated." Further, India has made clear, including through its responses to trading partners who raised the need for regionalization, that India does not ensure that its measures are adapted to the sanitary characteristics of an area. This is not a situation where a Member has demonstrated that the application of its measures will respond appropriately to any demonstration under Article 6.3.

3. Neither Article 6.1 nor the OIE Code Permits India to Refuse to Apply Its NAI Measures to Areas Smaller Than Countries

35. India suggests that Article 6.1 lets it choose, at its discretion, whether the "area" whose sanitary characteristics a measure is adapted to, will be "all of a country, part of a country, or all or parts of several countries." If Members had unchecked discretion to define the relevant "area" for purposes of determining whether a disease is present, then Article 6 would be meaningless. Rather, Article 6.2 supports the conclusion that an "area" for purposes of Article 6.1 could be defined by a combination of different characteristics, and that to ensure adaptation of measures to the characteristics of the area from which products originate, a Member's measures must allow for the application of requirements or restrictions with respect to areas that are appropriately sized and bounded in light of these characteristics. India's measures do not do so.

36. India also appears to argue that the OIE Code supports requiring that all of an exporting country be free of a disease whenever that disease is not present in the importing country. The OIE Code does not do so. Rather, for each product discussed in the OIE Code Chapter on AI,

the recommended import requirements apply either a) "for importation from an HPNAI free country, zone, or compartment," b) "for importation from an NAI free country, zone, or compartment," or c) "[r]egardless of the NAI status of the country of origin." Thus, under the OIE Code, AI-related requirements can be applied on a zone or compartmental basis—and nothing in the Code qualifies this conclusion based on an importing country's disease status.

G. India Has Acted Inconsistently With Its Obligations Under Article 2.3 Of The SPS Agreement By Treating Imported Products Differently From Indian Products Without Justification

37. There is no valid reason for India's disparate treatment of imported and domestic products following NAI incidents in their country of origin. This disparate treatment breaches the first sentence of Article 2.3.

38. India casts the U.S. discrimination claim as a challenge to its domestic measures. Yet like all claims in this dispute, the claim under Article 2.3 challenges the measures applied to imports. India asserts that the United States suggests "that India apply similar measures in the event of a domestic outbreak of NAI as it does for imports," adding that the U.S. would "essentially require[] India to cull or destroy its entire poultry population and further completely put a stop to poultry trade in the country" in the event of an NAI detection. India thus believes that the domestic measure equivalent to those it applies to imports would be one requiring it "to cull or destroy its entire poultry population and further completely put a stop to poultry trade in the country." India does not do this, and thus by its own account applies less favorable treatment to foreign products than to domestic products.

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

39. India's measures unjustifiably discriminate against imported products by banning them following detections of LPNAI in the exporting country while India does not even maintain surveillance requirements that would result in reliable detection of LPNAI cases occurring in India's poultry flocks. As one piece of evidence of the deficiency of India's surveillance, the United States highlighted that India has never notified a detection of LPNAI, despite notifying over ninety outbreaks of HPAI in recent years. It is not plausible that, during a period when India had over ninety HPNAI outbreaks, there was no LPNAI in India. India has responded to the U.S. assertions about India's surveillance by arguing that LPNAI is exotic to India. India's evidence does not demonstrate this. Further, India's imposition of import bans based on LPNAI detections discriminates against imports not because LPNAI has occurred in India, but because India's surveillance for LPNAI is inadequate, resulting in a situation where controls on trade in domestic products due to domestic LPNAI will not be imposed.

40. India advances the hypothesis that South Asia is somehow unique with respect to LPNAI, and that accordingly all HPAI incidents in India resulted from introduction of HPAI into India by migratory birds, not mutations from LPNAI in India. India offered no evidence that this is the case. But, even if it were correct, there is no reason to think the ecology of the region is unique in a way that would lead wild birds to spread HPAI but not H5 or H7 LPAI. As HPAI results from mutations from LPAI, bird migrations that bring into India H5N1 HPAI – the kind of HPAI that India has experienced – are likely to also bring birds exposed to H5 or H7 LPAI. Further,

the large number of H5N1 HPAI outbreaks in India's poultry would serve as an indicator of the high level of interaction occurring between wild birds and poultry, and thus of the likelihood of transmission of H5 or H7 LPAI from wild birds to poultry in India—thereby producing LPNAI.

41. The United States has also shown that H5 and H7 AI antigens were detected in domestic ducks in India. The antibodies establish that an infection has at some point been present in the birds. It is unlikely that India would not have detected an H7 HPAI outbreak. It therefore appears that India has experienced H7 LPAI in poultry—a form of LPNAI.

42. India does not dispute that it has no mandatory requirement for the conduct of routine laboratory tests in apparently healthy flocks for LPNAI, even though LPNAI's lack of symptoms makes visual observation inadequate for its detection. India purports to conduct "routine laboratory" surveillance for NAI. But the documents India cites do not demonstrate that India actually conducts routine testing of apparently-healthy flocks for LPNAI, let alone that such testing is conducted nationwide as part of a program or programs under which it is required. Further, India does not dispute that the NAP does not set forth programs under which routine testing of sample birds in apparently healthy flocks is conducted throughout India on a large-scale or systematic basis, let alone required. Indeed, the NAP simply provides that sampling "may" be conducted on flocks, and that routine surveillance should involve virological testing "where possible." The OIE Code supports the inadequacy of India's surveillance. The OIE Code provides that determination of the NAI status of a country, zone, or compartment involves "appropriate surveillance … to demonstrate the presence or absence of infection in the absence of clinical signs in poultry." India has not implemented the kinds of testing necessary for such a demonstration. India's failure to report LPNAI highlights the deficiencies in its surveillance. India, in sum, lacks the ability to reliably detect LPNAI, and this results in a situation where controls on trade in domestic products due to LPNAI are not imposed.

2. India's Unwillingness to Regionalize is Discriminatory

43. India does not dispute that it does not apply movement restrictions on products from more than 10 kilometers from an NAI detection. Rather, India argues that its application of more stringent measures to imports is not discriminatory because India does not know the details of NAI detections in exporting countries or control their disease containment and disinfection methods. Yet India applies import bans categorically to any exporting country when it reports NAI. India's imposition of more restrictive measures to imports is thus unrelated to risk associated with the potential for surveillance or control failures in exporting countries. Lack of knowledge about other countries' response systems and outbreaks cannot logically render non-discriminatory a measure that categorically precludes inquiry into how an exporting country identifies and contains NAI, and whether that identification and containment will be as effective as a response directed by India. India's logic suggests that application of more stringent measures to imported products than to domestic products would never be discriminatory. Underscoring that India's application of AI-based import bans to the entirety of an exporting Member is discriminatory, India believes its trading partners should be willing to apply NAI measures on a less-than-countrywide basis to its exports. India's position is simply that its products are entitled to more advantageous treatment than products from other Members.

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

44. From its contention that LPNAI has not occurred in India, India attempts to argue, not just that its measures are not discriminatory, but also that subjecting imports to AI measures more stringent than those applied to domestic products is justified. This argument lacks merit. As noted, India has had LPNAI. Further, India acknowledges that it has had numerous H5 HPAI outbreaks, and H5 LPNAI and H5 HPAI are the same disease. Moreover, India explains that it worries about LPNAI because it could mutate into HPAI. But India already experiences regular HPAI outbreaks. Additionally, India does not claim that LPNAI is a disease that could not reach its territory in the absence of imports. Rather, India itself believes that it is a country with significant risk for domestic LPNAI incidents and argues that it takes surveillance for LPNAI seriously. In light of that, India cannot plausibly claim that its domestic conditions are so dissimilar from conditions elsewhere that a lack of effective domestic surveillance and application of control measures only within ten kilometers of an outbreak, alongside measures for imports far more stringent than recommended by OIE guidelines, simply reflect differences in disease conditions between India and elsewhere.

45. India has not rebutted the U.S. showing that India's AI measures discriminate against imported products and that the discrimination is arbitrary and unjustified—by differences in conditions between India and elsewhere or by anything else. India's measures accordingly are inconsistent with the first sentence of Article 2.3.

H. India's Measures Constitute A Disguised Restriction On Trade

46. India's measures result in an additional breach of Article 2.3 as they amount to a disguised restriction on trade. Contrary to what India suggests, this claim is about what can be inferred from the totality of the circumstances surrounding India's measures, including the ways that they discriminate against imported products. A variety of considerations surrounding India's measures constitute indicia of a disguised restriction on international trade. These considerations are similar to those that the *Australia – Salmon* panel considered to be "warning signals" and "additional factors" indicating a disguised restriction.

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

47. If India were considered to have separate ALOPs for imported and domestic products, these would have to be inferred from the measures applied with respect to those products. In its First Written Submission, the United States explained why India's measures with respect to imports are far more trade restrictive than those applied to domestic products as a result of two key contrasts. The reasons why a more stringent ALOP would be inferred from the measures applied to imports than from those applied to domestic products are thus clear.

48. Similarly, the comparability of the different situations at issue in the U.S. claim under Article 5.5 needs no elaboration. They involve trade in the *same* products and control of the *same* diseases. The arbitrariness of application of different ALOPs to different situations based

exclusively, as here, on whether the otherwise identical products involved are imported or domestic likewise needs no elaborate proof. Moreover, the United States has established that India's measures cause discrimination and amount to a disguised restriction on international trade, satisfying the third element of a claim under Article 5.5. In sum, to the extent that transmission of NAI through imports and through domestic products are viewed as distinct situations for which India maintains separate ALOPs, then India is in breach of Article 5.5—with a resulting consequential breach of Article 2.3.

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

49. India's only response to the claims under Article 7 and Annex B is that its measures conform to international standards. However, India's measures are fundamentally in contradiction to, and not at all the same as, the relevant international standards.

K. India Has Breached Article XI of the GATT 1994

50. India's measures are not in conformity with the relevant provisions of the SPS Agreement, and India has suggested no other reason why its measures might be consistent with GATT Article XI. India's measures place India in breach of GATT Article XI:1.

III. CONCLUSION

51. The United States respectfully requests the Panel to find that India's measures are inconsistent with India's obligations under the GATT 1994 and the SPS Agreement. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that India bring its measures into conformity with the GATT 1994 and the SPS Agreement.