INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS: RECOURSE TO ARTICLE 21.5 OF THE DSU BY INDIA

(DS430)

SECOND WRITTEN SUBMISSION OF

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TABLE OF CONTENTS

TABLE OF REPORTS

SHORT FORM	FULL FORM
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EU – Footwear (Panel)	Panel Report, European Union – Anti-Dumping Measures on Certain Footwear from China, WT/DS405/R, adopted 22 February 2012
India – Agricultural Products (Panel)	Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R
India – Agricultural Products (AB)	Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R, adopted 19 June 2015
Russia – Pigs (AB)	Appellate Body Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/AB/R and Add.1, adopted 21 March 2017
Russia – Pigs (Panel)	Panel Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/R and Add.1, adopted 21 March 2017, as modified by Appellate Body Report WT/DS475/AB/R
Turkey – Textiles (Panel)	Panel Report, Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R
US – Wool Shirt & Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1

TABLE OF ABBREVIATIONS

ABBREVIATION	FULL FORM
ALOP	Appropriate Level of Protection
DADF	Department of Animal Husbandry, Dairying & Fisheries, Ministry of Agriculture, Government of India
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
LPAI	Low Pathogenic Avian Influenza
HPAI	Highly Pathogenic Avian Influenza
NAP 2012	India's National Action Plan 2012
NAP 2015	India's National Action Plan 2015
OIE	World Organisation for Animal Health
OIE Terrestrial Code	The Terrestrial Animal Health Code of the OIE
SIP	Sanitary Import Permit
SPS Agreement	WTO Agreement on the Application of Sanitary and Phytosanitary Measures
USDA	United States Department of Agriculture
WTO	World Trade Organization

TABLE OF EXHIBITS

Exhibit	Exhibit Number in Original Proceeding	Document
USA-18	IND-17	Office Memorandum No. 109-21/2007
USA-19		India Information Technology Act, 2000
USA-20	US-52	India, Department of Animal Husbandry, Dairying, and Fisheries, Veterinary Certificate For Import Of Chicken/Quail Meat Into India (downloaded April 1, 2013)
USA-21	US-54	India, Department of Animal Husbandry, Dairying, and Fisheries, Veterinary Certificate For Import Of Hatching Eggs Of Chicken, Turkey, And Other Avian Species Into India (downloaded April 1, 2013)
USA-22		Screenshot of http://dahd.nic.in/Trade/Sanitary-requirement-veterinary-health-certificate-import-various-livestock-products (taken on November 16, 2017)
USA-23		OIE Terrestrial Code User's Guide (26th Edition)
USA-24		Veterinary Certificate for Import of Poultry Meat and Poultry Meat Products into India (taken from DADF's website)

I. INTRODUCTION

1. Article 21.5 of the DSU[1] provides for recourse to dispute settlement in order to resolve a "disagreement as to the existence or consistency with a covered agreement *of measures taken to comply*."[2] India has requested this Article 21.5 proceeding, and alleges that it has adopted compliance measures that have brought its inconsistent measures into conformity with the SPS Agreement.[3] Thus, the Panel in this proceeding is charged with examining whether India has established that India's measures, as they existed at the time of panel establishment, are consistent with India's WTO obligations. To accomplish that task, the Panel's evaluation must include a thorough review of the Revised Avian Influenza Measure,[4] and compare that measure against the measures covered in the original dispute.

2. India's second written submission, like its first, does not show that India has brought its original Avian Influenza measure into compliance with India's SPS Agreement obligations. India still fails to provide evidence in support of its assertions; for example, India fails to explain:

- what evidence establishes that India properly interprets and applies the OIE Terrestrial Code;
- what evidence is there that India adopted and accepted OIE consistent veterinary certificates at the time the Panel was established;
- what evidence, including testing results and data on poultry demography, does India have to substantiate its claim that it conducts active surveillance for low pathogenic avian influenza (LPAI) domestically; and
- what evidence does India have that it grants an effective opportunity for WTO Members to have areas of their territory recognized as disease-free.

In contrast, the United States has shown that India's revisions have not brought India into compliance, including because the Revised Avian Influenza measure does not reflect the

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1 *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

2 Emphases added.

3 WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement").

4 The United States continues to refer to the five instruments collectively identified in India's Panel Request as the Revised Avian Influenza Measure. *See* United States' First Written Submission, para. 20, footnote 20.

recommendations of the OIE Terrestrial Code and because India has not addressed the findings of arbitrary and unjustifiable discrimination from the original proceeding.

3. Rather than speak to these evidentiary issues, India's second written submission speaks about matters unrelated to the WTO consistency of the Revised Avian Influenza Measure, such as its views of the current state of negotiations with the United States,[5] or trade arrangements the United States purportedly has with other countries.[6] India's failure to meet its evidentiary burden necessarily leads to the conclusion that India has not brought itself into compliance in this dispute.

II. INDIA'S ASSERTION CONCERNING THE REVISED AVIAN INFLUENZA MEASURE ARE NOT SUPPORTED WITH EVIDENCE

4. India's second written submission, like its first, suffers from a fundamental problem: it conflates assertion with fact. In particular, India tries to rebut – principally through assertions alone – three reasons why India has failed to bring its measures into compliance:

- *First*, India claims it no longer requires freedom from avian influenza as a condition for trade, but fails to provide any evidence that it has changed such requirements (or even try to reconcile the statements in its brief noting it applies precisely such a requirement before it grants a sanitary import permit);[7]

- *Second*, India claims the Revised Avian Influenza Measure conforms to the OIE Terrestrial Code, but fails to provide any evidence that at the time of Panel establishment India was issuing and accepting veterinary certificates that reflected the product specific recommendations of the OIE Terrestrial Code ;[8] and

- *Finally*, India claims it controls for low pathogenic avian influenza (LPAI) domestically, but fails to show data that would reflect that surveillance is actually taking place.[9]

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5 India's Second Written Submission, paras. 37-42 & 79-81.

6 India's Second Written Submission, paras. 13, 25, 41, 42.

7 India's Second Written Submission, paras. 30-33.

8 India's Second Written Submission, paras. 34-43.

9 India's Second Written Submission, paras. 44-50.

For each of these reasons for finding that India has not brought its measures into compliance, the United States notes that it has presented evidence. For example, the United States has analyzed the evolution of the text in the Revised Avian Influenza Measure as well as various statements made by India in asserting that India continues to require freedom from avian influenza as a condition of entry.[10] The United States has provided a screenshot of DADF's website demonstrating that relevant veterinary certificates, which are necessary to allow OIE consistent trade were nowhere to be found when the Panel was established.[11] And, the United States provided India's National Action Plan 2015 and compared it to its predecessor to show that India has not made any changes to its domestic avian influenza control regime that reflect that India controls for LPAI domestically.[12]

5. India's response in its second written submission is simply to deny the U.S. argument and supporting evidence and instead request that the Panel accept India's characterization of the Revised Avian Influenza Measure. India, however, cannot establish that it brought itself into consistency simply by asserting such is the case. WTO dispute settlement is no different than most other types of adjudication in that assertions that are freely made are also freely dismissed.[13] Thus, when India makes assertions – and fails to substantiate them with the requisite evidence – India has not presented a meaningful rebuttal.

6. In this section, the United States explains that with respect to each of the three reasons why India has not brought its measures into compliance, India's rebuttal fails. To that end, the United States provides a two-part analysis with respect to each of these reasons. First, the United States recounts how the measure in the original proceeding operated. This background is provided to assist the Panel in understanding why this point needed to be addressed by India as part of any claim of compliance – and to consider what options and evidence might be necessary

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[10] United States' First Written Submission, paras. 39-44.

[11] United States' First Written Submission, para. 33 & Exhibit USA-10.

[12] United States' First Written Submission, para. 138- & Exhibit USA-14.

[13] *US – Wool Shirts & Blouses (AB)*, p. 14; *Turkey – Textiles (Panel)*, para. 9.57; *EU – Footwear (Panel)*, para. 7.11 ("In this dispute, European Union has asserted that, with respect to a number of its claims, China has failed to make a prima facie case. Should we agree, we need not analyse such claims further, but will dismiss them."); *see also EU – Footwear (Panel)*, para. 6.112 ("More importantly, we agree with the European Union that the submission cited by China contains no evidence that would substantiate China's assertion that the Commission's selection of the sample of EU producers was irrevocable. Indeed, the cited paragraph does not even refer to the alleged irrevocability of the Commission's sampling selection. We therefore continue to consider that while China has presented as an uncontested fact that the Commission's selection of the sample of EU producers was irrevocable, it has provided no evidence in support of this assertion, and therefore we have made no changes to either paragraph 7.615 or paragraph 7.621 in response to China's request.").

to establish compliance. Thereafter, the United States discusses India's current characterization regarding the Revised Avian Influenza Measure – and why it is untenable.

A. India Has Not Demonstrated that Its Requirement for Avian Influenza Freedom Has Been Withdrawn

7. India claims the U.S. showing that India maintains freedom from avian influenza as a condition of entry is a mischaracterization.[14] As explained below, the United States' argument rests on a straightforward analysis of the situation. India's measure in the original dispute required freedom from avian influenza as a condition for entry – and asserted such a condition conformed to the OIE Terrestrial Code. India explicitly noted in the original proceeding that it checked the OIE's website to implement this condition of entry.[15]

8. India has not provided any evidence that the requirement has been eliminated nor that its interpretation of the OIE Terrestrial Code had changed. Indeed, the evidence belies India's assertion. S.O. 2337(E) as originally promulgated explicitly stated that India would allow trade from countries "free from avian influenza in accordance with the Terrestrial Animal Health Code," thereby plainly indicating India's interpretation of the OIE Terrestrial Code and a requirement for avian influenza freedom as a precondition for trade. Although India subsequently excised that blatantly problematic phrase, India has not demonstrated that the excision was anything other than cosmetic. Indeed, in this respect, it is telling that India acknowledges *in its submission* it continues to check the OIE's website before granting a sanitary import permit to see if the exporting territory is free from avian influenza. Thus, in the absence of any rebuttal evidence demonstrating that India has indeed removed its requirement for avian influenza freedom, India's assertion must fail.

1. Situation Under the Original Measure

9. The United States notes three aspects of the original measure that are relevant here: (1) India maintained avian influenza freedom as a condition of entry; (2) India operationalized this condition of entry requirement through formal instruction to its government authorities; and (3) India explicitly and vigorously claimed that such a requirement conforms to the OIE Terrestrial Code.

10. First, the original measure, S.O. 1663(E),[16] was a notification issued by DADF that explicitly required a country to be free of avian influenza as a condition of entry for the importation of various agricultural products. Paragraph 1(ii) of S.O. 1663(E) provided that India

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[14] India's Second Written Submission, para. 3.

[15] India's Response to Panel Question 21 in the original proceeding.

[16] Exhibit IND-1.

would prohibit "the import into India from the countries reporting Notifiable Avian Influenza (both Highly Pathogenic Notifiable Avian Influenza and Low Pathogenic Notifiable Avian Influenza) the following livestock and livestock products…." To that end, India utilized the OIE's reporting database as a tool by which to exclude any imports from countries that notified the OIE of avian influenza outbreaks.[17]

11. Second, India's practice was to communicate the requirements of notifications issued by DADF such as S.O. 1663(E) through official office memoranda. On this point, the United States recalls the panel's finding in the original proceeding about the operation of such memoranda:

> Once the DAHD publishes a notification, it informs other departments of the government such as the Department of Commerce, the Department of Revenue, and the Central Board of Excise and Customs (CBEC) through office memoranda of the promulgation of the notification. In this way, the CBEC does not re-issue a notification already issued by the DAHD regarding regulation of imports of livestock products. However, the notification issued by the DAHD may be disseminated as a circular or instruction (issued under Section 151A of the Customs Act) to field officers at all ports. Further, the CBEC may issue circulars where clarifications regarding the implementation of a notification are deemed necessary.[18]

With respect to S.O. 1663(E), the relevant memorandum was titled No. 109-21/2007 Trade.[19] The body of this memorandum provided as follows:

> The undersigned is directed to enclose a copy of Notification No. S.O. 1663(E) dated 19th July, 2011 banning the import of poultry and poultry products from countries reporting Avian Influenza. The earlier issued Notification No. S.O. 2976 (E) dated the 16th December, 2010 was valid for six months from the date of publication of the Notification in the Gazette or till such time it is reviewed whichever is earlier.

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[17] *See* India's Response to Panel Question 21 in the original proceeding ("Countries notify disease outbreaks as well as freedom from the outbreak to the OIE and this information is available on WAHID. India relies on a country's self- notification to the OIE to ascertain if a country is free of NAI.")

[18] *India – Agricultural Products (Panel)*, para. 2.29.

[19] Exhibit USA-18. (Original Exhibit IND-17). See India's First Written Submission from the Original Dispute, para. 27 ("Field formations are made aware of Government of India notifications regarding import of products from NAI countries through circulars as issued by the Board. The relevant notification in this regard is Customs Circular No. 13/2007.").

> Accordingly the Notification has been reviewed and decided to continue the ban on import from the countries reporting Avian Influenza (both Highly Pathogenic Avian Influenza and Low Pathogenic Avian Influenza). The copy of published Notification is enclosed for information and necessary action at your end.

Thus, through this memorandum, India notified its authorities about the status of its prior measure, *i.e.*, that S.O. 2976 had been reviewed and superseded by S.O. 1663(E), and more critically, the consequence – that the ban would continue to apply. Thus, even in a scenario where the only "necessary action" for the recipients of the memorandum was to continue the application of a ban that was already in place, India issued an instrument to ensure its competent authorities were appropriately apprised so.

12. Finally, India's position concerning the requirement for freedom from avian influenza under S.O. 1663(E) was that such a requirement conformed to the OIE Terrestrial Code. The United States refers to an excerpt from India's response to Panel Question 8 in the original proceeding as indicative of this view:[20]

> Chapter 10.4 of the OIE Code provides for product specific recommendations for trade in poultry and poultry products in the event of avian influenza. In essence, Chapter 10.4 of the OIE Code provides risk mitigation conditions which if applied by the importing and exporting country, prevent disease introduction in the importing country through trade in products which are considered to be agents of disease transmission.
>
> The risk mitigation in the product specific standards is achieved in two ways. The first form of risk mitigation is the recommendation that products mentioned in Chapter 10.4 of the OIE Code originate from a country which is free either from NAI (i.e. both HPNAI and LPNAI) or free only from HPNAI. Once the first risk mitigation requirement is fulfilled, then the second form of risk mitigation requires that the export consignment is additionally accompanied by a veterinary certificate certifying that certain conditions are fulfilled by the export consignment. It should be noted that for the products in question, i.e. eggs and fresh meat of poultry, the product specific standards recommend that both risk mitigation measures are fulfilled. The OIE Code does not recommend that risk mitigation will be achieved simply by the export consignment being accompanied by a veterinary certificate. The relevant standards recommend that as a starting point the product should originate from a free country. The risk mitigation which requires that products originate from a free country (either NAI or HPNAI) is being referred to as the 'condition of entry' by India. Hence as is evident from the OIE Code unless the first risk mitigation condition is fulfilled, i.e. unless the

[20] Footnotes in India's response have been omitted.

> condition of entry is fulfilled, importing countries are under no obligation to import eggs and fresh meat of poultry from countries reporting either HPNAI or LPNAI.

For India, its condition of entry, freedom from avian influenza, was perfectly consistent with its interpretation of the OIE Terrestrial Code.

13. Thus, prior to the Revised Avian Influenza Measure, the situation in India can be described as follows. India maintained a requirement for countries to be free of avian influenza as a condition for import; India formally instructed its government departments that the ban was in place; and India has declared that such action was in accordance with its interpretation of the OIE Terrestrial Code. Absent any affirmative action, there was no reason for this situation to change.

2. Situation Under the Revised Avian Influenza Measure

14. Nothing in the content of the Revised Avian Influenza Measure indicates that the situation has in fact changed. India provides three reasons as to why its assertion that the requirement has been removed should be accepted. As discussed below, these reasons do not demonstrate that India has any actual evidence to defend its assertion.

a. The Text of the Revised Avian Influenza Measure Does Not Support India's Assertion

15. The United States begins first with India's reasoning that its assertion can be accepted based on the text of Revised Avian Influenza measure itself. India states this is the "most important piece of evidence" in establishing that it no longer requires freedom from avian influenza.[21] The relevant language India points to are located in S.O. 2337(E), as amended. Specifically, India points to paragraphs 2(1), paragraph 2(4), and the preamble.[22]

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[21] India's Second Written Submission, para. 19.

[22] The United States places language deleted per the amendment in S.O. 2998(E) in red strikeout, and language added per the amendment in red underlining.

S.O. 2337(E).—In exercise of the power conferred by sub-section (1) of section 3 and Section 3A of the Livestock Importation Act, 1898 (9 of 1898) and in supersession of the notification of the Government of India in the Ministry of Agriculture (Department of Animal Husbandry, Dairying and Fisheries) published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii), vide number S.O. 1663(E), dated the 19th July, 2011, except of respect things done or omitted to be done before such supersession, the Central Government taking into consideration the requirements under the World Trade Organization Agreement on Sanitary and Phytosanitary Measures and the Terrestrial Animal Health Code of World Organization for Animal Health, hereby makes the following provisions to regulate the import of poultry and poultry products ;

* * *

[2(1)] The import of poultry and product products into India shall be allowed from the country, zone, or compartment ~~free from avian influenza~~ in accordance with the product specific recommendations of the Terrestrial Animal Health Code of World Organization for Animal Health and subject to fulfilment of requirements in paragraph 3 of this notification.[23]

* * *

(4) If infection has occurred in poultry in a previously free country, zone or compartment, avian influenza free status can be regained,-

(a) In the case of infections with high pathogenicity avian influenza viruses, three months after a stamping-out policy (including disinfection of all affected establishments) is applied, provided that surveillance in accordance with the provisions of the Terrestrial Code of World Organization of Animal Health has been carried out during that three month period.

(b) In the case of infections with low pathogenicity avian influenza viruses, poultry may be kept for slaughter for human consumption subject to conditions specified in the Terrestrial Code of World Organization of Animal Health or a stamping-out policy may be applied and in either case, three months after the disinfection of all affected establishments, providing that surveillance in accordance with the Terrestrial Code has been carried out during that three-month period.

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23 India's Second Written Submission, para. 19 (brackets original).

India's claim that the text is evidence that supports its assertion fails, because India cannot demonstrate what in this text actually indicates that the condition of entry has been lifted.

16. The preamble does not indicate the requirement for avian influenza freedom has been lifted. It simply notes this is a replacement measure. Indeed, S.O. 1663(E) per its terms was a replacement for an earlier measure that imposed a ban on agricultural products and required freedom from avian influenza as a condition of entry. Likewise, nothing in the text of paragraph 2(1) or paragraph 2(4) demonstrates that India has abandoned its requirement for freedom from avian influenza as a condition of entry.

17. Paragraph 2(1) simply provides that India will allow imports in accordance with the product specific recommendations of the OIE Terrestrial Code. But, as explained above, India's long held view of the product specific recommendations in the OIE Terrestrial Code was that they provided for a country to require avian influenza freedom.[24] The text does not suggest that India has changed its position in any respect. Likewise, paragraph 2(4) only notes how a country can regain avian influenza free status. That India recognizes that the process to regain avian influenza freedom after a detection of LPAI is different than HPAI does not indicate that India has eliminated its requirement for avian freedom as a condition of entry. India can of course maintain a requirement of avian influenza freedom that specifies how that freedom can be asserted or regained; it does not, however, eliminate the requirement that freedom exist as a condition for importation. Indeed, why has India chosen to reprint this text, but not the text of the various other recommendations of the OIE Terrestrial Code? The reasonable inference is that the concept of avian influenza freedom is particularly salient to the operation of the Revised Avian Influenza Measure.

18. On this point, the United States recalls the text of S.O. 2337(E), prior to amendment. The original iteration of paragraph 2(1) referenced "free from avian influenza." Despite the clear findings in this dispute that the OIE Terrestrial Code does not envisage a ban because of avian influenza,[25] the text of the Revised Avian Influenza Measure as initially promulgated still explicitly provided that freedom from avian influenza was somehow in accordance with the OIE Terrestrial Code. India has not explained why it drafted S.O. 2337(E) in a manner that is directly

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[24] The United States notes that India claims its reprinting of the text of the Revised Avian Influenza Measure, as amended, did not reflect the inclusion of the words "product specific recommendations." The United States has reviewed S.O. 2998(E), and agrees that the words should be added. However, the United States notes India has not explained why the inclusion of the terms changes the analysis of the measure. As noted above, India described its requirement for avian influenza freedom in the original dispute as a component of the product specific recommendations of the OIE Terrestrial Code.

[25] *India – Agricultural Products (Panel)*, para. 7.253 ("On the basis of the foregoing, we conclude that the product-specific recommendations in Chapter 10.4 of the Terrestrial do not envisage, either explicitly or implicitly, the imposition of import prohibitions with respect to poultry products.").

inconsistent with the findings from the original dispute. Instead, India argues that it is "difficult to understand" the United States argument because the text no longer exists.[26]

19. In sum: India's original measure required freedom from avian influenza as a condition of entry; a condition that India claimed conformed to the requirements of the OIE Terrestrial Code. Despite the panel and Appellate Body reports from the original dispute, India promulgated a measure after the reports were adopted that explicitly said that India would do what it was already doing: require freedom from avian influenza per its interpretation of the OIE Terrestrial Code. Although India, following U.S. discussions, issued a revised compliance measure that excised the words "free from avian influenza" through S.O. 2998(E), there is no evidence that this excision had any substantive effect in removing India's existing requirement for freedom from avian influenza. Indeed, India's notification of S.O. 2998(E), the measure under which the excision took place, did not identity the amendment as a trade facilitating measure.[27] Moreover, India told the Dispute Settlement Body that the amendment was simply "clarifying the concerns of the United States."[28] Thus, there is nothing to suggest the excision was anything other than cosmetic – and that India had actually eliminated freedom from avian influenza as a condition of entry.

b. India Lacks Evidence Reflecting any Revised Interpretation of the OIE Terrestrial Code

20. The second reason invoked by India to accept its assertion is that there is no need for "specific 'instruction to government departments indicating that its position has been reversed or changed'".[29] Thus, India itself acknowledges that it has not provided any pertinent instructions or memorandum to the Indian agencies that actually control the entry of products that reflects it has in anyway changed its interpretation of the OIE Terrestrial Code. On this point, the United States emphasizes that India's interpretation of the OIE Terrestrial Code was "diametrically opposed" to the interpretation that the panel in the original proceeding held was the correct interpretation.[30] In light of this, why would any of India's authorities know that India had completely renounced its prior position concerning the interpretation of the OIE Terrestrial Code and accept a completely different interpretation? As noted above, in order to maintain the ban, India issued an office memorandum to the relevant government agencies. Yet, in purportedly revoking a longstanding ban and applying a drastically different interpretation of the OIE

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26 India's Second Written Submission, para. 17.

27 G/SPS/N/IND/160 (Exhibit USA-6).

28 WT/DS430/19 (Exhibit USA-7).

29 India's Second Written Submission, para. 19.

30 *India – Agricultural Products (Panel)*, para. 7.231, 7.238, 7.253, 7.261-7.263.

Terrestrial Code, India somehow asserts that it did not need to provide any instruction, clarification, or other guidance to its authorities.

21. The only argument India provides for the lack of any such instrument is unavailing. Specifically, India's claim that Section 8 of the India Information Technology Act, 2000 "has dispensed with the physical printing of measures in favor of an electronic gazette notification."[31] The United States has located this law and reprints the text of Section 8 below:

> **8. Publication of rule, regulation, etc., in Electronic Gazette.**
>
> Where any law provides that any rule, regulation, order, bye-law, notification or any other matter shall be published in the Official Gazette, then, such requirement shall be deemed to have been satisfied if such rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette:
>
> Provided that where any rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette, the date of publication shall be deemed to be the date of the Gazette which was first published in any form.[32]

On its face, India's reliance on Section 8 is inapposite. As India notes, it simply provides that a notification's publication requirement is just as valid if printed electronically as printed on paper. And, India has not produced any sort of official notice – electronic, paper, or otherwise – that indicates that its authorities have renounced a requirement that had been in place for years? India's failure to provide such evidence again highlights that India has failed to rebut the U.S. argument that India continues to maintain avian influenza freedom as a condition of entry.

c. The Arguments in India's Submissions Are Not Evidence

22. The final reason offered by India to accept its assertion is that, according to India, the United States has mischaracterized India's written submission. As discussed below, the United States certainly did not mischaracterize India's submission. Further, India's argument is a complete *non sequitur* – regardless of how India's submission is characterized, the contents of that submission are arguments, not evidence, and cannot in and of themselves meet India's burden to establish the content of the measures at issue.

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[31] India's Second Written Submission, para 19, citing India's First Written Submission, para. 22, footnote 35.

[32] Exhibit USA-19.

23. Regarding the alleged mischaracterization of India's submission, India claims the United States is misleading the Panel by focusing on paragraphs 38 and 42 of its first written submission.[33] To recall, paragraphs 38 and 42 of India's first written submission provide:

> Once the DADF receives the application for a SIP, it checks the OIE website to determine whether there is (or has been within the last three months) an outbreak of AI in that country. If there has not been an outbreak of AI anywhere in the exporting country, the DADF will accept the SIP application and allow imports. If there has been an outbreak of AI in the exporting country, the DADF will check whether it has recognised pest or disease-free areas in the exporting country. If it has so recognized such areas, India may accept imports of poultry and poultry products from unaffected zones or compartments in that country even though there is an outbreak of AI in other parts of the country. A veterinary health certificate will be required, in any event, for every shipment.
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> * * *
>
> To summarise, it has always been possible for India to import from countries that have not had any outbreaks of AI, even though those countries did not make an application for recognition of pest and disease-free areas. India now has procedures in place whereby it will recognise pest and disease-free zones and compartments in an exporting country when the required information about that country's veterinary infrastructure, human resources, avian influenza control systems, and the approach to disease eradication activities in the event of an outbreak of HPAI is provided and verified, if necessary. After the DADF has recognised pest and disease-free areas in an exporting country, even though there may be an outbreak of AI in one zone or compartment in that country, India will be in a position to allow imports of poultry and poultry products from other unaffected zones or compartments in that country. Indian importers can then apply for SIPs in order to be able to import poultry and poultry products from that country.

As the United States explained, these specific statements confirm the United States reading that the Revised Avian Influenza Measure still requires avian influenza freedom.

24. India, however, believes the statement is incorrectly interpreted for two reasons. First, India suggests that the United States did not understand this statement was made in the context of regionalization.[34] However, as the U.S. first written submission indicates, including by italicizing language about zones and compartments, the United States understands that context.

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[33] India's Second Written Submission, para. 18.

[34] India's Second Written Submission, para. 31.

The context is in fact key to the U.S. point: India announced a theory of regionalization that permits zones and compartments free of avian influenza to export when other zones that have outbreaks cannot. The fact that India is willing to apply its condition of entry on a regionalized basis does not change the fact that a condition of entry for avian influenza freedom still exists.

25. Second, India asserts that the statements failed to consider other statements in its submission. To that end, India provided the following table of other assertions in its first written submission that it believes to be more salient.[35] The United States notes that this table does not include any references to any underlying evidence behind the statement, but simply invokes particular statements in and of themselves.

[35] India's Second Written Submission, para. 32.

India's first written submission	Text
Para. 5	First, India's revised AI regime allows imports of poultry and poultry products not only from disease-free countries, but also from disease-free zones and compartments, provided that the appropriate sanitary conditions are met. … For certain products, **India can now accept imports of poultry and poultry products, coming from countries, zones or compartments that are free from High Pathogenicity Avian Influenza (HPAI) even if they have Low Pathogenicity Avian Influenza (LPAI)**.
Para. 54	For certain products, **India can now accept imports of poultry and poultry products coming from countries, zones or compartments that are free from HPAI even if they have LPAI**, subject to certain conditions.
Para. 72	India's current regime no longer requires freedom from AI in general (both HPAI and LPAI), but it accepts the possibility that, even though an exporting territory reporting LPAI cannot be considered as a territory that is free from AI, it may, however, be considered as a territory that is free from HPAI for the purpose of trade. Thus, under India's current regime, **if a territory has reported LPAI in poultry but is free from HPAI in poultry, it can still export poultry and poultry products** provided that the veterinary certificate requirements as provided in the specific product recommendation has been met.
Para. 75	Similarly, this paragraph also indicates that day-old live poultry, hatching eggs of poultry, eggs for human consumption, poultry semen, and fresh meat of poultry, will be accepted by India from countries, zones or compartments that are either free from both HPAI and LPAI or, at a minimum, free from HPAI. In other words, in case of an occurrence of LPNAI, these product-specific recommendations provide for two options: freedom from both LPAI and HPAI or, at a minimum, freedom from HPAI in poultry. Therefore, applying these product-specific recommendations, **India accepts imports if the exporting country is at least free from HPAI in poultry** and is able to meet the veterinary requirements.
Para. 116	As already explained, India's revised AI measure fully conforms to chapter 10.4 of the Terrestrial Code, including the possibility of regionalization (zones and compartments) and the **possibility of importing from areas that are, at a minimum, free from HPAI.**
Para. 155	**Under the revised AI measure, therefore, poultry and poultry products from territories with LPAI can now be imported into India, as long as they are at least free from HPAI**. This is the same treatment that India accords to domestic poultry and poultry products that do not come from HPAI areas (i.e. areas free from AI or LPAI areas). Thus, the revised AI measure does not discriminate against imported products because they come from a territory where there is LPAI.

26. The United States makes three points concerning these compiled statements. First, and most importantly, these statements are not evidence that India does not require avian influenza freedom as a condition of entry. They are simply further unsupported assertions. Moreover, they are misplaced assertions as none of them addresses India's process for granting Sanitary Import Permits ("SIPs"). At best, they simply illustrate that the statements in India's first written submission are internally incoherent. Specifically, the incoherence is that India claims that it can claim to allow trade from areas reporting avian influenza even though it has explicitly said that DADF checks to confirm a territory is free of avian influenza before granting a SIP.

27. Second, India has not explained why the precise statements in paragraph 38 and 42 of its first written submission should be interpreted in any other manner than their plain meaning – e.g., "If there has not been an outbreak of AI anywhere in the exporting country, the DADF will accept the SIP application and allow imports." In other words, DADF will not grant the SIP when there is an outbreak.

28. Third, there is no rational reason why DADF would check the OIE's website before granting a SIP, except to require avian influenza freedom as condition of entry. The OIE Terrestrial Code does not call for using its website *a priori* to approve a permit for importation. The OIE Terrestrial Code calls for the use of veterinary certificates that contain certain attestations that might vary depending upon the avian influenza status of the exporting territory. If India suggested that DADF used the OIE website *a posteriori,* such as by verifying the attestations in a veterinary certificate that the product came from an area not reporting HPAI, then there would at least be some justification for checking the OIE website. But that is not the case here. Thus, there is no justification for India to examine the website before it has to verify a veterinary certificate, unless of course India still maintains a requirement of avian influenza freedom as a condition of entry.

29. In sum, India has failed to provide evidence that substantiates its assertion that it no longer requires avian influenza freedom as a condition of entry. India maintained such a requirement under its original measure; it reiterated a similar requirement following the expiration of the RPT; and it referenced it again in its first written submission. As India's assertion is thus bereft of evidence, the Panel should properly reject it.

B. India Has Not Demonstrated That It Has Issued Veterinary Certificates that Conform to the Product Specific Recommendations of the OIE Terrestrial Code

30. India asserts in its second written submission that "what the United States really means when it suggests that veterinary certificates do not 'exist' is that India has not accepted the validity of the content of some U.S. certificates."[36] India is incorrect. The United States' statement means precisely what it says: that on May 22, 2017, the date the Panel was established, veterinary certificates did not exist. Despite two rounds of briefings, India has not provided a single veterinary certificate that it claims was operational on that day, let alone a certificate that reflects the recommendations of the OIE Terrestrial Code. This fact refutes any claim that the Revised Avian Influenza Measure is consistent with India's WTO obligations.

31. As set forth below, the United States explains that India maintained veterinary certificates that contained avian influenza attestations, withdrew such certificates, and did not issue replacements by the time the Panel was established. Indeed, the United States will explain that even the veterinary certificates that India appears to have issued in recent days, and which are

[36] India's Second Written Submission, para. 38.

measures outside the scope of this dispute, do not conform to the recommendations in the OIE Terrestrial Code because they impose more onerous requirements than those prescribed by the OIE Terrestrial Code. Under these circumstances, India is not even in a position to claim that veterinary certificates that conform to the OIE Terrestrial Code were adopted after the terms of reference in this dispute were established.

1. Situation Under the Original Measure

32. The panel in the original proceeding found that S.O. 1663(E) imposed import restrictions on account of avian influenza on the following products:

(a) domestic and wild birds (including poultry and captive birds);

(b) day old chicks, ducks, turkey, and other newly hatched avian species;

(c) un-processed meat and meat products from avian species, including domesticated, wild birds and poultry;

(d) hatching eggs;

(e) eggs and egg products (except Specific Pathogen Free eggs);

(f) un-processed feathers;

(g) live pigs;

(h) pathological material and biological products from birds;

(i) products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use; and

(j) semen of domestic and wild birds including poultry.[37]

Thus, each of these products were banned from importation whenever a country reported an outbreak of avian influenza.

33. For each of these products, India also required a veterinary certificate for importation. For example, the United States has included the veterinary certificates for (1) chicken and quail

[37] *India – Agricultural Products (panel)*, paras. 2.32 & 7.217.

meat and (2) hatching eggs, both of which it submitted in the original proceeding, and is resubmitting in this dispute.[38]

India's Original Certificate for Chicken & Quail Meat Certificate

VETERINARY CERTIFICATE FOR IMPORT OF CHICKEN/QUAIL MEAT INTO INDIA

Exporting country :

Ministry of:

Department:

Province or District, etc.:

I. Identification of the meat

Type of portions of meat:

Type of package:

Number of objects or packages:

Net weight:

II. Origin of the meat

Address/es and number/s of veterinary approval of the abattoir/s:

Address/es and number/s of veterinary approval of the cutting-up establishment/s:

III. Destination of the meat

The meat/meat product is being sent from _____ (place of dispatch) to _____ (country and place of destination).

Nature and identification of means of transport:

(Specify the number of wagon, truck, flight number, name of the ship)

Name and address of exporter:

Name and address of the consignee:

IV. Attestation of wholesomeness

The undersigned Official Veterinarian certifies that the meat:

1. comes from birds slaughtered in abattoirs /processing plants accredited for export by the exporting country;
2. The birds from which the product has been produced, originate from the country of export which means it should have been bred, hatched, grown, slaughtered and further processed in the country of origin
3. the meat does not have residues of pesticides, drugs, mycotoxins and chemicals above the Maximum Residue Limits prescribed internationally
4. comes from birds slaughterd in abattoirs / processing plants where no ruminant or porcine tissue/ protein has been used in the production of meat or has been added to the meat at any stage, and"
5. satisfies the following requirements:

(a) Country is free from Avian Influenza (Highly Pathogenic Avian Influenza and Low Pathogenic Avian Influenza)

(b) The consignment comes from birds which were kept in an establishment where the incidence of the following diseases has not been reported during the last one year:

New Castle Disease, Marek's disease, Avian Mycoplasmosis, Haemorrhagic enteritis and Infectious synovitis/sinusitis, Avian chlamydiosis, Fowl typhoid, Avian infectious bronchitis, Avian infectious laryngotracheitis, Fowl cholera and Salmonella enteritidis Salmonella typhimurium, Avian Leucosis J virus infections, Inclusion body hepatitis (Hydropericardium), Infectious bursal disease, Pullorum disease, Avian tuberculosis, Fowl pox, Egg drop syndrome, Avian encephalomyelitis and Chicken anaemia virus.

(c) The source birds have never been fed with feeds produced from internal organs, blood meal and tissues of ruminant origin.

(d) The meat/ meat product has never come in contact with beef or beef product or any other ruminant meat or meat product or pork product.

38 Exhibit USA-20 & USA-21 (Original Exhibits US-52 & US-54).

(e) Fresh packing material is used and satisfies the necessary sanitary-hygienic requirements.

Official stamp:

Issued at _____ on _____
Name and address of Veterinarian
_____
Signature _____

_____

Post Import Requirements:

1. On arrival, the consignment and the documents will be examined by the Regional/Quarantine Officer.

2. The samples will be drawn for testing for risk analysis pertaining to diseases/pesticides/residues etc. before the consignment is released.

3. In case of positive findings, appropriate action shall be taken by the Department of Animal Husbandry, Dairying and Fisheries, Government of India at the cost of Importing agency.

Importing organizations should also give an undertaking that:

a) At no point of time, imported product shall find way to animal food chain,

b) The left over product will be disposed off through incineration.

c) The labeling of the products should be done in local/regional language also.

India's Original Certificate for Hatching Eggs

Annexure – IV.3

VETERINARY CERTIFICATE FOR IMPORT OF HATCHING EGGS OF CHICKEN, TURKEY, AND OTHER AVIAN SPECIES INTO INDIA

Exporting country:
_____
Ministry of:
_____
Department:
_____
Province or District, etc.:
_____

a. Identification of the hatching eggs

Number	Mark	Species	Breed

II. Origin of the hatching eggs

Name and address of the establishment of origin:
_____
Or of the hatchery*:
_____
Name and address of the exporter:
_____

III. Destination of the hatching eggs

Country of destination:
_____
Name and address of consignee:
_____
Nature and identification of means of transport:
_____
Type of containers:
_____

IV. Sanitary information

The undersigned Official Veterinarian certifies that the hatching eggs

a) come from an establishment which is regularly inspected;
b) come from an establishment which satisfies the following requirements:

1. The country is free from Notifiable Avian Influenza (both Highly Pathogenic and Low Pathogenic Avian Influenza.)

2. Only clean eggs have been selected and fumigated and the eggs are packed from the establishment into new boxes for export and transported directly to the placement of shipment through an area where the diseases mentioned at para 3 have not been reported

3. The eggs are drawn from an establishment where New Castle disease (Ranikhet disease), Infectious Bursal Disease (Gumboro disease), Marek's disease, Mycoplasmosis (*M. gallisepticum*), Fowl typhoid (*Salmonella gallinarum*), Pullorum disease (*Salmonella pullorum*), Fowl Pox, Avian Infectious Bronchitis, Avian infectious larynogtracheitis, Avian Tuberculosis, Psittacosis-ornithosis (Avian Chlamydiosis), Fowl cholera (Pasteurellosis), Salmonella enteritidis, West Nile Virus, Salmonella typhimurum, Egg drop syndrome, Avian encephalomyelitis, Avian leucosis J.Virus, Chicken anaemia and inclusion body hepatitis infection have not been reported since past 12 months.

4. The flocks from which the hatching eggs have been obtained are tested regularly and are found negative for the diseases as under:

a. Haemagglutination inhibition (HI) test for New Castle disease

b. Haemagglutination inhibition (HI) / Agar gel immunodiffusion (AGID) test for Avian Influenza.

c. Agar gel immunodiffusion (AGID) test for Infectious bursal disease (Gumboro disease).

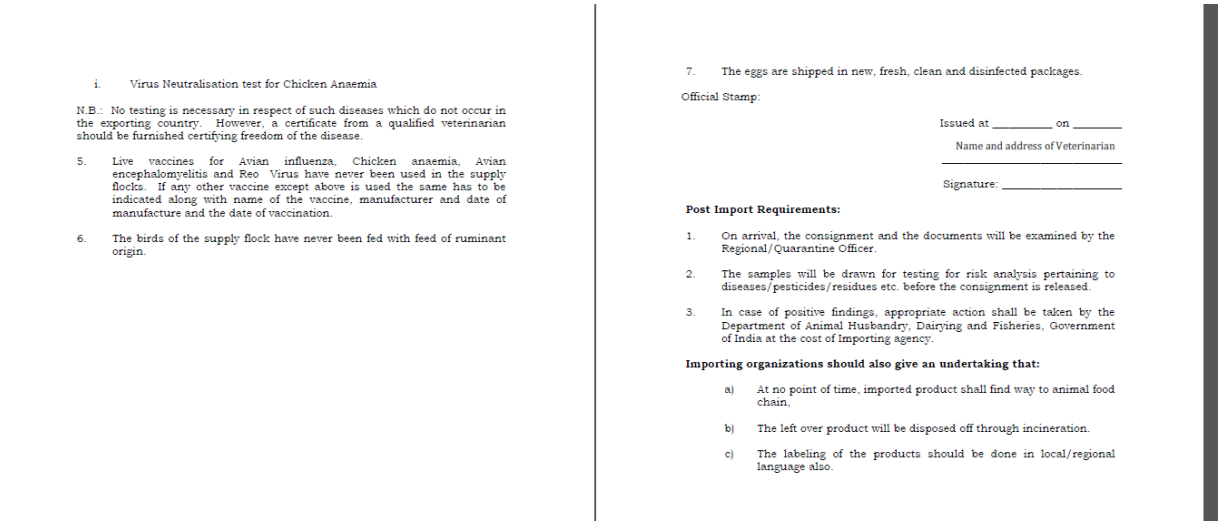
d. Agglutination (Agg)/Haemagglutination inhibition (HI) test for Mycoplasmosis.

e. Agglutination (Agg) test for Fowl Typhoid and Pullorum Disease

f. Haemagglutination inhibition (HI)/Virus Neutralization (VN)/Enzyme linked immunosorbent assay (ELISA) for Avian infectious bronchitis

g. Agar gel immunodiffusion (AGID) test for Marek's disease/ avian leucosis J.Virus

h. Agar gel immunodiffusion (AGID) / Virus Neutralization (VN) / Enzyme linked immunosorbent assay (ELISA) for Avian infectious laryngotracheitis



i. Virus Neutralisation test for Chicken Anaemia

N.B.: No testing is necessary in respect of such diseases which do not occur in the exporting country. However, a certificate from a qualified veterinarian should be furnished certifying freedom of the disease.

5. Live vaccines for Avian influenza, Chicken anaemia, Avian encephalomyelitis and Reo Virus have never been used in the supply flocks. If any other vaccine except above is used the same has to be indicated along with name of the vaccine, manufacturer and date of manufacture and the date of vaccination.

6. The birds of the supply flock have never been fed with feed of ruminant origin.

7. The eggs are shipped in new, fresh, clean and disinfected packages.

Official Stamp:

Issued at _____ on _____

Name and address of Veterinarian

_____

Signature: _____

Post Import Requirements:

1. On arrival, the consignment and the documents will be examined by the Regional/Quarantine Officer.

2. The samples will be drawn for testing for risk analysis pertaining to diseases/pesticides/residues etc. before the consignment is released.

3. In case of positive findings, appropriate action shall be taken by the Department of Animal Husbandry, Dairying and Fisheries, Government of India at the cost of Importing agency.

Importing organizations should also give an undertaking that:

a) At no point of time, imported product shall find way to animal food chain,

b) The left over product will be disposed off through incineration.

c) The labeling of the products should be done in local/regional language also.

34. These certificates contain attestations requiring the product to originate from a country free from avian influenza. For the Panel's convenience, the United States has juxtaposed the avian influenza attestation in these certificates against the corresponding attestation recommended by the current edition of the OIE Terrestrial Code.

India's Original Veterinary Certificate	**Relevant Recommendation in the 26th Edition of the OIE Terrestrial Code**
The undersigned Official Veterinarian certifies that the meat: … 5. satisfies the following requirements: Country is free from Avian Influenza (Highly Pathogenic Avian Influenza and Low Pathogenic Avian Influenza)	**Article 10.4.19. Recommendations for importation from a country, zone or compartment free from avian influenza or free from infection with high pathogenicity avian influenza viruses in poultry** <u>For fresh meat of poultry</u> Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the entire consignment of fresh meat comes from poultry: 1) which have been kept in a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry since they were hatched or for at least the past 21 days; 2) which have been slaughtered in an approved abattoir in a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in

India's Original Veterinary Certificate	Relevant Recommendation in the 26th Edition of the OIE Terrestrial Code
	poultry and have been subjected to ante- and post-mortem inspections
The country is free from Notifiable Avian Influenza (both Highly Pathogenic and Low Pathogenic Avian Influenza.	**Article 10.4.10 Recommendations for importation from a country, zone or compartment free from avian influenza For hatching eggs of poultry** Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the eggs came from an avian influenza free country, zone or compartment; 2) the eggs were derived from parent flocks which had been kept in an avian influenza free country, zone or compartment for at least 21 days prior to and at the time of the collection of the eggs; 3) the eggs are transported in new or appropriately sanitized packaging materials. If the parent flocks have been vaccinated against avian influenza, the nature of the vaccine used and the date of vaccination should be attached to the certificate.

As is evident, the original certificates do not contain OIE consistent attestations with respect to avian influenza. Instead of focusing on providing attestations concerning the specific conditions of the product at issue like the OIE Terrestrial Code, India required a blanket statement that the product originated in a country free from avian influenza. Accordingly, a compliance measure that conformed to the OIE Terrestrial Code would entail the issuance of revised certificates that have been changed to reflect the conditions in the OIE Terrestrial Code.

2. The Revised Avian Influenza Measure

35. India, however, did not issue revised veterinary certificates. As the United States noted in its first written submission, it simply withdrew the existing certificates from DADF's website, and did not provide any replacements.[39] India claims the United States engages in mischaracterization for arguing that the removal of these certificates results in a ban,[40] but India presents no basis for this position. India does not – because it cannot – argue that any

[39] *See* Exhibit USA-10, a screenshot from an internet archive site confirms that no certificate for the products covered by S.O. 1663(E) were on DADF's website, more than a month after the Panel was established.

[40] India's Second Written Submission, paras. 34-35.

certificates that reflected the OIE Terrestrial Code's recommendations were issued and in operation on May 22, 2017 when the Panel was established. On this fact alone, India cannot claim that the Revised Avian Influenza Measure conforms to the OIE Terrestrial Code.

36. Rather than address this problem with its position, India again relies on mere assertions; that is, India simply asserts the United States is incorrect, and asserts that OIE consistent veterinary certificates do somehow exist. To that end, India asserts that the existence of certificates can be inferred from the alleged facts that India grants SIPs and requires veterinary certificates; because the Revised Avian Influenza Measure incorporates the OIE Terrestrial Code; because India is negotiating in good faith with the United States about veterinary certificates; and because India has provided examples of certain certificates. The United States addresses each of these assertions in turn.

a. Sanitary Import Permits are Not Veterinary Certificates

37. First, India asserts that because it requires SIP for imports, and any SIP granted requires a veterinary certificate to accompany the shipment, India has fulfilled the requirement to maintain veterinary certificates.[41] This argument is unconvincing. Simply having a requirement for a veterinary certificate to accompany shipments does not mean that veterinary certificates actually exist, or that those hypothetical certificates are consistent with the OIE Code. In fact, India's reliance on this line of argument highlights that India, in fact, has not provided an actual, OIE-consistent veterinary certificate issued under the measure as in existence at the time of panel establishment.

38. In this respect, the United States notes that India references Exhibits IND-21 through IND-38, which are various SIPs that India has purportedly granted. As the United States noted in its first written submission, the United States fails to see why these SIPs are relevant since India acknowledges they were all issued with respect to countries that were not reporting avian influenza. Furthermore, not one of the SIPs that India has provided in this proceeding actually has a veterinary certificate appended to it. The United States notes that in the original proceeding, the SIPs that India provided did have such certificates appended.[42] In sum, India cannot show that any veterinary certificate has been actually successfully issued, let alone one that reflects conformity with the OIE Terrestrial Code.

39. Moreover, relevant trade data for poultry meat with respect to India shows that the sanitary import permits do not confirm that trade is actually taking place. The following table, compiled from data from Global Trade Atlas, demonstrates that despite the purported issuance of

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41 India's Second Written Submission, para. 36.

42 Exhibit IND-27.

these SIPs to twelve countries since July 8, 2016,[43] trade has actually been far more limited. India asserted that it has granted SIPs to the twelve countries since July 8, 2016, but the data indicates only three of those countries, Malaysia, Thailand, and Spain, have made any shipments – and then only in very limited amounts.[44]

India Import Statistics

Commodity: 0207, Meat And Edible Offal Of Poultry (Chickens, Ducks, Geese, Turkeys And Guineas), Fresh, Chilled Or Frozen

Monthly Series: 06/2016 - 12/2016

Partner Country	Unit	Quantity						
		06/2016	07/2016	08/2016	09/2016	10/2016	11/2016	12/2016
World	T	7	0	0	7	0	11	7
Austria	T	0	0	0	0	0	0	0
Malaysia	T	0	0	0	0	0	0	0
Singapore	T	0	0	0	0	0	10	6
Spain	T	0	0	0	0	0	0	1
Thailand	T	7	0	0	7	0	0	0
Turkey	T	0	0	0	0	0	1	0

[43] Austria, Brazil, Belgium, Canada, Japan, Italy, Lithuania, Malaysia, Poland, Spain, Thailand, and the United Arab Emirates. India's First Written Submission, para. 41.

[44] India's First Written Submission, para. 41.

Commodity: 0207, Meat And Edible Offal Of Poultry (Chickens, Ducks, Geese, Turkeys And Guineas), Fresh, Chilled Or Frozen								
Monthly Series: 01/2017 - 07/2017								
Partner Country	Unit	Quantity						
		01/2017	02/2017	03/2017	04/2017	05/2017	06/2017	07/2017
World	T	16	7	8	3	7	10	9
Austria	T	0	0	0	0	0	0	0
Malaysia	T	0	0	0	0	0	10	0
Singapore	T	0	0	0	0	0	0	0
Spain	T	0	0	0	0	0	0	0
Thailand	T	16	7	8	3	7	0	9
Turkey	T	0	0	0	0	0	0	0

b. Claiming That Any Certificates Will Apply the OIE Terrestrial Code Does Not Mean Certificates Actually Exist

40. India asserts "the most important element of the sanitary certificate is its *content*."[45] If one assumes that certificate actually exists, the United States would agree with this statement. The problems with India's argument are (1) that – as explained in the prior section – the evidence shows that no such certificates were available (at least at the time of panel establishment, and (2) India has not shown that any certificate that India might use is in fact consistent with the OIE. India claims that the content of its certificates must necessarily reflect Chapter 10.4 of the OIE Terrestrial Code, since S.O. 2337(E) incorporates the OIE Terrestrial Code.[46] That statement is a *non-sequitur*. The only way to assess if a veterinary certificate conforms to the OIE Terrestrial Code is to examine the content of the certificates.

41. This point is particularly important here because no one knows what India perceives the content of the OIE Terrestrial Code to be. As explained above in Section II.A.1, India's long held interpretation of the OIE Terrestrial Code was actually in contradiction with it. To establish

[45] India's Second Written Submission, para. 37 (emphasis original).

[46] India's Second Written Submission, para. 37.

that India has finally adopted the proper interpretation of the OIE Terrestrial Code and implemented it accordingly requires an examination of the results of the implementation.

c. Negotiating a Sanitary Certificate Does Not Mean a Sanitary Certificate is in Place

42. The next assertion India raises appears to be that there is no certificate because the United States and India are presently in negotiations – and India views the United States as being unreasonable in the negotiations. To that end, India expends some effort discussing its view of the negotiations over the last few months and provides copies of documents from those negotiations. In particular, India references a response it delivered on June 14, 2017 to the United States commenting on the March 21, 2017 U.S. proposal for India to adopt OIE consistent certificates.

43. As an initial matter, the United States regrets that India has decided to portray in its submission – in a slanted manner and for litigation purposes – the content of ongoing settlement negotiations. This choice undermines the goal of the dispute settlement system to encourage positive resolution of disputes.[47] And were the United States to seek to engage with those assertions, it would involve further assertions in relation to conversations that the Panel would not be in a position to confirm or evaluate. Thus, the Panel should attach no evidentiary value to India's self-serving assertions relating to bilateral conversations.

44. In any event, India's arguments based on the content of ongoing discussions do nothing to advance its positions. First, the very existence of negotiations demonstrates that India had no certificates in place for trade when the Panel was established. As India notes, the U.S. request for India to accept OIE consistent certificates was made on March 21, 2017. Nearly three months later – and nearly a month after the Panel was established – India finally responds by providing some comments on the U.S. proposed certificates and attaching a certificate it had developed. It is unclear whether even the certificate that India attached was valid for trade on June 14, 2017, since India acknowledges that certificate was subsequently amended.[48]

45. India notes that the OIE Terrestrial Code provides that veterinary authorities may consult about certificates. Specifically, India invokes Article 5.1.1 of the OIE Terrestrial Code, which provides in pertinent part as follows:

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[47] DSU Article 3.7 ("The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.").

[48] Exhibit IND-45.

> Certificates should be exact and concise, and should clearly convey the requirements of the importing country. *For this purpose, prior consultation between Veterinary Authorities of importing and exporting countries may be necessary*. It enables the setting out of the exact requirements so that the signing veterinarian can, if necessary, be given a note of guidance explaining the understanding between the Veterinary Authorities involved.[49]

India appears to be relying on the italicized text. To the extent that India is arguing that this language entitles India to avoid issuing a certificate until negotiations are complete, India is wrong. The fuller context by the surrounding sentences make clear that consultation is not some type of prerequisite to maintaining a veterinary certificate. That provision does not provide that negotiation is a prerequisite to apply OIE Terrestrial Code recommendations. Moreover, it bears noting that this is not a situation where India had an existing certificate that the parties are trying to improve or simplify or better understand. They are negotiating precisely because India did not have certificates. If India wants to accept certificates only after negotiations with its trading partners are complete, then India can make that position known. But India cannot claim it has OIE consistent certificates already in place simply because negotiations might lead to the adoption of such certificates.

46. Second, India is not allowed to expand the scope of this dispute to actions it is taking after the Panel was established. As the United States explained in its first written submission, the temporal scope of this dispute under the DSU extends to the Panel's establishment on May 22, 2017. Furthermore, it is important to recall the Panel's task here. The Panel is not mediating negotiations – nor examining any measures taken after the Panel's establishment – but examining whether the steps taken to comply by India as set forth in the Panel Request have brought India into compliance with its WTO obligations. Therefore, India's characterization of the negotiations, India's discussion of what arrangements the United States purportedly has with third countries, or India's claim that it successfully reached agreement on a certificate with Spain on October 30, 2017 are not subject to this dispute. Accordingly, while the United States disagrees with much of India's characterization of these various issues, the key point is that what India has done, is trying to do, or might do since the Panel's establishment is irrelevant.

d. India Has Not Demonstrated the Validity of the Sample Veterinary Certificates

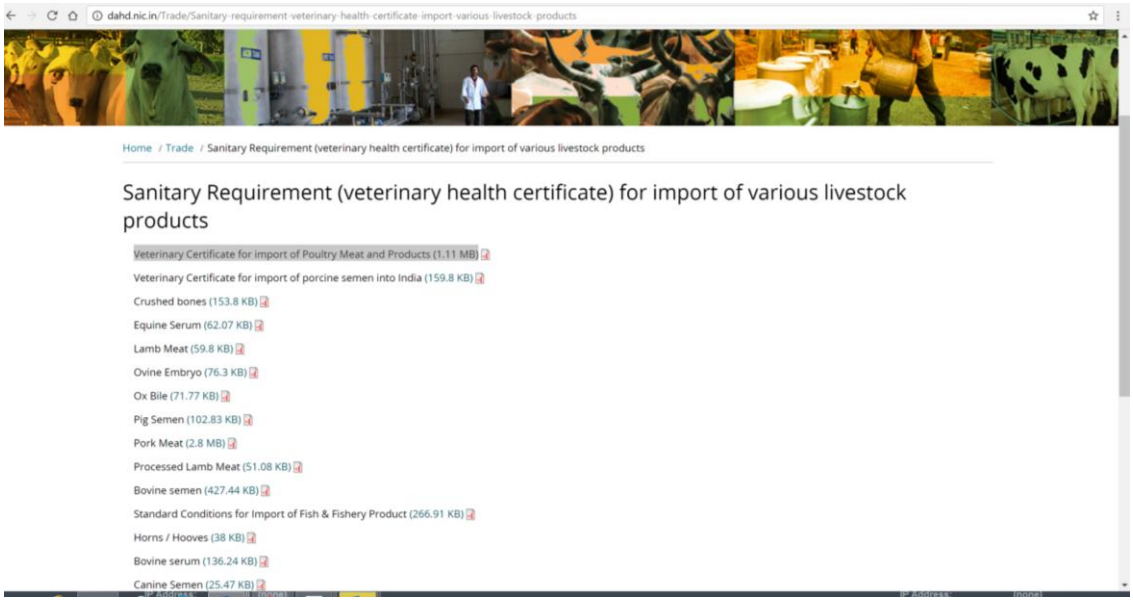
47. India has provided examples of veterinary certificates for certain products: live poultry/day old poultry/hatching eggs of poultry; shell eggs; egg products; semen of poultry; feathers and down of poultry; and poultry meat and poultry meat products. India does not explain what precisely they prove. For example, India fails to state when they were promulgated, whether they have been made available to trading partners, whether these

[49] Exhibit USA-12.

certificates are valid for trade, and if they have ever been utilized. In other words, India has not explained whether these example certificates are simply models India developed for the purposes of this dispute, for negotiations with trading partners, or whether they are actually valid instruments. In the absence of such information, India has no basis for asserting that they are of any relevance to any issue in this dispute.

48. Indeed, in this respect, the United States notes that it is striking that India, which focuses extensively on matters following the Panel's establishment, ignores a notable moment that preceded it – and concerned certificates: the United States providing OIE Model Certificates to India on March 22, 2017 as a basis for trade.[50] However, the United States did not receive a response until after the Panel in this proceeding was established.[51]

49. In light of India's submission of these certificates, the United States has researched whether India has posted them on DADF's website. As reflected by the screenshot below, the DADF website appears to have been recently updated to reflect an additional certificate for poultry meat and poultry products. However, the United States also notes that the document on DADF's website does not appear to be the same document that India has provided in this dispute in Exhibit IND-45.



50 Exhibit IND-15, p. 6, Letter to Mr. Sagar Metha from S. Sindelar dated March 22, 2017 ("Please find enclosed here with the official correspondence from the U.S. Department of Agriculture, Washing providing the proposed health certificates for the export of poultry and poultry products.").

51 Exhibit IND-17; see also Exhibit USA-110.

Accordingly, India has not designated these "example certificates" as a sanitary requirement on its government website.

50. In the course of examining the "example certificates" and the one on DADF's website, the United States has learned that India imposes a requirement for avian influenza not called for by the OIE Terrestrial Code: border testing. Specifically, the document on DADF's website, and two of the certificates in Exhibit IND-45 (feathers and poultry meat) discuss testing for avian influenza post-import. For example, the recently added certificate on DADF's website contains a section for the "Post Import Requirements." In that section, the certificate provides:

> The samples from every consignment shall be drawn if the consignments originated from compartments or zones of avian influenza infected country for absence of avian influenza virus before release of the consignments. The cost of testing shall be bourne by the importer.[52]

In other words, if an importer fulfills all of the requirements India maintains to have a SIP granted, and has a consignment that is accompanied by a veterinary certificate that provides whatever attestations India requires, the importer must still pay to have his consignment tested for avian influenza if it arose from a country that had an outbreak of avian influenza. The certificate for feathers has this requirement regardless of whether the country is free of avian influenza or not. Suffice it to say, this additional requirement has no basis in the OIE Terrestrial Code, which relies on attestations in veterinary certificates to ensure safe trade. Such a requirement simply confirms that even if India is issuing veterinary certificates following the Panel's establishment, they reflect requirements that are not called for in the OIE Terrestrial Code. As the United States demonstrates *infra*, such a requirement in fact contradicts the OIE Terrestrial Code.

51. The final point the United States raises concerning these certificates is that India has not provided an explanation as to what attestations relate to avian influenza or not. The United States provides the following three examples:

- For day old poultry or perhaps live poultry that is not day old poultry, India requires an attestation that "The flocks from which the day old poultry/ live poultry/hatching eggs originate have been in the country for at least 12 months and during this period they have not come in contact with any imported birds."[53]

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52 Exhibit USA-24.

53 Exhibit IND-45, p. 6.

- For poultry meat and poultry products, India requires an attestation that "the meat or meat products comes from animals slaughtered in abattoirs /processing plants where no meat other than poultry meat has been processed during production of fresh meat or added to the meat products at any stage during production and processing."[54]

- For poultry meat and poultry products, India requires an attestation that "the birds from which poultry meat and poultry meat product has been sourced born and reared in the country of export, or the poultry meat has been produced in the exporting country……(name of the exporting country) with the raw materials legally imported from the country..... (Name of the country) that satisfies the Indian requirements detailed in the sanitary information."[55]

Knowing the precise attestation India is requiring for avian influenza is necessary to determine their consistency with the OIE Terrestrial Code.

C. India Has Not Demonstrated That It Maintains Domestic Controls For LPAI

52. India asserts that India maintains a meaningful domestic surveillance program for detecting LPAI, and that accordingly the United States is factually incorrect in arguing otherwise. India notes that it "fails to understand how the United States can acknowledge NAP 2015, and deny, at the same time, that India has no 'official control program' for AI, including LPAI."[56] The U.S. argument, however, suffers from no contradiction. Rather, the United States explicitly submitted the NAP 2015 in this dispute to show that India's present regime – like its predecessor NAP 2012 – does not reflect a surveillance regime that is capable of reliably detecting LPAI.

53. The U.S. first written submission already provides a comparison of the key operative paragraphs between NAP 2012 and NAP 2015. That comparison demonstrated that there were no significant differences between the documents. This comparison was more than sufficient to show that India has not in fact made a substantive change in its domestic surveillance program, and thus has failed to address the findings that India treats imported products less favorably than domestic products.

54. In this second submission, the United States will further show the deficiencies in India's compliance and respond to India's new arguments by referring to the views of the scientific experts in the original panel proceeding. In particular, the United States notes the views of

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54 Exhibit IND-45, p. 17.

55 Exhibit IND-45, p. 17.

56 India's Second Written Submission, paras. 44-45.

experts in the original proceeding on three discrete points relating to the detection of avian influenza. Following that discussion, the United States specifically addresses India's claims concerning why it now has a "robust" system for detecting LPAI.

1. Situation Under the NAP 2012

55. The first point the United States makes is that the surveillance program set forth in the National Action Plan 2012 (NAP 2012) was insufficient to detect LPAI.

- Dr. Brown: The evidence provided does not support a conclusion that India is conducting surveillance activities that would reliably detect LPNAI in poultry. All of the evidence offered refers to avian influenza surveillance that could be classified as clinical or passive (see question 4 for definitions). [57]

- Dr: Guan: No (In response to being asked whether India's exhibits support a conclusion that India is conducting surveillance activities that would reliably detect LPNAI in poultry).[58]

- Dr. Honhold: If this assumption is correct, the guidelines of taking tracheal swabs, cloacal swabs and serum samples from 4 birds per sampling unit (farm or block) would not give a sufficient probability of detection of infection with an LPAI virus unless the animals are clinically ill due to that infection. To explain, a detection sample size increases as the detection threshold decreases. A sample size of 4 is adequate to give a 95% confidence of at least one positive result if the population sampled has a prevalence of 65%. This level of prevalence is only likely in a group composed of infected and sick birds. That assumes that the tests used are 100% sensitive, which as noted elsewhere is unlikely. If the prevalence is 10% which may still be high, the sample size required from a large flock is 29 and from a flock of 100 birds, 22. With a sample size of 4, there is a 50:50 chance of a positive result if the actual prevalence is 20%.[59]

56. The second point the United States recalls is that because LPAI is often asymptomatic, active surveillance is needed to detect its presence.

- Dr. Honhold: Detection of infections that have few or limited clinical signs or a long incubation period requires active surveillance. That means that they are

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57 Response of Dr. Brown to Question 5, p.5.

58 Response of Dr. Guan to Question 5, p.8.

59 Response of Dr. Honhold to Question 4b, p. 22.

actively sought. When there are few or no clinical signs, the test used must be direct detection of the infection rather than of a clinical syndrome.

- Dr. Brown: LPNAI is best detected through serological and virological surveys/investigations. The reason for this is that these viruses are of the H5 and H7 serotype and in most species and in most circumstances they will cause relatively mild clinical signs which especially in backyard flocks would not necessarily trigger obvious attention.[60]

57. Third, active surveillance requires a structured approach where representative sampling is utilized.

- Dr. Honhold: Active surveillance can be either a random representative design or a targeted (but also representative) design. The former selects the units to be sampled at random with every member of the population having a known and similar probability of being sampled. A targeted sample selects a subset of the population to sample based on expected/predicted risk of infection. The units selected have a higher probability/risk of being infected compared to those that are not included.[61]

- Dr. Brown: Some statistical structure at flock level based on poultry population would seem appropriate, and within flock sampling to detect a predetermined prevalence of probably at least 30%. This would be especially applicable to commercial production systems but such studies in the backyard sector are more problematical. The laboratory testing methods are not described in the NAP2012 and so no conclusion can be made as to the validity of any of these approaches for the detection of LPNAI.[62]

- Dr. Brown: If this is a truly "National Action Plan" you would expect to see under the control of the competent authority a clear structure to the surveillance design, a consistency on how it's applied, with some evidence of what is the design prevalence. What are the target sectors? What is the frequency? How is it applied? What are the samples that are going to be taken? How many samples from each flock? And how are they going to be tested?

  All of these are components of a national surveillance programme that would be described as active. Now, while some of the documents provided some evidence

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60 Response of Dr. Brown to Question 4, p 4.

61 Response of Dr. Honhold to Question 4a, p. 22.

62 Response of Dr. Brown to Question 4, p. 5.

that samples were being taken, we wouldn't dispute that, but we were not able to see the context under which the samples were being taken.[63]

- Dr. Honhold: But, there are requirements within that, which are clearly laid down by the OIE, and those requirements are that it is a statistically valid sample, representative of the population, so you must know your population…[64]

58. Finally, to demonstrate the presence of active surveillance, one would expect to see significant testing results, information on poultry demography, selection of surveillance, and frequency of testing.

- Dr. Brown: This is underpinned by the fact that the majority of samples analysed were tissues from affected birds and according to the OIE Diagnostic Manual for Terrestrial Animals and Vaccines, an appropriate sample type for LPNAI should include a large component of blood sampling to determine if exposure to LPNAI had occurred. Very few blood samples by comparison to tissues (Ind15 &123) were examined and reports frequently refer to case submissions from diseased or sick poultry with mortality; classical indicators for HPAI and not LPNAI. I would expect to see very significant numbers of blood samples as the key component of a national survey that were examined for antibodies to LPNAI and therefore evidence of active or targeted surveillance. These sample types can be complemented by swabs of the oral and cloacal tracts of the birds to eliminate the active circulation of LPNAI viruses in the affected population. I could find no definitive references to these approaches in the evidence provided.[65]

- Dr. Brown: I think the question here is whether it's an active surveillance programme that is adequate to make any statements about the status with respect to LPNAI. Now, I've seen nothing in the documents, and I apologise if I have overlooked it, that clearly tells me the demography of poultry production in India, where it's located, the poultry type, the number of holdings containing the poultry, and how they're selected for surveillance, actively, at what frequency, and by region. I would expect to see under a national Plan a clear structure laid out. I haven't seen any evidence of that.[66]

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63 Transcript of Expert Panel's Meeting with the Experts and Parties (Dec. 16, 2013), paras. 1.265-1.266.

64 Transcript of Expert Panel's Meeting with the Experts and Parties (Dec. 16, 2013), para. 1.282.

65 Response of Dr. Brown to Question 5, p.5.

66 Transcript of Expert Panel's Meeting with the Experts and Parties (Dec. 16, 2013), para. 1.275.

- Dr. Brown: Broadly, the principle is 5% prevalence at flock level with 95% confidence. So that means you need to know the demography, you need to know how you are going to apply it to your different states or territories. And then is visible and transparent, and those results can be then inspected.[67]

59. Because of facts such as these, the experts concluded that the NAP 2012 was not capable of reliably detecting LPAI.

2. Situation Under the NAP 2015

60. India alleges that the situation presently is different because India now controls for LPAI domestically. The United States addresses the various pieces of evidence that India submits for that assertion.

61. First, India points to a communique issued by DADF on November 22, 2013 (the 2013 Communique). India asserts this communique introduced routine active surveillance for the detection of LPAI.[68] Notably, India does not point to what language in this communique reflects active surveillance, particularly of the type referred to above.[69] The communique contains the word "active surveillance," but it does not contain any of the type of information identified in the above expert views, such as poultry demography, sampling, testing frequency, and what establishments have been tested. Indeed, the reference to active surveillance seems to suggest that it is **not** applied to healthy birds. Specifically, it notes "Swab samples from sick bird and collect dead birds from specific bird populations at risk."[70] As noted above, such surveillance may miss LPAI since LPAI often has few clinical signs. Such surveillance is inadequate, and in fact, cannot really be considered "surveillance" in a meaningful sense.

62. Second, India argues that aspects of NAP 2015 have been significantly improved. For example, India references these statements:

- "the presence of an H5 or H7 virus in poultry is always cause for concern, even when the initial signs of infection are mild".[71]

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67 Transcript of Expert Panel's Meeting with the Experts and Parties (Dec. 16, 2013), para. 1.285.

68 India's Second Written Submission, para. 105, citing Exhibit IND-51.

69 The only thing India notes in the footnote are the names of various laboratories that have purportedly been of great help to India in terms of surveillance. India does not identify what help or activities these laboratories are providing.

70 Exhibit IND-51, p.3.

71 India's Second Written Submission, para. 111, citing NAP 2015 (Exhibit US-14), p. 67.

- "[c]onsiderable circumstantial evidence suggests that migratory birds can introduce low pathogenic H5 and H7 viruses to poultry flocks, which then mutate to the highly pathogenic form".[72]

None of these statements reflect active surveillance. At most, they might indicate that India has an awareness of why surveillance for LPAI should take place. But, these statements do not show that active surveillance is actually occurring.

63. India also contends that the following statements in the NAP 2015 are relevant in establishing that India controls for LPAI.

- "[a]ssessment should be made in routine, irrespective of any outbreak

- "Routine surveillance which consists of active and passive surveillance for Avian Influenza should be ongoing … The frequency of active surveillance should be at least every six months".[73]

64. These statements, however, do not support India's position that it has brought its measures into compliance. The first statement was present in NAP 2012, and does not indicate anything about the nature of the surveillance.[74] The second statement, like the first, suffers from vagueness and does not reflect active surveillance as the experts explained it. For example, the statement does not specify what it means to survey every six months in terms of what population is being tested and what is the sampling methodology to ensure the sample is representative. As such, the statement is not meaningful in terms of an actual, operational surveillance plan. India also relies on the argument that that it does passive surveillance and that Dr. Honhold said in the original proceeding that "India has clearly demonstrated that on occasions its surveillance system does detect LPAI viruses"[75] But as explained above, that is not a reliable way to detect LPAI. On that point, Dr. Honhold also said "From this information, it clear that "passive" surveillance based on clinical signs cannot be expected to detect LPAI except by accident."[76]

65. India also claims that NAP 2015 reflects the criticisms of the experts from the original proceeding. India argues that it now uses blood samples, that stakeholders must do passive and

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72 India's Second Written Submission, para. 111, citing NAP 2015 (Exhibit US-14), p. 67.

73 India's Second Written Submission, para. 111, citing NAP 2015 (Exhibit US-14), pp. 3-4.

74 Exhibit USA-16, Section I.1 p. 2

75 India's Second Written Submission, para. 113, citing *India – Agricultural Products*, para. 7.419 (quoting Dr Honhold, Transcript, para. 1.308).

76 Dr. Honhold's Response to Question 4(a), p. 22.

active surveillance, and that India's plan has "structure."[77] But India apparently does not understand the extent of the criticism of the NAP 2012. The experts were not suggesting that there simply needed to be statements in an action plan that reflect individuals should do surveillance and blood testing should be incorporated. They were discussing that there needed to be a fundamental architecture so one would know what was sampled, how was it sampled, how often was it tested, how was it tested, and what level of confidence can we have from that data. NAP 2015 does not contain these elements. Nor has India provided any actual real life data indicating that any of the points of the experts have actually been implemented.

66. Finally, India relies on a lengthy quotation from the NAP 2015. But the excerpt, reproduced below, does not support India's position:

> Active surveillance (Physical / Clinical Surveillance)
>
> The veterinary authorities shall visit commercial poultry farms, backyard poultry and live bird markets (LBMs) for clinical examinations and collection of samples etc.
>
> Active surveillance (based on sample testing)
>
> i). Swab samples from sick bird and collect dead birds from specific bird populations at risk
> - Swab sample shall be taken from oro-pharynx, cloaca or fresh wet faeces.
> - Tracheal samples are best for species with the virus accumulating in the respiratory tract (chickens).
> - Cloacal swabs are best for species with the virus accumulating in the intestinal tract (ducks).
> - Fresh, wet faeces swabs are useful for birds that are not handled (wild birds) or where it is uncommon to see sick or dead birds (live market and wild)
> - Fresh **droppings** from live bird market and wild water bird zone
>
> ii) Environmental samples:
> - drinking water
> - waste water
> - droppings in the cages
> - processing tables
> - knives etc.
>
> **Pooled samples (pool size of 6) should be taken from the environment.**
> iii). Blood samples (serum) from healthy bird population:

[77] India's Second Written Submission, para. 124.

> The blood samples are required as the targeted surveillance in the areas of high risk. The blood samples are necessary to detect the presence of Low Pathogenic Avian Influenza virus where the birds do not show the disease despite being positive; or they show very mild symptoms. H7N9 infection in China is the recent example of the same where the birds did not show the disease but affected the human beings and caused severe diseases in humans. International organizations have put a special emphasis on sero-surveillance for detection of H7N9 virus.

The United States notes three problems with India's sweeping claim that this excerpt shows that India now conducts active surveillance. First, India has not provided any results of such testing to indicate that this is anything other than aspirational. Second, India has not explained what are these "areas of high risk" that are being surveyed. If India is doing a limited survey, then this does not mean the NAP 2015 applies a system capable of reliably detecting LPAI. Finally, it lacks the details the experts above said was necessary for an active surveillance system. It does not identify the demography of poultry, the number of holdings, the selection process, testing methods, frequency, statistic design, etc.[78]

67. In sum, although India claims the United States mischaracterizes NAP 2015,[79] the United States' assessment is based on the information before it. That information shows that NAP 2015, like its predecessor, does not reflect a surveillance system that can reliably detect LPAI.

III. INDIA'S NEW LEGAL ARGUMENTS ARE WITHOUT MERIT

A. India Has Failed To Establish That The Revised Avian Influenza Measure is Consistent With Article 3.1 of the SPS Agreement

68. As discussed above, India contests the United States' three arguments regarding why the Revised Avian Influenza Measure contradicts the OIE Terrestrial Code:

1. India requires freedom from avian influenza prior to granting a SIP;

2. India does not allow trade through OIE Consistent Veterinary Certificates; and

3. India is imposing controls on LPAI even though it does not control for the disease domestically.

The United States has addressed these arguments in Section II above.

69. In this section, the United States will further rebut India's arguments by addressing three other discrete issues concerning why the Revised Avian Influenza Measure is inconsistent with

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78 *See e.g.*, Transcript of Expert Session, para. 1.275, 1.284-1.286, 1.301.

79 India's Second Written Submission, para. 103.

Article 3.1 of the SPS Agreement. First, the United States addresses India's argument that its measure can conform to the OIE Code by incorporating it through reference. Second, the United States addresses India's argument in the alternative that its measure is "based upon" the OIE Terrestrial Code. Finally, the United States explains that India's avian influenza testing requirement for consignments provides yet another reason why the Revised Avian Influenza Measure is neither based upon nor conforming to the OIE Terrestrial Code.

1. A Member Does Not Conform to an International Standard Simply Through Cross-Referencing The International Standard, but by Operationalizing It

70. As an initial matter, India's second written submission argues that the United States claims the "only possible way for a measure to 'conform to' an international standard is by copying and pasting the recommendations of such standard into the domestic legal instrument."[80] This proposition, however, was not stated in the U.S. First submission, and India does not provide a citation to where the United States has made such a statement.

71. India further argues that:

> incorporating an international standard by reference in a domestic instrument is the best way to avoid textual inaccuracies and guarantee total conformity with the recommendations set forth in that standard as well as to save on printing costs for the paper version.[81]

India's arguments lack merit. As noted, India misstates the U.S. position. More fundamentally, India misunderstands the relevant legal obligation in Articles 3.1 and 3.2 of the SPS Agreement.

72. The actual U.S. position is that "India has not put forward any evidence that the Revised Avian Influenza Measure actually effectuates the product specific recommendations of the OIE Terrestrial Code."[82] This is particularly important in a situation, such as the one here, where the original measure was shown to be inconsistent with the OIE Code, and where the revised measure contains only cosmetic changes. The Appellate Body's analysis in *EC – Hormones* speaks to this issue:

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[80] India's Second Written Submission, para. 52.

[81] India's Second Written Submission, para. 54. The United States is not necessarily sure what India is arguing about with respect to paper costs. After all, India is arguing that all of DADF's notifications can be effectuated through electronic publication.

[82] United States' First Written Submission, para. 76.

> Under Article 3.2 of the SPS Agreement, a Member may decide to promulgate an SPS measure that conforms to an international standard. Such a measure would embody the international standard completely and, for practical purposes, converts it into a municipal standard. Such a measure enjoys the benefit of a presumption (albeit a rebuttable one) that it is consistent with the relevant provisions of the SPS Agreement and of the GATT 1994.[83]

To validate its claim of conformity with the OIE Terrestrial Code, India needs to demonstrate that the Revised Avian Influenza Measure embodies the international standard completely. The United States provided a reprint of the OIE Terrestrial Code to highlight precisely what a measure that conforms to the OIE Terrestrial Code would need to reflect.

73. Thus, India's grievance on transposition is misplaced. The United States would agree for example that if a Member transposed an international standard word for word into municipal law, that does not necessarily establish conformity with the international standard either. A Member could have one thing written in its law, but act completely contrary to the actual content of the standard. For example, if India has transposed the text of the product recommendations of the OIE Terrestrial Code into a statutory order, but India's conduct reflected the interpretation of the OIE Terrestrial Code that India advanced in the original proceeding, India's claim of conformity would fail regardless of the text in its measure.

74. Here, India has not provided any evidence that the Revised Avian Influenza Measure embodies the OIE Terrestrial Code. As discussed at length in Section II.A above, India has not provided guidance documents, instructions, veterinary certificates issued prior to the Panel's establishment, or even evidence that trade from countries reporting avian influenza is taking place in a manner that reflect the OIE Terrestrial Code. Accordingly, in the complete absence of evidence, India is not able to support its contention that the Revised Avian Influenza Measure conforms to the OIE Terrestrial Code.

2. The Revised Avian Influenza Measure Is Not "Based on" the OIE Code

75. India argues that in the event the Panel rejects its claim that the OIE Terrestrial Code conforms with the OIE Terrestrial Code, India is nonetheless entitled, "at a minimum," to have its measures decided as being based upon the OIE Terrestrial Code.[84] To make this assertion, India presumes that the Panel will not find the Revised Avian Influenza Measure in contradiction with the OIE Terrestrial Code. India invokes three reasons for why the Panel must find so. Each of them is unavailing.

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83 *EC – Hormones (AB)*, para. 170.

84 India's Second Written Submission, para. 56.

76. First, India claims that if incorporation by reference is not sufficient "to reach the 'conform to' level, it is definition enough to meet the 'based on' standard."[85] This argument fails for the same reason India cannot establish conformity with the OIE Terrestrial Code: India has not provided evidence on how the Revised Avian Influenza Measure operationalizes the OIE Terrestrial Code. Incorporation by reference or repeating the text of an international standard is of no consequence under Article 3.1 of the SPS Agreement unless the Member actually demonstrates how the measure effectuates the standard so it can be determined whether or not measure is indeed based on the standard.

77. Second, India claims it had adopted concepts "(e.g. AI, poultry, HPAI- and LPAI-free status)" from the OIE Terrestrial Code and its sanitary conditions.[86] The United States notes two deficiencies. One, India's notion of concepts is simply using the same terminology. For example, that views "poultry" as having the same meaning as ascribed by the OIE Terrestrial Code. Simply because two things share a common vocabulary does not mean one is based upon the other. The measure at issue in the original proceeding, S.O. 1663(E), utilized some of the same concepts found in the OIE Terrestrial Code, such as avian influenza freedom, to act in a manner that contradicted the OIE Terrestrial Code. As the panel in the original proceeding found, "'there must be a very strong and very close relationship between two things in order to be able to say that one is 'the basis for' the other'".[87] Put plainly, having a common tongue does not suffice.

78. Two, India claims the sanitary import conditions for poultry products is based on the OIE Terrestrial Code. The United States has explained that India lacks such evidence to show that the Revised Avian Measure is based on the OIE Terrestrial Code – and in fact that the Revised Avian Influenza contradicts the OIE Terrestrial Code. In considering this point though, the United States notes that although it has provided evidence for why such is the case, the burden of proof in this dispute is different than the original proceeding. India is the complainant asserting that the Revised Avian Influenza Measure is consistent with Article 3.1 of the SPS Agreement, and thus bears the burden of presenting a *prima facie* case. In this respect, the United States recalls that Article 3.1 of the SPS Agreement is no different than most WTO Agreement provisions in that the complaints bears the burden:

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85 India's Second Written Submission, para. 57.

86 India's Second Written Submission, para. 57.

87 *India – Agricultural Products (Panel)*, para. 7.266 quoting *EC – Sardines (AB)*, para. 245; *see also Russia – Pigs (Panel)*, para. 7.254, quoting same.

> Accordingly, as with Articles 3.1 and 3.3 of the SPS Agreement, there is no 'general rule–exception' relationship between the first and the second parts of Article 2.4. Hence, in this case, it is for Peru — as the complaining Member seeking a ruling on the inconsistency with Article 2.4 of the TBT Agreement of the measure applied by the European Communities — to bear the burden of proving its claim.[88]

79. Finally, India notes that its measure references the OIE Terrestrial Code repeatedly – "more than ten times" – indicating is the "foundation" of India's revised AI measure.[89] The United States notes that India's invocation about the number of times S.O. 2337(E) references the OIE Terrestrial Code is irrelevant because, as noted above, such cross-referencing or invocation does not demonstrate the consistency of a measure with an international standard. Indeed, India's second written submission references the OIE Terrestrial Code no less than 66 times, but does not seem to advance its recommendations either.

3. Testing Particular Consignments Contradicts the OIE Terrestrial Code

80. As the United States has explained, any veterinary certificates India has promulgated since the Panel was established are not within the scope of this proceeding. However, to the extent these certificates are to be examined for some purpose in this dispute, the United States notes that they contradict the OIE Code. For example, these certificates reference new requirements for testing of consignments for avian influenza. These testing requirements may have been in force at the time the Panel was established.

81. The requirements can be found in the certificates India has provided with its second written submission for (1) the import of feathers and down and poultry and of birds other than poultry and (2) the import of poultry meat and poultry meat products. Paragraph 2 for Post Import Requirements in the respective certificates provides as follows:

> The samples of imported feather will be taken for testing of avian influenza at the cost of importer(s). In case of positive finding the feathers will be destroyed.[90]

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88 *EC – Sardines (AB)*, para. 275.

89 India's Second Written Submission, para. 57.

90 Exhibit IND-45, p. 15.

> The samples from every consignment shall be drawn if the consignments are originated from compartments or zones of avian influenza infected country for absence of avian influenza virus before release of the consignments. The cost of testing shall be borne by the importer.[91]

Thus for feathers, all consignments regardless of the avian influenza status of the exporting country will be subject to testing at the border, *even though veterinary attestations have been provided.* For poultry meat and poultry meat products, testing will occur even if the zone or compartment from which the export takes place is free of avian influenza if there is an avian influenza outbreak somewhere else in the country. This requirement again is *in addition to provision of the required veterinary attestations.*

82. The OIE Terrestrial Code does not impose any requirements for such testing. As reproduced below, the pertinent OIE Terrestrial Code recommendations for these products simply require provision of veterinary certificates with specified attestations.

OIE Terrestrial Code Recommendations 26th Edition
Article 10.4.19. **Recommendations for importation from a country, zone or compartment free from avian influenza or free from** **infection with high pathogenicity avian influenza viruses in poultry** For fresh meat of poultry *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that the entire consignment of *fresh meat* comes from *poultry*: 1) which have been kept in a country, *zone* or *compartment* free from *infection* with high pathogenicity avian influenza viruses in *poultry* since they were hatched or for at least the past 21 days; 2) which have been slaughtered in an approved *abattoir* in a country, *zone* or *compartment* free from *infection* with high pathogenicity avian influenza viruses in *poultry* and have been subjected to ante- and post-mortem inspections in accordance with Chapter 6.2. and have been found free of any signs suggestive of avian influenza.
Article 10.4.20. **Recommendations for the importation of meat products of poultry** Regardless of the avian influenza status of the country of origin, *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that: 1) the *commodity* is derived from *fresh meat* which meets the requirements of Article 10.4.19.; or 2) the *commodity* has been processed to ensure the destruction of avian influenza virus in accordance with Article 10.4.26.;

[91] Exhibit IND-45, p. 20.

OIE Terrestrial Code Recommendations 26th Edition
AND 3) the necessary precautions were taken to avoid contact of the *commodity* with any source of avian influenza virus.
Article 10.4.22. **Recommendations for the importation of feathers and down of poultry** Regardless of the avian influenza status of the country of origin, *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that: 1) these *commodities* originated from *poultry* as described in Article 10.4.19. and were processed in an avian influenza free country, *zone* or *compartment*; or 2) these *commodities* have been processed to ensure the destruction of avian influenza virus using one of the following: *a)* washed and steam-dried at 100ºC for 30 minutes; *b)* fumigation with formalin (10% formaldehyde) for 8 hours; *c)* irradiation with a dose of 20 kilogray; *d)* any equivalent treatment which has been demonstrated to inactivate avian influenza virus; AND 3) the necessary precautions were taken to avoid contact of the *commodity* with any source of avian influenza virus.
Article 10.4.23. **Recommendations for the importation of feathers and down of birds other than poultry** Regardless of the avian influenza status of the country of origin, *Veterinary Authorities* should require the presentation of an *international veterinary certificate* attesting that: 1) these *commodities* have been processed to ensure the destruction of any virus which would be considered avian influenza in *poultry* using one of the following: *a)* washed and steam-dried at 100ºC for 30 minutes; *b)* fumigation with formalin (10% formaldehyde) for 8 hours; *c)* irradiation with a dose of 20 kilogray; *d)* any equivalent treatment which has been demonstrated to inactivate avian influenza virus; 2) the necessary precautions were taken to avoid contact of the *commodity* with any source of viruses which would be considered avian influenza in *poultry*.

Accordingly, India is imposing a requirement on account of avian influenza that has no basis in the OIE Terrestrial Code. Moreover, such a requirement contradicts the OIE Terrestrial Code in three respects.

83. First, such requirement fails to take into account regionalization as reflected in the OIE Terrestrial Code. The recommendations in the OIE Terrestrial Code can be applied on a country, zone, or compartment basis in order to facilitate trade. If there is a requirement to universally test a product or test it from a zone free of disease because some of part of the country has an outbreak of disease, then the requirement undermines the trade facilitation that regionalization affords.

84. Second, such a requirement renders the veterinary attestations redundant and thus an unjustified sanitary barrier. The panel in the original proceeding found that "the Terrestrial Code aspires to assure sanitary safety of international trade in terrestrial animals while avoiding

unjustified sanitary barriers to trade."[92] Application of the OIE Terrestrial Code Recommendations however should suffice to ensure safe trade. As noted in the User's Guide to the OIE Terrestrial Code:

> The OIE standards are based on the most recent scientific and technical information. Correctly applied, they protect animal health and welfare and veterinary public health during production and trade in animals and animal products, and in the use of animals.[93]

Accordingly, application of an unnecessary sanitary barrier – *i.e.*, one that needlessly increases the cost of trade – is contrary to the OIE Terrestrial Code.

85. Third, India is imposing a more stringent requirement than the OIE with no evidence that the requirement is based upon a risk analysis. The OIE User's Guide notes the following:

> A Member Country may authorise the importation of animals or animal products into its territory under conditions different from those recommended by the Terrestrial Code. To scientifically justify more stringent measures, the importing country should conduct a risk analysis in accordance with OIE standards, as described in Chapter 2.1.[94]

In the absence of any evidence that this requirement is based upon a risk analysis undertaken consistent with OIE Terrestrial Code recommendation, the requirement again contradicts the OIE Terrestrial Code rather than conforms to it. Thus, there are three independent reasons for why India's requirement for testing at the border, in addition to any requirement for a veterinary certificate, contradicts the OIE Terrestrial Code.

B. India Has Failed to Establish That the Revised Avian Influenza Measure is Consistent with Articles 5.1, 5.2, and 2.2 of the SPS Agreement

86. India's second written submission summarily asserts that because the Revised Avian Influenza Measure – according to India – conforms to the OIE Terrestrial Code, India benefits from the presumption of conformity in Article 3.2 of the SPS Agreement. As explained above

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92 *India – Agricultural Products (Panel)*, para. 2.53; *see also* OIE Terrestrial Code User's Guide 26th Edition, para. A2 ("Veterinary Authorities should use the standards in the Terrestrial Code to set up measures providing for early detection, internal reporting, notification and control of pathogenic agents, including zoonotic ones, in terrestrial animals (mammals, birds and bees) and preventing their spread via international trade in animals and animal products, while avoiding unjustified sanitary barriers to trade."). (Exhibit USA-23).

93 OIE User's Guide (Exhibit USA-23).

94 OIE User's Guide, Paragraph C.5 (Exhibit USA-23).

and in the U.S. first written submission, India is not in a position to claim the Revised Avian Influenza Measure conforms to the OIE Terrestrial Code.

87. The United States notes an additional problem with India's claim of consistency with Articles 5.1, 5.2 and 2.2 of the SPS Agreement: to the extent that the new testing requirement contained in the documents India submitted in its second submission existed at the time of panel establishment, the existence of such a requirement would be inconsistent with the SPS Agreement.

1. A Post-Import Testing Requirements Breach Articles 5.1 and 5.2 of the SPS Agreement

88. A post-import testing requirement is an sanitary measure subject to the disciplines of the SPS Agreement. Paragraph 1(a) of Annex A of the SPS Agreement provides in pertinent part as follows:

> Sanitary or phytosanitary measure - Any measure applied:
>
> (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

The chaussette to paragraph 1 states:

> Sanitary or phytosanitary measures include all relevant laws, decrees, regulations, requirements and procedures including, inter alia, end product criteria; processes and production methods; testing, inspection, certification and approval procedures; quarantine treatments including relevant requirements associated with the transport of animals or plants, or with the materials necessary for their survival during transport; provisions on relevant statistical methods, sampling procedures and methods of risk assessment; and packaging and labelling requirements directly related to food safety.

89. Post-import testing for avian influenza is undoubted a sanitary measure under this definition. It is a testing procedure applied to protect animal health. Moreover, since it part of an import process, it affects international trade.[95] Accordingly, it is a sanitary measure that is subject to the SPS Agreement. Accordingly, India needs to demonstrate that the measure is based upon a risk assessment per SPS Agreement Article 5.1, which takes into account the factors provides for in Article 5.2 of the SPS Agreement. As India has not provide any such risk assessment, the measure breaches both Articles 5.1 and 5.2 of the SPS Agreement.

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[95] SPS Agreement, Article 1.

2. A Post-Import Testing Requirement Breaches Articles 2.2 of the SPS Agreement

90. Article 2.2 of the SPS Agreement provides that:

> Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

India's failure to have a risk assessment consistent with Articles 5.1 and 5.2 of the SPS Agreement for its post-import testing breaches two aspects of Article 2.2. First, in the absence of a risk assessment, the measure is not based on scientific principles. Second, absent a risk assessment, there is no indication that India took into account "available scientific evidence" per Article 5.2 of the SPS Agreement. This results in a breach of Article 2.2's requirement that a sanitary measure not be maintained without sufficient scientific evidence. Accordingly, India's post-import testing breaches two obligations in Article 2.2 of the SPS Agreement.

C. India Has Failed to Establish That the Revised Avian Influenza Measure is Consistent with Articles 5.6 and Article 2.2 of the SPS Agreement

91. India argues that because the Revised Avian Influenza Measure conforms to the OIE Terrestrial Code, it is consistent with Articles 5.6 and Article 2.2 of the SPS Agreement. As with India's claim of consistency regarding Articles 5.1, 5.2, and Article 2.2, this claim fails because the Revised Avian Influenza Measure does not conform to the OIE Terrestrial Code. Similarly, to the extent India's post-import testing requirement is within the terms of reference of this dispute, this would be another reason the Revised Avian Influenza Measure breaches Articles 5.6 and 2.2 of the SPS Agreement.

1. India's Post-Import Testing Requirements Breach Article 5.6 of the SPS Agreement

92. Article 5.6 of the SPS Agreement provides as follows:

> Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

The footnote to Article 5.6 provides:

> For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into

> account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

Thus, a breach of Article 5.6 is established when there is (1) a reasonably available alternative measure that (2) achieves the Member's appropriate level of protection (ALOP), which is (3) less trade restrictive than the measure at issue.[96]

93. Here that measure readily exists: require only OIE-consistent veterinary certificates. The measure is technically and economically feasible because it requires India to abandon an unnecessary requirement, and instead use veterinary certificates that reflect the recommendations of the OIE Terrestrial Code. As the panel found in the original dispute, the use of OIE-consistent veterinary certificates is economically and technically feasible.[97] Likewise, the panel in the original dispute found that measures based on the OIE Terrestrial Code would achieve India's ALOP of very high or very conservative.[98] Finally, such a measure is less trade restrictive. India's post import testing requires importers to pay the cost of testing thus raising the costs of trade. Abandoning such a requirement in favor of OIE consistent certificates would eliminate costs, potential delays in clearing customs, and thus better facilitate trade. Accordingly, the post-testing requirement of the Revised Avian Influenza Measure breaches Article 5.6 of the SPS Agreement.

2. A Post-Import Testing Requirements Breaches Article 2.2 of the SPS Agreement

94. Article 2.2 of the SPS Agreement provides that "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health…" An unnecessary or redundant requirement is clearly one that is not applied to the extent necessary to protect animal health. Because application of the OIE Terrestrial Code would be sufficient to ensure India's ALOP is met, the use of post-import testing under the Revised Avian Influenza Measures breaches Article 2.2 of the SPS Agreement.

D. India Has Failed to Establish That the Revised Avian Influenza Measure is Consistent with Articles 6.1 and 6.2 of the SPS Agreement

95. In this section, the United States will not repeat two points it made in its First Written Submission: India cannot claim the Revised Avian Influenza Measure is consistent with Article 6 of the SPS Agreement because India lacks veterinary certificates and insists on freedom from

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96 *See e.g., Australia – Salmon (AB)*, para. 194.

97 *India – Agricultural Products (Panel)*, paras. 7.542-7.546.

98 *India – Agricultural Products (Panel)*, paras. 7.570-7.571.

avian influenza as a condition of entry.[99] Instead, the United States will focus on the evidentiary issues raised by India's second written submission. The United States begins by discussing the consistency of the Revised Avian Influenza Measure with Article 6.2 and then proceeds to examine its consistency with Article 6.1.

1. The Revised Avian Influenza Measure Does Not Provide Opportunity To Have Disease Free Areas Recognized Consistent with Article 6.2 of the SPS Agreement

96. Both the United States and India agrees that Article 6.2 of the SPS Agreement requires India to provide an "effective opportunity" for Members to make a claim to have their territories recognized as disease free or of low disease prevalence. India invokes three pieces of evidence to claim that the Revised Avian Influenza Measure is consistent with Article 6.2. The United States discusses each in turn.

a. India Does Not Explain How S.O. 2337(E) Has Been Operationalized to Afford and Effective Opportunity

97. First, India points again to the following text in S.O. 2337(E), as amended, as demonstrating that an effective opportunity exists.

> **3. Recognition of Pest or Disease-Free Areas and Areas of Low Pest or Disease Prevalence-**
>
> (i) The adaptation to the sanitary and phytosanitary characteristics of the area of the exporting country and the determination of pest or disease free areas and areas of low pest or disease prevalence shall be made in accordance with the requirements of the World Trade Organization Agreement on Sanitary and Phytosanitary Measures and the guidelines issued by the Central Government.
>
> (ii) For the recognition of pest or disease free areas and areas of low pest or disease prevalence, the appropriate authority of the exporting country shall make a written request along with the necessary evidence to the Department of Animal Husbandry, Dairying and Fisheries, Ministry of Agriculture and Farmers Welfare in the Government of India.[100]

What India does not do is highlight any concrete actions that reflect operationalization of this text in the manner India claims that would demonstrate it will lead to recognition of disease free

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99 United States' First Written Submission, Sections V.D.2 & 3.

100 Paragraph 3 of notification S.O. 2337(E), as amended (Exhibits IND-3 to IND-5).

areas and ensure adaptation of India's measures.[101] As the United States previously noted, neither of the paragraphs cited by India explain how India will be affording the effective opportunity to have other Member's areas recognized as disease-free or of low disease prevalence.[102] The first paragraph is a declaration that India will follow its interpretation of its WTO obligations, while the second simply provides that a Member can submit a substantiated proposal to India; it does not address how India will ensure that the Member who submits the request and evidence will have an opportunity to have its territory recognized as being disease free or low disease prevalence.

(1) The First Paragraph

98. India's second written submission claims an explanation is unnecessary with respect to the first paragraph:

> For example, paragraph 3(i) of S.O. 2337(E), as amended, does not need to explain what Article 6.1 of the SPS Agreement means or how it needs to be complied with. Article 6.1 is self-explanatory.[103]

India's response is striking in two respects.

99. First, the reason the Parties are contesting India's claim of consistency under Article 6 of the SPS Agreement in this compliance proceeding is precisely because India's interpretation and application of Article 6 was incorrect in the original proceeding. Indeed, consider the logic of India's assertion in any other circumstance. If a Member proclaimed in an instrument that its intellectual property law will abide by the TRIPS Agreement[104] or that its antidumping determinations with be consistent with the Anti-dumping Agreement,[105] no one would simply

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101 *Russia – Pigs (AB)*, para. 5.126 ("we see Article 6.2 not as an obligation to acknowledge the concept of regionalization as an abstract idea; rather, we see it as an obligation to render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.") (footnote omitted); *India – Agricultural Products (AB)*, para. 5.139 ("a Member may be required to recognize the concepts of these areas not only by virtue of the express obligation in Article 6.2, but also so as to be in a position properly to "assess" the SPS characteristics of relevant areas under the second sentence of Article 6.1, and ultimately ensure, as required under the first sentence of Article 6.1, that its SPS measures are adapted accordingly.").

102 United States' First Written Submission, paras. 113-116.

103 India's Second Written Submission, para. 75.

104 Agreement on Trade-Related Aspects of Intellectual Property Rights.

105 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

accept that such will necessarily be the case. The Member would still need to demonstrate how the actual conduct comported with the substantive obligations in those agreements. Here, India has not explained what actions it is taking as a result – and that speaks louder than simply referencing the provisions of SPS Agreement.

100. Second, if India cannot explain what its interpretation is, then how can it claim that an opportunity exists? An effective opportunity to do something requires understanding the relevant criteria at issue. Indeed, that is why due process is often described as requiring both notice and an opportunity to be heard. The opportunity is effective because a party knows what is expected.

(2) The Second Paragraph

101. With respect to the second paragraph, India asserts that the U.S. concerns are "unfathomable."[106] To assist India, the problem the United States fathoms is that the text simply allows a Member to deliver a request; it does not provide how the request will be fairly treated. None of the explanations provided by India addresses this problem.

102. First, India notes that the language in the second paragraph requires a Member to submit not only a proposal but evidence as well. Moreover, India notes that it has a questionnaire that specifies the information it will be requiring.[107] According to India, this renders the requirement consistent with Article 6.3 of the SPS Agreement. The issue though is not consistency with Article 6.3 of the SPS Agreement, it is whether India recognizes the concept of regionalization under Article 6.2 by affording an effective opportunity to Members. If a Member simply took delivery of several well-substantiated requests to have their territories recognized as disease-free, that would not mean it has granted an opportunity. The Member would need to engage in an evaluation of those requests, precisely because they are substantiated.

103. Second, India claims it is impracticable to say *when* a regionalization determination will be completed. The United States does not take issue with the idea that a regionalization determination may take time to complete. The process may often be iterative requiring engagement by both the importing and exporting Member that can render a precise schedule impracticable. The United States' point is that Members do not know from this language the "*what*" that India seeks to confirm before granting recognition. For example, in this dispute, India argues that its questionnaire for information is similar those maintained by other Members.[108] Assuming *arguendo* that it is, India's measure still fails to explain what types of

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106 India's Second Written Submission, para. 76.

107 India's Second Written Submission, para. 76.

108 India's First Written Submission, para. 31.

criteria the information will be assessed against so that India can make a judgment as to whether to grant recognition of disease-free areas or not.

b. The Guidelines Do Not Demonstrate an Effective Opportunity

104. India also points to the Guidelines it has issued which "facilitate speedy recognition of AI-free of HPAI-free areas."[109] Again, India's statement is an assertion that is not explained or supported through evidence. As the United States explained in its First Written Submission, the Guidelines are silent as to any circumstances regarding when India will grant regionalization. Instead, the Guidelines say more about DADF's ability to request information – such as through the initial questionnaire, through supplementary questionnaires, through an inspection, and through a post-verification questionnaire.[110]

105. The United States does not dispute that Members may use tools such as questionnaires and visits before granting regionalization. The point is not the legitimacy of the tools in that respect, but that the tools do not equate to an effective opportunity. Indeed, one can easily foresee a situation where such tools are used in fact to deny an effective opportunity. For example, the importing Member imposes continual and unreasonable information demands on the exporting Member simply to try and exhaust the exporting Member into abandoning its request. The Guidelines in this respect may be useful for India as a mechanism to document its conduct, but they do not provide any form of opportunity to other WTO Members.

c. India' Engagement with France

106. India invokes its engagement with France's regionalization request as an example of showing it affords a genuine opportunity.[111] Specifically, India asserts that France made a request on July 15, 2016 for regionalization. Six weeks later, India provided a letter noting its instruments and its request for France to provide information.[112] The fact that India acknowledged receipt of a request and requested information in return does not indicate that India affords an effective opportunity. Indeed, more salient is the fact that France's request was made nearly 10 months before the Panel was established – and India can point to no other activity having taken place in that interval.

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109 India's Second Written Submission, para. 75.

110 Exhibit IND-7.

111 India's Second Written Submission, para. 78.

112 India's Second Written Submission, para. 78; Exhibit IND-47 (SCI).

d. India's Engagement with the United States

107. The final pieces of evidence India invokes is its engagement with the United States on the U.S. request to have its disease-free areas recognized. As a preliminary matter, the United States notes that much of India's purported evidence concerns acts taken by India after the Panel was established in this proceeding. These actions cannot be evaluated in this dispute in assessing whether India has brought itself into compliance. Indeed, this is not only a requirement that flows from the DSU, but also comports with practical sense here. For example, India includes among its actions a visit taking place by DADF to the United States right now – November 13-17, 2017. Allowing consideration of such evidence would preclude the Panel's assessment of the matter before it because the extent of evidence could change at any moment.

108. Accordingly, the United States notes the relevant evidence, if any, of India's engagement with the United States is that which can existed before the Panel's establishment. In that case, the evidence is that the United States submitted a completed questionnaire on March 21, 2017[113] and India responded almost 2 months later by acknowledging receipt, and stating it would provide a preliminary assessment 4-8 weeks later.[114] This evidence does not amount to showing that India affords an opportunity; it amounts to India acknowledging receipt of a proposal.

109. In sum, none of the evidence invoked by India in its second written submission demonstrate that India affords other WTO Members an effective opportunity to have their territory recognized for areas that are disease-free or of low-disease prevalence.

2. The Revised Avian Influenza Measure Is Not Adapted to the Sanitary Characteristics of an Area Consistent with Article 6.1 of the SPS Agreement

110. India has acknowledged that it cannot provide an example of the Revised Avian Influenza Measure being adapted to the sanitary characteristics of a particular area, but suggests such an adaptation may happen soon with respect to the United States.[115] For the reasons noted previously, India's attempt to enlarge the scope of this dispute by considering actions taken by India after panel establishment must be rejected. Instead, the United States asks a more basic question: has India presented evidence concerning the mechanisms and flexibilities in the Revised Avian Influenza Measure that will be utilized to achieve adaptation?[116] Absent such

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[113] Exhibit IND-15.

[114] Exhibit IND-16.

[115] India's Second Written Submission, para. 83.

[116] *India – Agricultural Products (AB)*, para. 5.139; *Russia – Pigs (AB)*, para. 5.123 ("we must consider the meaning of the terms of Article 6.2 within the context of the principal obligation stipulated in Article 6.1, namely, that SPS measures be adapted to the SPS characteristics of the areas from which the

evidence, there is no reason to accept that the Revised Avian Influenza Measure is consistent with Article 6.1 of the SPS Agreement.

E. India Has Failed to Establish That the Revised Avian Influenza Measure is Consistent with Article 2.3 of the SPS Agreement

111. India claims that the two forms of discrimination identified by the United States do not breach Article 2.3. With respect to the first form of discrimination – disparate treatment between local and foreign products – the dispute between the parties appears to be principally concerning the existence of India's condition of entry and veterinary certificates. Accordingly, the United States refers back to its arguments in Section II.A and B on those matters. With respect to the second form of discrimination, India claims that it controls for LPAI, and even if it did not, the Revised Avian Influenza Measure does not constitute discrimination. With respect to the preceding point, whether India controls for LPAI, the United States refers back to its argument in Section II.C. The United States will briefly below address the argument that the Revised Avian Influenza Measure would not be discriminatory in any event. The United States, however, will also address a third form of discrimination that arises to the extent the Revised Avian Influenza Measure includes post-import testing. As demonstrated below, such a requirement would breach the obligations in Article 2.3 of the SPS Agreement.

1. Second Form of Discrimination: India's Lack of Domestic Control For LPAI

112. In addition to arguing that India controls for LPAI, India argues that its "control and surveillance regime vis-à-vis LPAI becomes moot and irrelevant as the revised AI measure does not discriminate by imposing an import prohibition if there is an occurrence of LPAI in the exporting country."[117] Specifically, the reason India claims its domestic surveillance regime is irrelevant is because the pertinent question is not India's domestic controls, but rather where U.S. products are discriminated against.[118] This analysis is wrong.

113. The discrimination arises precisely because other WTO Members are subject to a more trade-restrictive regime to which India's own producers are not subject. The OIE Terrestrial Code's recommendations reflect different recommendations between HPAI, LPAI, and sometimes regardless of the avian influenza status of the exporting territory. India would require its trading partners to be subject to that regime, but excuse its own domestic industry. Simply

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product originated and to which the product is destined. Article 6.1 provides that Members shall "ensure" that their SPS measures are adapted to the SPS characteristics of the area from which the product originated.").

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

[118] India's Second Written Submission, para. 127.

because the burden India might impose on foreign producers is less onerous than a ban does not mean it is no longer discriminatory. Moreover, when India makes a requirement for a disease that it does not control for at home, then it is most certainly arbitrary and unjustifiable as well.

2. Third Form of Discrimination Post-Import Testing Breaches Article 2.3

114. As explained above, India has produced evidence in its second submission that it now requires imported goods – feathers, poultry meat, and poultry meat products – to be tested for avian influenza. To the extent that this measure existed at the time of panel establishment, it would be another basis for finding a breach of Article 2.3. For feathers, the testing is for every consignment while poultry meat and poultry meats products are subject to testing if another part of the exporting country has an avian influenza outbreak, even when the product originates from a zone free from avian influenza. In another words, if at some point trade does become possible because certificates are established, then those products will be subject to testing, at the importer's expense, even though they are accompanied by a veterinary certificate.

115. There is no evidence that India has any similar requirement for domestic products. Indeed, it would likely make domestic trade infeasible. Consider the equivalent application by India domestically:

- Every consignment of feather is tested by the Government of India at the producer's expense for avian influenza;
- Anytime there is an outbreak of avian influenza in India, all consignments of poultry meat and poultry meat products in the country, even if subject to domestic inspection, would require follow up testing, again to be paid at the producer's expense.

In light of the onerous nature of such a requirement, the United States is not surprised to find that it has not located any domestic analogue. Accordingly, the requirement discriminates against WTO Members in comparison to producers within India.

116. This discrimination is also arbitrary and unjustifiable. The panel in the original dispute made the following findings – and they are applicable to this situation:

> Specifically, India's AI measures do not account for the possibility that an exporting country (be it the United States or otherwise) that notifies NAI may be able to demonstrate that its exports of poultry products do not pose an NAI-related risk.[119]

[119] *India – Agricultural Products (Panel)*, para. 7.433.

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> India's AI measures do not pay any regard to the possibility that an exporting country maintains measures that will contain and/or control the spread of NAI within its territory. In this way, India's measures do not take account of the fact that different conditions may prevail in an exporting country that affect the likelihood that NAI will infect consignments of exported poultry.[120]

India's use of post-import testing is ignoring that other mitigation measures – like OIE consistent veterinary certificates – can effectively mitigate the risk. Thus, there is no justifiable reason to maintain this requirement.

117. Finally, the United States notes that there are identical conditions between other WTO Members and India. There is no reason to believe that there are circumstances in India that would somehow justify excusing testing in India but mandating for other producers. Accordingly, this third form of discrimination also breaches Article 2.3 of the SPS Agreement.

3. India Breaches the Second Sentence of Article 2.3 of the SPS Agreement

118. India asserts that the United States' claim under the second sentence of Article 2.3 is a consequential claim. The United States disagrees. The United States believes that the same evidence that establishes a breach of the first sentence of Article 2.3, however, can also be utilized to prove a breach of the second sentence. Here, the evidence, including that arbitrary discrimination, a lack of risk assessments, and the contradictions with the OIE Terrestrial Code also support a finding that all three forms of discrimination constitute a disguised restriction on international trade in breach of the Article 2.3, second sentence.

F. India Has Failed to Establish That the Revised Avian Influenza Measure is Consistent with Article 7 and Annex B of the SPS Agreement

119. The United States notes a threshold problem with how India characterizes the issues concerning the consistency of the Revised Avian Influenza Measure with India's transparency obligations under Article 7 and Annex B of the SPS Agreement: India continually describes it as a U.S. claim.[121] This is inaccurate.

120. Here, India, as the Member asserting that the Revised Avian Influenza Measure has brought it into compliance with the Panel and Appellate Body's findings, bears the burden of establishing so with respect to *all* of the findings made in the original dispute – including the

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120 *India – Agricultural Products (Panel)*, para. 7.434.

121 *See e.g.*, India, Second Written Submission, para. 12.

findings concerning the transparency obligations in Article 7 and Annex B of the SPS Agreement. In the interests of completeness, the United States highlighted three examples of how the Revised Avian Influenza clearly breached India's WTO obligations. India has chosen only to respond to those three, but bears the burden of addressing all of the findings

1. India's Notification of the Revised Avian Influenza Measure is Inconsistent with Paragraph 5 of Annex B of the SPS Agreement.

121. Paragraph 5(b) and (d) of Annex B provide as follows:

> (b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;
>
> (d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

122. The United States begins by addressing India's failure to abide by the obligations in paragraph 5(b) by not properly identifying the products subject to the measure. India asserts that it is "puzzled" why the United States is claiming it identified the products covered by the measure as animal products when the notification "unequivocally indicates in item 5 that the products concerned were 'poultry and poultry products.'"[122] India's puzzlement aside, the answer is that item 5 in the notification does not address the products covered. Item 3 does. Item 3 in India's Notification reads as follows:

> **Products covered (provide tariff item number(s) as specified in national schedules deposited with the WTO; ICS numbers should be provided in addition, where applicable):** Animal products

Thus, when the United States says the notification said the products covered were described only as "animal products," that is because it is what India explicitly stated in response to the question.

123. Moreover, even under India's proffered understanding, the term "poultry and poultry products" does not meet the requisite level of specificity required by the obligation. Paragraph 5(b) provides Members are entitled to know the "products" covered by the measure, not the class or type of products at issue. The Panel should thus reject this attempt by to undermine the transparency obligations in the SPS Agreement.

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[122] India's Second Written Submission, para. 144.

124. India has also not demonstrated that the notification comports with the obligations in paragraph 5(d) to allow Members a reasonable amount of to make comments in writing and to take any such comments into account. In considering the reasonable period of time to provide comments, the United States draws the Panel's attention to the SPS Committee's Recommended Procedures for Implementing the Transparency Obligations of the SPS Agreement.[123] Paragraph 13 of this document notes the following:

> Paragraph 5(d) of Annex B of the SPS Agreement obliges Members to allow a reasonable period of time for submission, discussion and consideration of comments. Members should normally allow a period of at least sixty calendar days for comments, except for proposed measures which facilitate trade and those which are substantially the same as an international standard, guideline, or recommendation. Where domestic regulatory mechanisms allow, the 60-day comment period should normally begin with the circulation of the notification by the WTO Secretariat. Any Member which is able to provide a time-limit beyond sixty days is encouraged to do so.

Sixty days is the normal convention for the comment period, unless the measure conforms to the relevant international standard or facilitates trade. Items 8 and 11 of the notification asks precisely those two questions through check boxes. India checked "None" with respect to whether there was a relevant international standard and declined to check the box indicating this measure was trade facilitating. In other words, India did not invoke either of those two grounds.

125. Here, the notification provides that in item 10 the measure was being adopted on June 19, 2016, which is also the date India provided for the close of comments. India did not file any addenda or corrigenda to this notification indicating that the comment period has been extended or that India had made any errors. The use of the same date suggests that India was not intending to take comments into account. India suggests the same date was necessitated by the expiration of the RPT.[124] The expiration of the RPT though signifies that the Member has used up its time to bring itself into compliance with its WTO obligations; it does not mean a Member is entitled to be excused from those obligations. Moreover, India *agreed* to the RPT in the original proceeding. India accepted that it was responsible for bringing itself into compliance within one year. India's complaint is thus misplaced. Accordingly, India has failed to bring itself into compliance with paragraph 5(d) of Annex B of the SPS Agreement.

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123 G/SPS/7/Rev.3.

124 India's Second Written Submission, para. 147.

2. India Did Not Allow a Reasonable Interval for Implementation

126. Annex B, paragraph 2 provides:

> Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.

India appears to concede that it did not provide a reasonable interval, but appears to claim it is excused on two grounds. First, because India had to bring itself into compliance in the "shortest period possible," it needed to enact the measure as soon as possible. To that end, India cites the Arbitrator's decision in *US – COOL* (21.3(c)) declining to afford a Member additional time to accommodate a reasonable interval.[125] India again does not appreciate the concept of an RPT. Its expiration does not allow a Member to forego any obligations; its expiration simply means the time afforded to a Member to bring itself into compliance has expired. The fact that an arbitrator declined to provide a Member additional time in a RPT on account of wanting a reasonable internal does not mean that a Member's obligation concerning the same can be excused. Moreover, the situation is inapposite here – India agreed to the RPT in this original proceeding.

127. Second, India appears to argue that because the Revised Avian Influenza Measure benefits traders, the Panel should not "read the requirement strictly."[126] The notification, however, did not assert the measure was trade facilitating. There is no reason to take India's characterization now over the one it made then – and which the United States submits above remains correct. Accordingly, India has failed to establish that it has brought itself into compliance with paragraph 2 of Annex B of the SPS Agreement.

IV. CONCLUSION

128. For the above reasons and those provided in the United States' first written submission, the United States respectfully requests that the Panel find that India has failed to establish that the Revised Avian Influenza Measure brings it into consistency with its obligations under the WTO SPS Agreement.

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125 India's Second Written Submission, para. 152.

126 India's Second Written Submission, paras. 152-154.