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

(DS430)

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

January 26, 2018

Public Version

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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 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

1. The United States appreciates this opportunity to comment on the Responses of India to the Questions of the Panel to the Parties Following the Panel Meeting. The United States notes that it has already addressed many of the arguments raised by India in in prior U.S. written and oral submissions. Accordingly, the comments below focus principally on those points or statements by India where additional comments from the United States could be of most assistance to the Panel.[1]

2. As an introduction to these answers, the United States would like to respond to India's thematic remark that "this is a compliance proceeding" and that findings be made with a view "to fully dispose of this matter."[2] The United States recalls that the original dispute in DS430 began with India making baseless claims that its prior avian influenza (AI) measure was consistent with international standards. Since the DSB[3] made its findings in the original dispute, India's claims with respect to compliance with the SPS Agreement have been similar. After India was found in breach of numerous SPS Agreement provisions and its reasonable period of time came and went, India asserted compliance even though no measure taken to comply existed.[4] Since then, India issued new instruments, claiming compliance each time any of them were promulgated. And each time, as noted in the United States' Article 5.8 request, India failed to explain and communicate how exactly the instrument achieved compliance.

> following each modification, India has made a new assertion of compliance. In these circumstances, it is not clear what actions India has taken to comply and whether we should expect further amendments. Second, India has not provided notice of the revisions to the United States or any explanation as to the rationale for these amendments. Our ability to work constructively with India is constrained by the lack of communication.[5]

Now in this compliance proceeding, India has again asserted compliance and argues that anything that stands in the way of that assertion – whether rules of procedure, rules of evidence, or even the enforceability of SPS provisions (Article 7 and Annex B) – must give way so India can "dispose" of this matter. The WTO Agreement is clear, however, that if India wishes to be sustained in its assertion of compliance, India must actually ensure that it has addressed the findings made by the original panel and Appellate Body in this dispute. India, however, has failed to do so.

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1 For the Panel's convenience, the United States notes it will not be providing specific comments on India's response to the following questions: 2.9, 2.10, 2.17, 2.20, 2.22, 3.1, 5.3, 5.8, and 7.3.

2 India's Responses to Panel Questions, para. 217.

3 Dispute Settlement Body.

4 United States' First Written Submission, para. 24; WT/DS430/15 (emphasis added) (Exhibit USA-3).

5 Article 5.8 Request (Exhibit USA-26).

1. GENERAL

Question 1.1: Does India's panel request delimit the scope of the measure taken to comply that is subject to scrutiny in these proceedings? With reference to para. 354 of the Appellate Body's decision in *US/Canada - Continued Suspension*, would an original complainant have to file its own Article 21.5 proceedings if it challenges measures within the scope of Article 21.5 that are not covered by the original respondent's panel request?

Comment:

3. At least as the United States understands it, India's position is both remarkable, and unsupportable. India argues that because the United States did not file a second panel request in this dispute involving India's asserted compliance, the Panel will not "have the full picture of whether appropriate implementation has actually taken place."[6] In fact, India blatantly asserts that the Panel will have to accept "only one half of the story" – that is, the half-story told in India's Panel Request![7] Based on India's own words, it appears that India is asking the Panel to find in favor of India based only on information and evidence brought forward by India. Nothing in the DSU,[8] however, calls for this type of meaningless and patently unfair procedure.

4. The United States recalls that in this dispute, India filed a panel request seeking a finding that India has brought its measures into compliance. The United States, as the responding party, is completely within its rights to rebut India's assertions. In doing so, the United States may rely on any evidence or arguments that it chooses, just like the responding party in any WTO proceeding. The United States further recalls that the United States is not seeking to establish that a measure taken by India to comply breaches provisions of the WTO Agreement not covered by the DSB recommendations and rulings in the original dispute. Accordingly, as the United States noted in its response to this question,[9] the Appellate Body's statement in *US/Canada – Continued Suspension* – opining that an original complainant should file its own Article 21.5

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6 India's Responses to the Panel's Questions, para. 6.

7 India's Responses to the Panel's Questions, para. 6.

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

9 *See* United States' Response to Panel Questions, para. 3.

request to invoke different provisions than those in the original proceeding – is simply not at issue in this proceeding.[10]

5. The "half a story" the Panel must purportedly accept per India is the following: one where a respondent Member that brings its own Article 21.5 proceeding wins, even if the measure taken to comply remains inconsistent with the provisions found breached in the original proceeding, provided the measure taken to comply is inconsistent with those provisions in some slightly different manner. Neither the text of the DSU, nor any interpretation proffered by a prior panel or the Appellate Body, supports such an absurd result.

6. *First*, the text of Article 21.5 provides in its prefatory clause that the proceeding is undertaken to resolve the "disagreement as to the *existence or consistency* with a covered agreement of measures taken to comply with the recommendations and rulings…"[11] India's interpretation would preclude an Article 21.5 proceeding from actually performing this function. Under the DSU, the Panel's assessment of whether a measure taken to comply actually *exists* and is *consistent* requires assessing the measure *in toto* with the Member's legal system, ***i.e.***, its relationship with other measures. This Appellate Body has supported this precise interpretation:

> In order to make an assessment of the "existence or consistency" of "measures taken to comply", it seems to us that a panel must be able to assess measures taken to comply in their full context, including how such measures are introduced into, and how they function within, the particular system of the implementing Member. The word "existence" suggests that measures falling within the scope of Article 21.5 encompass not only positive acts, but also omissions. It also suggests that, as part of its assessment of whether a measure taken to comply exists, a panel may need to take account of facts and circumstances that impact or affect such existence. The word "consistency" implies that panels acting pursuant to Article 21.5 must objectively assess whether new measures are, in fact, consistent with relevant obligations under the covered agreements.[12]

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[10] *US/Canada – Continued Suspension (AB)*, para. 354 ("If, however, the original complainant considers that the implementing measure is inconsistent with provisions of the WTO agreements not covered in the request for the establishment of a panel by the implementing Member, it may file its own request for the establishment of a panel under Article 21.5 identifying those provisions that it considers should be examined by the Article 21.5 panel. It would be for the Article 21.5 panel to determine if the implementing measure violates the WTO agreements in ways different from the original measure or whether certain claims fall outside the scope of Article 21.5 proceedings.")

[11] Conversely, there is no text that suggest that when a respondent initiates an Article 21.5 proceeding to resolve the disagreement, the existence and consistency of the measures taken to comply can only be determined if the original complainant also brings its own dispute.

[12] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 67; *see also* U.S. Responses to Panel's Questions, paras. 5-7.

As the Appellate Body correctly recognized in the preceding analysis, an Article 21.5 proceeding must be able to consider relevant facts and circumstances surrounding the measure taken to comply, including how it functions in the Member's system. That understanding allows a compliance panel to determine whether a measure taken to comply indeed exists or is consistent with the covered agreements. In contrast, the Appellate Body has never found that an Article 21.5 proceeding should "allow circumvention by Members by allowing them to comply through one measure, while, at the same time, negating compliance through another."[13]

7. The untenable nature of India's position is further illustrated by the situation – which is usually the case – where the original complaining Member brings the compliance proceeding. Certainly, no one would argue that the original complaining Member could try to game the result by omitting evidence or measures showing compliance, and by arguing that the defending Member had no right to introduce new evidence, including evidence of other relevant measures. Rather, the defending Member would have the right to bring that evidence forward, and the panel would need to consider it in evaluating compliance. The same is true where – as in the present proceeding – the original responding party brings the compliance proceeding.

8. *Second*, India's argument ignores what a panel in an Article 21.5 proceeding evaluates: a new measure. As the Appellate Body found in *Canada – Aircraft (21.5 – Brazil)*, a measure taken to comply is of course a new measure that is distinct from the measure at issue in the original proceeding:

> In our view, the phrase "measures taken to comply" refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been "taken to comply with the recommendations and rulings" of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the "measures taken to comply" which are – or should be – adopted to *implement* those recommendations and rulings. In these Article 21.5 proceedings, the measure at issue is a new measure …[14]

If there is a new measure at issue, then of course the arguments and evidence should not be confined to that raised against the measure in the original proceeding. The arguments and evidence instead will reflect the nature of the new measure. The Appellate Body's prior analysis is in accord:

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[13] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 102.

[14] *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 36 (emphases original) (footnote omitted).

> Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the "measure taken to comply" may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that the claims, arguments and factual circumstances which are pertinent to the "measure taken to comply" will not, necessarily, be the same as those which were pertinent in the original dispute. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.[15]

Accordingly, the United States or any other similarly situated Member in a similar procedural posture can of course raise arguments and evidence that take into account the nature of the new measure rather than be confined to inapposite arguments concerning a measure that may not exist.[16]

9. *Third*, under the DSU, India in this dispute must establish that the measure taken to comply is *fully* consistent with the *provisions* the panel and Appellate found to have been breached in the original dispute. On this point, India seems to confuse the difference between an argument and a claim. For example, India seems to take the position that the United States explaining how the Revised Avian Influenza Measure – assuming *arguendo* it applied OIE recommendations would still breach Article 2.3 – is a different claim, and thus outside the Panel's terms of reference.[17] India is wrong. It is an argument that demonstrates why India's claim of consistency under Article 2.3 fails. On this point, the recent analysis of the panel in *China – Broiler Products (21.5 – United States)* is instructive in providing an example of how a specific argument is different than a claim:

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[15] *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 41.

[16] Indeed, the limitation India proposes would also seem to frustrate the "prompt settlement" of disputes that "is essential to the effective functioning of the WTO" because it would require a multiplicity of litigation in order to effectively address WTO inconsistent measures. DSU, Article 3.3.

[17] India's Response to Panel Question 5.7, para. 137.

> As we have observed, in addressing questions of panel jurisdiction, there is an important distinction between claims and arguments. The claims here allege that the redetermination, which is the measure take to comply, does not satisfy the requirements of Articles 3.1 and 3.5 of the AD Agreement and 15.1 and 15.5 of the SCM Agreement. We note in this respect that the four sentences of Articles 3.5 and 15.5 are inextricably linked. Among the various arguments the United States makes in support of those claims is MOFCOM's alleged failure to reconcile its causation analysis with the improving domestic industry performance. Merely because this argument is not set out in the panel request does not preclude the United States from making it in the course of the dispute.[18]

In short, India's interpretation rests on the erroneous conflation of arguments and claims.

10. Here, India's Panel Request is presenting the following claims of consistency regarding the Revised Avian Influenza Measure: Articles 2.2, 2.3, 5.1, 5.2, 5.6, 6.1, 7.2, 7 as well as Annex B(2) and Annex B(5)(a), (b) and (d) of the SPS Agreement.[19] There is no notion in the DSU of presenting "one half story of the story" with respect to them; there is only whether India has made out a *prima facie* case that it has brought itself into compliance with respect to these provisions – and that its *prima facie* case subsequently withstands any rebuttal. This requirement stems from the basic burden of proof principles in dispute settlement – that the party making the assertion or claim bears the burden of establishing it.[20] The burden of proof principle in dispute settlement does not change simply because the present proceeding is through recourse to Article

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[18] *China – Broiler Products (21.5 – United States)*, para. 2.38(c), WT/DS427/RW/Add.1.

[19] India's Panel Request, Section 2, pp. 2-4, WT/DS430/21.

[20] *US – Gambling (AB)*, para. 140 ("A *prima facie* case must be based on "evidence and legal argument" put forward by the complaining party in relation to each of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."); *US – Wool Shirts and Blouses*, p. 14 ("Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.")

21.5 of the DSU – or because the original complainant has not brought its own Article 21.5 proceeding.[21]

11. *Finally*, the only support India draws for its interpretation is misplaced. Specifically, India invokes the panel requests for Article 21.5 proceedings filed by Colombia and Panama in DS461. India has not explained why Members' panel requests should have any interpretative value with respect to the DSU. After all, panels find that panel requests – not infrequently – fail to meet the requirements of the DSU.[22] In any event though, the panel requests in DS461 appear to reflect the scenario the Appellate Body described in *US/Canada – Continued Suspension*: the original complainant, Panama, is bringing claims on provisions that were not at issue in the original proceeding. The findings in the original proceeding reflected breaches of Article II:1(a) and (b) of the GATT 1994, which is what Colombia is claiming consistency regarding in its panel request.[23] A cursory review of Panama's panel request indicates that it seeking findings on various *other* provisions than those at issue in the original proceeding such as GATT Article X:3, XI:1, and multiple provisions of the Agreement on Customs Valuation.[24] As the United States explained above, that is not the situation in this case. The United States agrees that the only provisions at issue in this dispute are the one found breached by the panel and Appellate Body in the original proceeding.

12. In sum, India's grievance about the United States failing to bring its own Article 21.5 proceeding has no import on the Panel's assessment of whether the Revised Avian Influenza Measure is in fact consistent with the various provisions identified in India's Panel Request.

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[21] *Brazil – Aircraft (Article 21.5 – Canada) (AB)*, para. 66 ("However, in these Article 21.5 proceedings, Brazil argues that this burden of proof, under item (k), is on Canada. In our view, the fact that the measure at issue was "taken to comply" with the "recommendations and rulings" of the DSB does not alter the allocation of the burden of proving Brazil's "defence" under item (k)."); *US – Upland Cotton (21.5 – Brazil) (Panel)*, para. 9.3 ("The general rules regarding the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO agreement by another Member assert and prove its claim. These rules also apply to proceedings under Article 21.5 of the DSU.") (footnotes omitted); *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, para. 6.18.

[22] *See e.g., Canada – Wheat Exports & Grain Imports (Panel)*, para. 6.10 (portions of panel request did not comply with DSU Article 6.2 with respect to identification of measures).

[23] WT/DS461/19.

[24] WT/DS461/21.

Question 1.2: Are the veterinary certificates part of the measure taken to comply? Are they covered by the Panel's terms of reference?

Question 1.3: Are the post-import testing procedures part of the measure taken to comply? Are they covered by the Panel's terms of reference?

Consolidated Response to Questions 1.2 & 1.3:

13. India asserts that neither the veterinary certificates nor the post-import testing are measures taken to comply. To put it plainly, they are measures ostensibly applied to control for the risk of avian influenza from international trade – the subject of the original proceeding – and they were enacted as part of replacing the regime that was found WTO-inconsistent in the original proceeding.[25] For example, with respect to veterinary certificates, India's own response asserts that the certificates reflect how "India's AI measure is operationalized in specific cases."[26] While the United States acknowledges that India in its response to the U.S. Article 5.8 request asserted that they were not related to the Revised Avian Influenza Measure,[27] it is sufficiently clear that they contain the veterinary attestations India requires as a condition of import. Likewise, India acknowledges in a separate response that "the post-import inspection procedures are relevant to ensuring safety and compliance."[28] Under these circumstances, India cannot plausibly claim that they are not measures taken to comply.[29] At a minimum, since they clearly operate closely with S.O. 2337(E), as amended, they would be the types of measures that could be found to be closely connected to the measure taken to comply.[30]

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[25] United States' Response to Panel Questions, paras. 12-14.

[26] India's Response to Panel Questions, para. 11.

[27] India's Response to the Article 5.8 Request, Response to Question 6 (Exhibit IND-62) ("However, the requirements of SIP and health certificates have no correlation with the measures at issue.")

[28] India's Response to Question 4.2, para. 119.

[29] *Australia — Salmon (Article 21.5 — Canada)*, para 7.10, subpara 22 ("We note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether a measure is one 'taken to comply'. If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures 'taken to comply'").

[30] *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 81 & 90.

14. With respect to whether these are measures within the terms of reference of this dispute, the United States refer back to its response to this question.[31] With respect to the remainder of India's response, the United States has three observations.

India Cannot Avoid the Panel's Consideration of Post-Import Testing by Omitting It from its Panel Request

15. India first argues that post-import testing is irrelevant because it was not identified in the Panel Request.[32] With respect to this point, India's omission does not shield it from scrutiny. To the contrary, evidence of other measures adopted by India are completely relevant to determine the validity of India's assertions that it has brought its measures into compliance. The United States, as the responding party in this dispute, has brought these matters forward as rebuttal evidence. In accordance with the Panel's obligation under DSU Article 11 to conduct an objective assessment, the Panel must consider the parties' evidence and arguments, including evidence of post-import testing adduced by the United States. If post-import testing existed on May 28, 2017, then India clearly did not have a measure in place that conformed to the OIE Terrestrial Code; it had a measure that was more burdensome and restrictive (assuming you could even get to the point of having a shipment presented to India).

16. Moreover, India has not addressed why post-import testing is not a constituent component of S.O. 2337(E).[33] The evidence indicates that post-import testing is. On this point, it bears recognizing the relationship between the two. Specifically, the veterinary certificate for poultry meat on DADF's website states the following about the import testing:

> 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.

In other words, if one part of a country has avian influenza (say Hawaii), then even if a shipment arises from a zone free from avian influenza (say a part of a Delaware), the shipment from the AI free area will be tested. It is effectively the imposition of a control related to zoning. Zoning, as well importation in general in view of avian influenza is set forth in S.O. 2337 (E). Specifically, paragraphs 2(1) and 3(1)(i) of S.O. 2337(E) respectively provide as follows:

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[31] United States Response to Panel Questions, paras. 15-23.

[32] India's Response to Panel Questions, para. 13.

[33] United States' Response to Panel Questions, para. 23.

> (1) The import of poultry and poultry products into India shall be allowed from the country, zone or compartment ~~free from avian influenza~~ in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health and subject to fulfilment of requirements in paragraph 3 of this notification.
>
> ***
>
> (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.[34]

Since S.O. 2337(E) governs how "import of poultry and poultry products into India shall be allowed" and the "adaptation" for disease-free areas, it appears that an avian influenza testing requirement for imports is a consequence of S.O. 2337(E), and its process for importation and regionalization. Thus, post-import testing and S.O.2337(E) appear to be part and parcel of India's current avian influenza's control regime.

India's Claim of a Bilateral Agreement Does Not Preclude the Panel's Scrutiny of Post-Import Testing

17. India also asserts that the Panel should ignore post-import testing on account of a purported bilateral agreement between the United States and India.[35] Similarly, the existence of a purported bilateral agreement between the United States and India does not have any import on the situation of whether post-import testing requirements existed on May 28, 2017. As an initial matter, an agreement requires more than one party by definition – and the United States does not agree that there is any agreement. What India characterizes as an agreement is simply its own correspondence to the United States, *i.e.*, an offer.[36] Ultimately, even this correspondence did not exist when the Panel was established. Moreover, as India acknowledges in response to Question 2.1, the findings made in the original proceeding were "as such."[37] If India granted a

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[34] Exhibit IND-3 (text in red-strikeout was deleted in a subsequent amendment).

[35] India's Responses to Panel Questions, para. 12.

[36] As the United States noted at the panel meeting, if an agreement that resolves this dispute is reached, both India and the United States can approach the Panel to inform it of such. The United States' position is straightforward: India decided to initiate this dispute, and it does not need the United States' permission to terminate or suspend it under the DSU. If India decides to comply through technical discussions, the United States would certainly welcome it, and could approach the Panel jointly with India to let it know the Panel know that it concurred with India that compliance or satisfactory settlement was in fact achieved. But as of now, the United States does not concur with India's characterization concerning any agreement.

[37] India's Response to Panel Question 2.1, para. 18.

special dispensation to the United States, even if true, would not remedy the concerns regarding post-import testing "as such."

India Has Failed to Establish When it Adopted Veterinary Certificates and Post-Import Testing

18. India still refuses to answer a question that is central in determining whether the post-import testing and veterinary certificates are relevant evidence for the purposes of this dispute: when did India put them into place? Not surprisingly, India asserts veterinary certificates are evidence and post-import testing is not evidence. The reality though is that the question of veterinary certificates and post-import testing cannot be disaggregated in the arbitrary and unsupported fashion India proposes. The content of veterinary certificates and post-import testing are ***requirements.*** Whether these requirements are something that the Panel can take into account depends upon when they came into force so the Panel can ascertain their relevance to the operation of the Revised Avian Influenza Measure, as it existed on May 28, 2017.

19. On this point, the United States recalls its response to Question 1.6. A panel can consider action that takes place after a panel's establishment if doing so "shed[s] light on the actual content of the measure ***as it existed at the time of panel establishment***."[38] For these ***requirements***, they only shed such light if they were in place when the Panel was established. The table below summarizes the three potential scenarios when they came into existence; the relevant evidence for the scenario; and the consequence of that scenario with respect to whether the Panel should consider evidence in understanding the operation of the Revised Avian Influenza Measure when the Panel was established.

[38] United States' Responses to Panel Questions, para. 19.

Scenario	Status on May 28, 2017	Relevant Evidence For the Scenario	Relevant Evidence?
Scenario A	Veterinary certificates and post-import testing requirement are **Not** in Place	The evidence for veterinary certificates not being in place: • India removed veterinary certificates from DADF website, and they were still missing as of the date of the Panel Request.[39] • U.S. raised absence of veterinary certificates at DSB without response.[40] • U.S. requested copies of veterinary certificates in Article 5.8 request and did not obtain response.[41] • India did not respond to U.S. Department of Agriculture's request in March 2017 to accept U.S. model certificates and U.S. regionalization requests by acknowledging that any model certificates could be used for trade.[42] • India has not provided any veterinary certificates used as part of an actual import into India.	**No**
Scenario B	Veterinary certificates and post-import testing requirement Are in place	There is no evidence to support India's assertion the certificates were in place, capable of use, could be obtained by speaking with DADF. Since the veterinary certificates India has provided reference post-import testing, it must be the case that post-import testing was in existence at the same time India generated the veterinary certificates, if not earlier.	**Yes**

39 United States' First Written Submission, para. 30; Exhibit USA-10.

40 WT/DSB/M/389, para. 6.2 (Exhibit USA-9).

41 United States' Article 5.8 Request, question 2. (Exhibit USA-24) ("Please provide a copy of all instruments, including any statutory orders, *veterinary certificates*, or office memoranda, that India maintains with respect to the control of AI from imported goods or has otherwise taken to comply with the DSB's rulings and recommendations in DS430.") (Emphasis added).

42 Exhibit IND-18.

Scenario	Status on May 28, 2017	Relevant Evidence For the Scenario	Relevant Evidence?
Scenario C	Veterinary certificates are Not in Place and post-import testing requirement Is in place	The evidence for veterinary certificates not being in place is the same evidence noted in Scenario A. Post-Import Testing: India did not notify any other avian influenza measures than the one referenced in this dispute. Either post-import testing is a part of the measure, or breaches India's notification obligation under Article 7 and Annex B of the SPS agreement.	**No for Veterinary Certificates; Yes for Post-Import Testing**

20. Under Scenario A, post-import testing may not be an issue in this dispute. However, India cannot invoke the veterinary certificates either. As the United States has explained, this means that importation was not feasible under S.O. 2337(E) when the Panel was established – and India had not brought itself into consistency because there is a *de facto* import ban.[43] This scenario has the most evidence behind it. In considering the evidence, the United States notes that the Panel asked India to clarify at the Panel Meeting the circumstances regarding the model certificates that were available for use. This is information solely within India's possession. The Panel is entitled to make a logical inference: that India has withheld such information because it is not favorable to its interests.[44]

21. Under Scenario B, the United States agrees that the Panel could take into account the veterinary certificates, but would also have to take into account the post-import testing, which would demonstrate that India's measure does not conform to the OIE Terrestrial Code, and that it discriminates against foreign producers.[45]

22. Under Scenario C, like scenario A, India has a measure that does not allow trade because of the absence of veterinary certificates. The only difference is the existence of a post-import testing requirement. That requirement, while perhaps a redundant and superfluous barrier, is nonetheless within the Panel's scrutiny. The United States' position, however, is if the Panel determines that veterinary certificates are outside the scope of this dispute – and that India accordingly still maintains a WTO inconsistent measure – then the Panel would be within its

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[43] *See e.g.*, United States' First Written Submission, paras. 78-79; United States' Second Written Submission, Section II.B.2.

[44] *Canada – Aircraft (AB)*, para. 203 ("Clearly, in our view, the Panel had the legal authority and the discretion to draw inferences from the facts before it — including the fact that Canada had refused to provide information sought by the Panel.").

[45] *See* United States' Second Written Submission, Sections III.A.3 and III.E.2; European Union's Third Party Submission, para. 12 & 21.

discretion to simply refrain from expending further effort to ascertain when post-import testing came into place.

Question 1.4: The Appellate Body described the burden of proof of an original respondent in a 21.5 proceeding initiated by that respondent as follows:

> **"…the original respondent will have the onus to show that its implementing measure has cured the defects identified in the DSB's recommendations and rulings. The quantum of proof entailed by this is a clear description of its implementing measure, and an adequate explanation regarding how this measure rectifies the inconsistencies found in the original proceedings, so as to place the Article 21.5 panel in a position to make an objective assessment of the matter and, in the absence of rebuttal, to rule in favour of the original respondent".[1]**

Should the Panel apply the burden of proof test as described in this passage? If not, why not?

> **1 Appellate Body report, *US/Canada – Continued Suspension*, para. 362.**

Comment:

23. Concerning India's comment regarding where an original "complainant adduces new inconsistencies…," the United States refers to it comments on India's response to question 1.1. Specifically, the United States has brought forward evidence and argumentation demonstrating that India did not meet its burden of showing compliance. For example, the United States has argued and supplied evidence on points such as the following:

- India claims that when the Panel was established, it allowed trade under a regime that conformed to the OIE Terrestrial Code. The United States' arguments and evidence show India removed veterinary certificates from DADF's website, and they were still missing when the Panel was established.[46] The United States additionally showed that India's documentation reflects post-import testing for avian influenza, which is not called for under the OIE Terrestrial Code.[47]

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

[47] United States' Second Written Submission, para. 50, Exhibit USA-24.

- India without supports claims it has rectified the breaches of Article 3.2 found by the panel in the original proceeding, and upheld by the Appellate Body. The United States has provided India's National Action Plan 2015, which shows that India has not adopted any controls adequate to reliably detect Low Pathogenic Avian Influenza (LPAI).[48]

- India claims it has withdrawn its condition of entry requirement for avian influenza. The United States has explained that India utilized office memoranda to communicate S.O.s to relevant government departments and that the only one before the Panel is one that noted the ban has continued.[49]

- India in its first written submission did not even try to address the findings from the original dispute concerning the breach of Article 7 and Annex B of the SPS Agreement. The United States provided India's notifications and demonstrated that there are clear instances where India's measures are inconsistent with those provisions.[50]

24. Thus, the United States provided evidence and arguments explaining why India did not meets its burden of showing compliance. The United States did not, however, bring new claims, because the United States did not argue that India's compliance measures are inconsistent with any provision not covered in the original recommendations.

Question 1.5: Is the application of the revised AI measure part of the case that India has to make in order to demonstrate compliance?

Question 1.6: Can a panel take into account action that occurs after panel establishment, if that action (1) is part of the measure taken to comply; (2) may constitute evidence of the application of the measure?

<u>Consolidated Comment to Questions 1.5 and 1.6:</u>

25. India, invoking the Appellate Body's prior analysis from *US – Clove Cigarettes*, asserts that the Panel's assessment "must take into account its 'design, architecture, revealing structure, operation, and application.'"[51] India also asserts that "[t]o the extent that the actions occurred

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48 Exhibit USA-14.

49 Exhibit USA-17 (Exhibit IND-17 in the original proceeding).

50 United States' First Written Submission, Section V.F and Exhibit USA-1.

51 India's Response to the Panel Questions, para. 15, citing *US – Clove Cigarettes (AB)*, para. 181-182.

after the panel establishment constitute evidence relevant to ascertaining" those aspects of the measure, the Panel may consider them as evidence in this proceeding.

26. With respect to the first point, the United States notes that the Appellate Body analysis from *US – Clove Cigarettes* that India invokes did not concern an examination of these factors in the context of establishing compliance. Instead, it concerns a panel's evaluation of a claim that a measure breaches Article 2.1 of the TBT Agreement. The paragraph from which India draws these factors provides as follows:

> Accordingly, where the technical regulation at issue does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.[52]

Accordingly, the Appellate Body has never found all of these factors to be a prerequisite "to ascertain[ing] whether India's revised AI measure has effectively implemented the DSB's recommendations and rulings in the context suggested by India."[53]

27. Nonetheless, the United States does not disagree that the Panel may examine such aspects of the Revised Avian Influenza Measure, if it contributes to conducting an objective assessment under Article 11 of the DSU. In particular, the features India invokes may be relevant to understanding the measure in totality, which the Appellate Body has recognized is part of the task of a compliance panel:

> When the issue concerns the consistency of a new measure "taken to comply", the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality. The fulfilment of this task requires that a panel consider both the measure itself and the measure's application. [54]

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52 *US – Clove Cigarettes (AB)*, para. 182.

53 India's Response to Panel Questions, para. 15.

54 *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para 87 (footnote omitted).

Accordingly, the United States does not disagree that the Panel can consider these factors, provided they are recognized as simply part of an overall assessment of the measure.

28. With respect to India's position that the Panel can examine evidence after the Panel establishment if it touches on these features, the U.S. position is: yes, evidence of these features that post-dates the Panel's establishment can be considered, provided it goes to the content of the measure as it existed on the date the Panel was established. For example, if a measure provides that customs rulings will be issued within 30 days, a panel might take into account the existence of rulings that meet such deadlines, even if they are issued after the Panel's establishment. The rulings could be evidence concerning the measure's application, although a panel is entitled to weigh it accordingly. Conversely, in the context of the same measure, if the evidence at issue was the appointment of customs officials who issue rulings (and none or few were in place when the Panel was established), a panel could not take that development into account because it could not be construed as reflecting the measure's operation when the panel was established. In short, the issue is not as simplistic as India suggests.

2 MEASURE AT ISSUE

Question 2.1: What is the relevance of evidence of application in assessing the consistency of the revised AI measure? Do the veterinary certificates submitted by India amount to evidence of "consistent application" of the revised AI measure?

Comment:

29. As noted in its comments on the preceding question, and in its response to Question 1.5,[55] the United States does not dispute India's statement that application is "very much relevant in assessing the consistency of [the] revised AI measure."[56] The United States, however, disagrees with India that the veterinary certificates it has provided are evidence of application because they purportedly demonstrate that India has operationalized the Revised Avian Influenza Measure.

30. India needs to establish operationalization of the Revised Avian Influenza Measure by the time of the Panel's establishment. That requires showing that such certificates were in place, and capable of use at that juncture. None of the certificates India has provided indicate that is the case. For example, the most recent certificates India provided, Exhibits IND-57 through IND-59, are simply blank certificates stamped by DADF's Assistant Commissioner. There is no indication as to when they were created, what the stamp signifies, of if they have even been distributed to any of the entities that India supposedly issued sanitary import permits (SIPs).[57] Indeed, none of the certificates India has provided even indicate they *have even been utilized for*

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55 United States' Responses to Panel Questions, paras. 27-28.

56 India's Response to Panel Questions, para. 19.

57 *See e.g.*, Exhibits IND-21-38.

trade. Accordingly, they simply demonstrate that at some point in time India generated paperwork; not that India had adopted certificates by the time the Panel was established; and certainly not any evidence regarding how the Revised Avian Influenza Measures has been applied for the purposes of trade.

Question 2.2: Paragraph 1(f) of S.O. 2337(E) excludes "processed poultry and poultry products in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health" from the definition of "poultry products". Are any processed products of poultry covered by S.O. 2337(E)?

Question 2.3: : In paragraph 24 of India's second written submission, India confirms that live pigs are not covered by S.O. 2337(E) as amended. What is the legal regime currently applicable to the import of live pigs?

Question 2.4: What is the import regime applicable to pathological material and biological products from birds, which were covered by the original measure?

Consolidated Comments to India's Responses to Questions 2.2, 2.3, and 2.4:

31. The United States makes three points concerning India's responses to these questions. First, India appears to assert that the products covered by S.O. 2337(E) are irrelevant to assessing the compliance of the Revised Avian Influenza Measure.[58] Such an assertion is in contradiction with the precise findings made by the panel and Appellate Body in the original dispute. The Panel explicitly found what products the measure at issue in the original proceeding covered and made findings accordingly.[59] Because there are findings that the original measure was inconsistent with specific products, including live pigs and pathological materials, India has an obligations to bring itself into consistency with respect to the measures that apply to those products.

32. Second, the United States notes that India's response does not include any supporting evidence, including instructions to border authorities and office memoranda, regarding the precise products that are subject to S.O. 2337(E). Nor has India explained or provided evidence demonstrating that its prior instructions for the products subject to S.O. 1663(E) have been

[58] India's Response to Panel Questions, para. 22 & 25.

[59] *See* India – Agricultural Products, para. 7.193 & 6.24. For example, the panel in the original proceeding found breaches of Article 5.6 of the SPS Agreement for those products where the OIE Terrestrial Code reflected a relevant recommendation. *India – Agricultural Products (Panel)*, para. 7.597 ("We have found that the United States identified measures based on the Terrestrial Code as a reasonably available alternative to India's AI measures for the products that are within the scope of Chapter 10.4."). Likewise, when the Appellate Body reversed certain Article 2.2. findings on fresh meat and poultry and eggs, it left the Article 2.2 finding undisturbed for other products. *India – Agricultural Products (AB)*, para. 6.1a(iii).

superseded by S.O. 2337(E).[60] Accordingly, India's has not explained what products does S.O. 2337(E) set import conditions for, and what the import conditions for particular products might be.

33. Third, with respect to each of the products referenced in these questions, the United States notes that India's responses highlight its failure to provide requisite evidence to establish that the Revised Avian Influenza Measure is consistent with India's WTO obligations. The United States highlights below several instances where India's comments demonstrate that India has failed to provide a clear description of the relevant import conditions, and thus cannot claim the Revised Avian Influenza Measure has brought India into compliance with the findings made with respect to these findings.

Processed Products of Poultry

34. India states that processed products are not subject to S.O. 2337(E). India has not explained precisely what the phrase "except processed poultry and poultry products in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health" means. India has not explained, for example, whether the expression refers to products that are subject to Article 10.4.20 of the OIE Terrestrial Code, a subset of those products, or a completely different set of products altogether. Absent such explanations and evidence, India has not provided a clear explanation regarding how its avian influenza regime governs the importation of these products.

Live Pigs

35. India claims that there is no measure with respect to live pigs for HPAI. India, however, has not demonstrated that the prior restrictions were indeed removed, including whether there are still restrictions on account of LPAI. Moreover, India claims that according to India's Tariff Import Harmonized System Policy 2017, live pigs are a "restricted good" that will only be allowed if a license is issued.[61] India does not even try to address what the licensing conditions are, whether it is a sanitary measure supported by a risk assessment, and whether this 2017 policy is replacing the import conditions in S.O. 1663(E) with respect to live pigs. Accordingly, India with respect to this product has also not carried its burden.

Pathological Material and Biological Products from Birds

36. As with its explanation of live pigs, India has not demonstrated that the prior restrictions were indeed removed, including restrictions on account of LPAI. India claims the import

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[60] *See* Exhibit USA-18 (Exhibit USA-17 in the original proceeding) (interoffice memorandum noting continuation of the ban).

[61] India's Responses to Panel Questions, para. 23.

conditions it applies will be in accordance with Article 5.8 of the OIE Terrestrial Code, but has failed even to provide the measure that reflects that is indeed the case.[62]

Question 2.5: **Paragraph 2(1) of S.O. 2337(E) states that "The import of poultry and poultry products into India shall be allowed from the country, zone or compartment 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 the notification." During the meeting with the Panel, India explained that this does *not* mean that no imports are possible unless and until the procedure set out in paragraph 3 has been completed and that this sentence has to be read with the addition "whenever a regionalization claim is made." Can India confirm this statement, and explain the basis on which the words "whenever a regionalization claim is made" should be read into the text? Has this reading been communicated to relevant parties such as Indian authorities and market participants, and, if so, how?**

Comment:

37. The United States raises four points concerning India's response. First, India has not explained the basis for why the language "whenever a regionalization claim is made" should be incorporated into S.O. 2337(E), or how such language even arose. On this point, it bears emphasis that this is not a situation where the relevant language is ambiguous, and India is suggesting one potential interpretation over another. Here, India is incorporating language that would not flow from any natural or even potential interpretation of the relevant text of paragraph 2(1). There is no reason any typical reader of this language, including an Indian customs official, would arrive at the interpretation India suggests.

38. Second, the failure to draft clear language should be construed against India, particularly given that India brought this dispute, and bears the burden of proving its assertions. India has drafted a measure which does not on its face clearly meet India's international obligations. And, India has not India adduced other evidence – such as contemporaneous, publicly available guidance – that would support the position that the language has the meaning that India asserts in its litigation submissions. In short, India cannot prove its assertions regarding the meaning of its purported compliance measure.

39. Third, the trade data cited by India is not evidence that supports its proffered interpretation. Specifically, India argues that Exhibit IND-39 demonstrates that poultry products have entered into India, but none of these countries have sought regionalization.[63] As India noted in its first written submission though, "[t]hese countries had not applied for the recognition of pest or disease-free areas as they have not had any outbreaks of AI in their territories,

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62 India's Responses to Panel Questions, para. 26.

63 India's Response to Panel Questions, para. 29.

according to the OIE website."[64] India fails to explain why any purported imports from these countries would necessarily be relevant. Moreover, Exhibit IND-39 is a simply a chart of India's trade data. It does not explain the precise import conditions that were applied to any imports from these countries.

40. Finally, India's assertion that a SIP would inform importers of with the interpretation it proffers is incorrect. Notably, India does not point to language to any of the SIPs that India has provided to explain how they support the interpretation. For the Panel's convenience, the United States has placed a screenshot of the import conditions listed in a sample SIP (Exhibit IND-25 (Contains SCI) in this case). As the Panel can establish, the import conditions in the SIP do not contain any language suggesting how paragraph 2(1) of S.O. 2337 (E) should be interpreted. Thus, India has failed to provide any evidence to support the interpretation it proffers to the Panel or that India communicated such an interpretation to relevant parties. Accordingly, the Panel is entitled to infer that this interpretation is simply a *post-hoc* justification of the text.

64 India's First Written Submission, para. 41.

***** SCI Redacted *****

Question 2.6: During the Panel's meeting with the parties, India explained that it is not possible for an exporting country, in case of an outbreak of HPAI, to export from HPAI-free zones or compartments unless it has previously requested and been granted recognition of disease free areas or areas of low disease prevalence under paragraph 3 of S.O. 2337(E). In light of this statement, please explain the purpose of the asterisked clause contained in the model veterinary certificate for poultry meat in Exhibits IND-45 and IND-57.

Comment:

41. India's assertion concerning the relationship between the asterisked clause and paragraph 3 of S.O. 2337(E) is incorrect.[65] For the Panel's assistance, the United States has placed the respective texts side by side below. As the Panel can see, the texts are not reproductions or even close similes. The asterisked clause appears to indicate that India when taking an export from a zone or compartment is asserting the right to engage in an audit, or perhaps insist on an audit in order to approve trade from a zone. The text of paragraph 3 broadly states that *exporting countries* need to make a written request and provide information to India for recognition of pest or disease free areas and that India will adapt its measures in accordance with the SPS Agreement. They are thus not the same. One is speaking of site visits or audits while the other is speaking about making a request for regionalization and perhaps adapting measures.

Asterisked Clause	Paragraph 3 of S.O. 2337(E)
*In case of export from zones and compartments, the Indian Veterinary Authority reserves the right to verify one or more processing plants/related facilities covering the zones and compartments of the country of origin and approve such zone and compartments along with the concerned facilities after audit. Department of Animal Husbandry, Dairying and Fisheries, Ministry of Agriculture and Farmers Welfare, Government of India, Krishi Bhawan, New Delhi may be approached to approve such zones and compartment.	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 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 necessary evidence to the Department of Animal Husbandry, Dairying and Fisheries, Ministry of Agriculture and Farmers Welfare in the Government of India.

[65] India's Responses to Panel Questions, para. 32.

42. The United States highlights this discrepancy not because it objects in principle to Members using site visits as part of a regionalization determination, but to highlight that the meaning India ascribes to paragraph 3 of S.O. 2337(E) is not readily clear despite its protests otherwise.[66]

Question 2.7: India also stated during the meeting with the Panel that outbreaks of LPAI do not prevent exports from a country. Where is this reflected in S.O. 2337 (E)? Does this also apply to live poultry?

Question 2.8: Have there been any imports into India from LPAI-affected countries since the entry into force of the revised AI-measure?

Combined Comments to Questions 2.7 & 2.8:

43. India's responses are a reiteration of the arguments it has made previously concerning S.O. 2337(E).[67] Notably though, India also still fails to provide any documentation that demonstrates that the interpretation it presents to the Panel now has ever been communicated to the relevant Indian authorities, or generally to interested parties. On this point, the United States notes India's invocation of the model veterinary certificates. The United States has already addressed why the absence of veterinary certificates from DADF's website suggests that no certificates actually existed when the Panel was established.[68] There is an additional implication though with respect to the issue of India's assertion that no countries reporting outbreaks of LPAI have attempted to ship or that India allows for import from such countries: why would producers in those countries think they could? If India has historically blocked trade from areas reporting LPAI, and then is not transparently conveying any purportedly revised import requirements per the system it normally uses, then they have no reason to believe anything has changed. In other words, in addition to the lack of any documentary evidence to support India's proffered interpretation, the Panel can also take into account India's obfuscation in evaluating the India's contentions on the meaning of S.O. 2337(E).

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

67 India's Response to Panel Questions, para. 33; *see* India's First Written Submission, paras. 73-74; India's Second Written Submission, para. 53.

68 *See e.g.*, United States' First Written Submission, para. 33, 77-79.

Question 2.11: India refers to the case of Spain, with which India has agreed on a veterinary certificate (Exhibit IND-44):

(a) Which veterinary certificates were used with Spain prior to agreeing on this certificate? Please submit copies of these certificates. What were the reasons - and the procedural context, if any - for negotiating the certificate contained in Exhibit IND-44? Please submit all relevant communication between India and Spain.

Comment:

44. India does not specifically answer the question of what veterinary certificates were used for exports from Spain to India prior to the certificate contained in Exhibit IND-44. While India claims that it "maintains" (present tense) a model certificate, India does not claim that it did so prior to its agreement with Spain, or that any such certificate had been used or could have been used for exports from Spain. Nor has India provided a response from Spain concerning India's purported acceptance of its certificate – or any evidence that this bilaterally agreed certificate (like its model certificates) was ever used for trade.

45. As the United States explained in its First Written Submission, as of the date that the Panel was established in this Article 21.5 proceeding, and as of over a month thereafter, DADF's website did not have veterinary certificates for poultry products posted.[69] Accordingly, there is no evidence that as of establishment of this Article 21.5 panel, there were any veterinary certificates that could be used to import poultry products into India.

46. As the United States has previously indicated,[70] this Article 21.5 proceeding concerns the question of whether India had achieved compliance as the date that the Panel was established. An agreement with Spain on a veterinary certificate many months later does not indicate that, as of the date that the Panel was established, India's measures permitted importation, permitted regionalization, or in any way addressed the inconsistencies with the SPS Agreement that the Panel and Appellate Body found in this dispute.

47. The United States further notes that, despite the Panel's request in Question 2.11(a), India did not provide context, including relevant bilateral communication, indicating the reasons why this certificate was negotiated. Rather, it provided only the certificate itself and India's letter

[69] U.S. First Written Submission, para. 33.

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

accepting the certificate.[71] Accordingly, even if the certificate had been agreed to before establishment of the Panel, it could not have served as evidence of willingness by India to negotiate veterinary certificates, and more generally, as evidence that India had complied with the DSB's recommendations.

(b) At the substantive meeting, India stated that Spain has not requested recognition of disease free status pursuant to paragraph 3 of S.O. 2337(E). India also explained that this means that no exports from anywhere in the country would be possible if and when there is an outbreak of HPAI in Spain. However, the certificate contained in Exhibit IND-44, in clause 8, contains language referring to "country, zone or compartment" which would seem to make it possible that a Spanish veterinarian would attest to disease freedom in a zone or compartment of Spain, rather than the whole country. Thus, under the terms of the veterinary certificate it would be possible to export from disease free zones, even though India has not recognized any disease free zones in Spain. Please explain how, and submit all relevant documentation demonstrating that, it would be impossible (in the absence of any recognition of disease free status) for Spain to import under these circumstances, including the bilateral agreement referred to by India during the meeting with the Panel.

Comment:

48. India's interpretation of its bilateral veterinary certificate for imports from Spain (Exhibit IND-44) bears directly on the interpretation of S.O. 2337(E), as both use the phrase "country, zone, or compartment."

49. In paragraph 44 of its responses, India explains that the use of this phrase in the certificate with Spain does NOT mean that imports would be accepted from an AI free zone or compartment of Spain when HPAI is present elsewhere in Spain. By contrast, India has taken the position that use of the phrase in S.O. 2337(E) demonstrates that India is willing to regionalize and has complied with its regionalization obligations.

50. India's reading of the veterinary certificate for imports from Spain highlights why the language of S.O. 2337(E) should not be taken to demonstrate compliance with India's

[71] *See* Exhibit IND-44. India appears to indicate, in its answer to question 2.11(b), that the documentation in Exhibit IND-61 provides context for the certificate. Exhibit IND-61 provides no indication as to why the certificate was negotiated. Moreover, except for the non-substantive two-line letter from a Spanish official transmitting the proposed certificate, the documents in Exhibit IND-61 were not exchanged until after the certificate had been agreed to. Of particular note, while the transmittal letter for Spain's questionnaire is dated September 12, 2017, India's letter of December 12, 2017 indicates that Spain's transmittal letter and questionnaire were delivered to India at a meeting that occurred on November 13, 2017 – after India's October 30, 2017 letter accepting Spain's veterinary certificate. India confirms the November 13, 2017 date of receipt in paragraph 52 of its answers to the Panel's questions.

regionalization obligations. Indeed, India's contrary interpretation of the same language in the certificate highlights that the language's appearance in the S.O. does not necessarily indicate any intent to offer real regionalization opportunities.

51. India's answer highlights a second important point about its process for approving importation. It notes that veterinary certificates can be used only with a valid SIP and implies that SIPs would not be issued for imports from Spain in the event of an HPAI incident anywhere in that country.[72] This response demonstrates that even in the event that an India-approved veterinary certificate on its face would appear to allow for regionalization, or would appear to otherwise comport with requirements of the SPS Agreement, that does not offer assurance that India will actually permit importation in the circumstances apparently contemplated by the certificate. Rather, it appears from India's response that non-issuance of SIPs could be used to enforce additional requirements for importation beyond those for which an agreed certificate requires certification.

Question 2.12: With reference to paragraph 78 of India's second written submission, please provide further details of India's engagement with France. Has France submitted a formal application for recognition, including replies to the Questionnaire, required under paragraph 3 of S.O. 2337(E)? If so has the request been processed and what has been the outcome of the process?

Comment:

52. [[SCI Redacted **********[73]**********.

53. **********.

54. **********

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Question 2.13: Has any country not mentioned in India's second written submission requested recognition under paragraph 3 of S.O. 2337(E)? If so, please provide details. How often has the procedure in paragraph 3 been applied so far? Please provide details of every instance of application, including on the outcomes of such applications, if any.

Comment:

55. As the United States has already explained in its comments above, India's exchanges with Spain and France do not serve to establish compliance with India's regionalization obligations. Given their timing, moreover, they certainly do not assist India in establishing that India had achieved compliance with these obligations as of the date of establishment of this Article 21.5 Panel.

Question 2.14: According to the heading of paragraph 3 as well as paragraph 3(2) of S.O. 2337(E), paragraph 3 concerns "recognition of pest or disease free areas and areas of low pest or disease prevalence". The "Guidelines for Recognition of Disease Free Areas, Zones and Compartments", submitted by India as Exhibit IND-7, set out a procedure to obtain a "final decision".

a. Please explain what from the final decision takes and to who it is communicated both internationally and domestically. In particular, how do the relevant authorities in India know which country has received recognition of disease free areas and which has not?

Comment:

56. India's answer to question 2.14(a) is incomplete, and India's failure to fully the answer the question is telling. In particular, India provides no indication of who within India a final decision is communicated to, and thus no indication that it is communicated to anybody. India states that "[t]he SIP issued by the relevant committee issues the SIP only for those areas which are free from HPAI," but India provides no indication of how "the relevant committee" would know that it could issue SIPs for imports for certain areas of a country following an AI incident in that country, let alone how the "relevant committee" would know what the relevant areas of an exporting country are or how "this arrangement" should otherwise be "reflected in the SIP issued" for a particular shipment.

57. India's answer highlights the fact that India has not demonstrated that mere issuance by India of a "final decision" on a request for regionalization would result, consistently or even ever, in compliance with India's regionalization obligations under the SPS Agreement. India has

accordingly failed to meet its burden of showing compliance with respect to its regionalization obligations.

b. Is the decision contained in Exhibit IND-54 such a "final decision"?

Comment:

58. For a number of reasons, India's letter of December 4, 2017, found in Exhibit IND-54, does not establish that India has in fact accepted anything.

59. First, the December 4 letter seeks changes to the Company Self Certification Statement[74] and also informs the United States of the imposition of certain post-import testing requirements which are unnecessary, and to which the United States has not agreed.[75] The certification and import process is thus not complete. Accordingly, it does not appear that Exhibit IND-54 results in a final decision on the terms pursuant to which imports from the United States will be permitted into India.

60. Second, in light of the points made in the U.S. Comment on Answer 2.14(a), the United States does not consider that the document found in Exhibit IND-54 establishes that India will in fact apply the principles of regionalization with respect to the United States or ensure acceptance of any veterinary certificate for imports from the United States.

61. Third, the timing of this letter, which is dated just one day before the meeting of the parties with the Article 21.5 Panel in this dispute, suggests a particularly strong need for additional evidence here in order to conclude that the purportedly-accepted veterinary certificates and regionalization will be accepted in practice, and that the letter was not generated only to create an impression of action for purposes of this WTO dispute.

62. Fourth, the United States notes that in any event, India's letter of December 4, 2017, establishes nothing with respect to India's compliance with its SPS Agreement obligations on the date that the Panel was established.

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74 Exhibit IND-54, para. 3.

75 Exhibit IND-54, para. 4.

c. What are the applicable criteria in deciding whether to recognize a disease free area, zone, or compartment? Where are they laid down?

U.S. Comment:

63. India cites to S.O. 2337(E) for the proposition that adaption shall be made "in accordance with" the requirements of the SPS Agreement and the Indian government's own guidelines. This is problematic for a number of reasons.

64. First, India's guidelines provide no substantive criteria for the assessment of regionalization.[76] Accordingly, India's answer that those guidelines and the SPS Agreement supply the relevant criteria in truth points only to the SPS Agreement, and represents nothing more than an unsupported assertion that India will comply with its WTO obligations when assessing whether to recognize an area, zone, or compartment.

65. Indeed, Article 6 of the SPS Agreement lists only considerations that should be taken into account when assessing the SPS characteristics of a region. It does not state how these considerations might translate into assessment criteria when a Member is assessing regionalization with respect to a particular disease. It certainly does not explain what criteria are relevant with respect to AI specifically.

66. India contends that its reference to requirements of the SPS Agreement serves to effectuate two layers of cross-references: first an incorporation of criteria in SPS Agreement Article 6.1, and then an incorporation of international standards on account of SPS Agreement Article 6.1's reference to "appropriate criteria or guidelines which may be developed by the relevant international organizations."[77] This raises the question of why two layers of cross-references were needed. If India had sought to incorporate criteria from Article 6.1 or international standards, it could have done so explicitly.

67. India's failure to do so is all the more problematic given that the underlying dispute focused significantly on India's unreasonable interpretations of what was permitted under relevant international standards. The original panel and Appellate Body roundly rejected those interpretations. India's decision to merely cross-reference the SPS Agreement thus cannot serve to establish that India has in place WTO-consistent criteria on whether to recognize a disease free area, zone, or compartment.

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[76] India states that the guidelines in turn note the need to complete India's questionnaire (India's Responses to Panel's Questions, para. 61), but the questionnaire merely provides information that India is seeking, not criteria against which India will assess a regionalization request. This point is discussed in more detail in the U.S. Comment on India's response to question 6.3.

[77] India's Responses to Panel's Questions, paras 59-60.

68. Finally, it is irrelevant whether or not the United States criticized India, prior to initiation of this Article 21.5 proceeding, for failure to provide criteria against which regionalization requests will be assessed. The United States has no obligation to have previously warned India of defects in its measures in order to defend against an improper claim of compliance by India. India's claim that the United States is somehow precluded from arguing that India lacks assessment criteria is particularly baseless in a proceeding that, like the present one, was initiated by India.

69. Further, the fact that the United States provided certain information to India in response to India's questionnaire in no way suggests that the United States understood the subjects covered by the request to be the criteria against which a recognition assessment would be made. The United States simply understood that the information provided to be information that India had requested.

d. S.O. 2337(E) refers, inter alia, to "area of low pest or disease prevalence" as defined in the SPS Agreement (Paragraph 1 of S.O. 2337(E) as amended). The definition contained in Annex A, paragraph 7 of the SPS Agreement speaks of an area "in which a specific pest or disease occurs at low levels…" Is the concept of "low pest or disease prevalence" relevant to the control of AI? If so, how is it interpreted and applied in the context of S.O. 2337(E)?

Comment:

70. India's contention that the concept of areas "of low pest or disease prevalence" "may not be relevant with respect to AI" raises the question of why this concept is mentioned specifically in India's AI measure (S.O. 2337(E), as amended). This illustrates that for India, inclusion of a concept in the measure does not necessarily mean the concept is relevant to AI. This in turn serves to undermine India's position that, in the circumstances presented here, the text of S.O. 2337(E), as amended, could itself serve to demonstrate compliance.

e. How does the procedure under paragraph 3 of S.O. 2337(E) relate to the procedure for obtaining a sanitary import permit (SIP) under S.O. 2666(E) (previously S.O. 655(E)), in particular as regards the carrying out of a risk analysis (paragraph 3(ii)) of S.O. 655(E)?

Comment:

71. India's answer highlights the existence of significant questions with respect to whether, in the event that DADF were to recognize the regionalization an of exporting country for HPAI under S.O. 2337(E), the existence of AI in the exporting country but outside the zone from which a shipment originates could result in the Risk Analysis Committee denying a SIP for the shipment. Indeed, India's answer does not state that the Risk Analysis Committee would be bound by a decision made pursuant to S.O. 2337(E). With India bearing the burden of proof, its failure to establish that the Risk Analysis Committee is bound by the regionalization recognition

is fatal to its position. Indeed, India has not established that the SIP process will not be used as an alternate avenue for the imposition of WTO-inconsistent AI-related requirements for importation.

f. How are the locations and boundaries of proposed disease free areas, zones and compartments identified? Taking the example of the United States, in the case of an outbreak of HPAI in, e.g. California, how would India identify the disease-free areas, from which exports are still possible?

Comment:

72. Neither S.O. 2337(E), as amended, nor India's Guidelines, actually provide that the locations and countries of proposed disease free areas will be those identified by the exporting country. Rather, the guidelines simply provide that an exporting country may approach India "with an application to recognize [its] Avian Influenza free areas." The S.O. and Guidelines do not say that the exporting country should identify the boundaries of those areas, or that India will define areas based on the boundaries proposed by the exporting country. This is crucial in an Article 21.5 proceeding initiated by a Member claiming compliance – like the present proceeding – in which the Member claiming compliance bears the burden of establishing that its measures achieve compliance.

73. Further, while the United States appreciates India's statement that it has accepted the United States request for regionalization, the United States would reiterate that for the reasons discussed elsewhere, India has not established that it will in fact accept products from anywhere in the United States following detections of AI in the United States – including following detections of LPAI or products from outside containment zones following detections of HPAI. With respect to India's assertions that India's letter of December 4, 3017 constitutes an agreement on veterinary certificates, the United States refers to its comment on India's answer to question 2.14(b).

g. Once an area, zone or compartment has been recognized as disease free, does the exporting country have to re-file an application, for example, after an outbreak in that area or after a given period of time?

Comment:

74. Again, the United States notes the disconnect between India's answer and what India's measures actually say. In particular, S.O. 2337(E), as amended, lists requirements for regaining AI free status following an AI detection.[78] This raises the question of how India intends to verify compliance with those requirements. If India is planning to rely on countries' reports to the OIE

[78] S.O. 2337(E), para. 2(4).

that AI-free status has been regained, there would have been no reason for India to have set out in the S.O. its own requirements for regaining AI-free status.

Question 2.15 : Can the procedure under paragraph 3 of S.O. 2337 (E) to recognition of AI-free zones only, or can it also lead to recognition of HPAI-free zones? If so, where is this provided for?

Comment:

75. The United States notes once again that S.O. 2337(E) does not actually state the things that India is claiming it provides. Paragraph 3 of the S.O. makes no reference to HPAI or HPAI-free areas. Moreover, the subparagraphs immediately preceding it, 2(3) and 2(4), set out criteria for when a "country, zone or compartment may be considered **free from avian influenza**" and when, if "infection has occurred in poultry in a previously free country, zone or compartment, **avian influenza free** status can be regained" (emphasis added). Paragraph 2(2) sets out how India will determine "[t]he **avian influenza status** of a country, zone or compartment" (emphasis added).

76. If there measure were in fact intended to allow trade from areas with LPAI, it is unclear why India's S.O. would set out criteria for establishing AI freedom but not HPAI freedom. Moreover, the above-described context for paragraph 3 leaves it unclear that paragraph 3 in fact provides a process for recognition of HPAI-free zones, as opposed to AI-free zones.

77. As previously noted, India bears the burden of establishing that, as of the date the Article 21.5 Panel was established, India's measures achieved compliance with its regionalization obligations under the SPS Agreement. India's measures did not do this. India cannot meet its burden here by offering in dispute settlement interpretations divorced from the actual language of its measures to correct problems and deficiencies in that language.

Question 2.16: What is the role of Paragraph 2(3) and 2(4) of S.O. 2337(E)? At the Panel's meeting with the parties, India explained that paragraph 2(4) sets out the concepts of freedom of HPAI and LPAI. What would be the purpose of setting out the definition of LPAI-freedom if LPAI freedom is not a requirement for trade?

Comment:

78. India's response appears to assert that the purpose of Paragraph 2(4) of S.O. 2337(E) is to permit import of live poultry, since Article 10.4.5 provides recommendations only for importation from areas free from avian influenza.[79] Additionally, India claims a country may only wish to export if it is free from both HPAI and LPAI.

[79] India's Response to Panel Questions, para. 76.

79. With respect to the first assertion, India fails to explain why providing such text would be needed for poultry. If paragraph 2(1) of S.O. 2337(E) really does ensure importation is consistent with all of the relevant recommendations of the OIE Terrestrial Code, why require this additional text? Presumably, the import conditions of live poultry would be reflected simply by having paragraph 2(1). With respect to the second assertion, it seems implausible to suggest that an exporting country would impose more onerous conditions on its exports. Even where the exporting Member is concerned about the impact of its exports on other Members, the products at issue here can be safely traded per the OIE Terrestrial Code.[80]

80. The more plausible reason for the inclusion of paragraphs 2(3) and 2(4) is that they reflect that India designed its measure not to allow imports from territories reporting LPAI, albeit in a more concealed manner. Consider the language of paragraph 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.[81]

The language in red-strike out was subsequently removed by S.O. 2998(E), while the language in blue underline was added by it.[82] The United States draws attention to the language "free from avian influenza" that was contained in S.O. 2337(3) as originally promulgated. Below is a table that juxtaposes paragraphs 2(3) & 2(4) of S.O. 2337(E) against OIE Terrestrial Code Article 10.4.3 of the OIE Terrestrial Code.

S.O. 2337(E), paras. 2(3) & 2(4)	OIE Terrestrial Code 10.4.3
(3) A country, zone or compartment may be considered free from avian influenza when it has been shown that infection with avian influenza viruses in poultry has not been present in the country, zone or compartment for the past twelve months, based on surveillance in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health.	Article 10.4.3. **Country, zone or compartment free from avian influenza** A country, *zone* or *compartment* may be considered free from avian influenza when it has been shown that *infection* with avian influenza viruses in *poultry* has not been present in the country, *zone* or *compartment* for the past 12 months, based on *surveillance* in accordance with Articles 10.4.27. to 10.4.33.

[80] OIE User's Guide, para. A(3) ("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. (Exhibit USA-23).

[81] Exhibits IND-3 & IND-4.

[82] Exhibit IND-4.

(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.	If *infection* has occurred in *poultry* in a previously free country, *zone* or *compartment*, avian influenza free status can be regained: 1) 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, providing that *surveillance* in accordance with Articles 10.4.27. to 10.4.33. has been carried out during that three-month period. 2) 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 Article 10.4.19. or a *stamping-out policy* may be applied; in either case, three months after the *disinfection* of all affected *establishments*, providing that *surveillance* in accordance with Articles 10.4.27. to 10.4.33. has been carried out during that three-month period.

81. Paragraph 2(3) and 2(4) are essentially a transposition of OIE Terrestrial Code Article 10.4.3: territories that are free from avian influenza: both HPAI and LPAI. The most logical reason this text exists is because it was intended to inform what "free from avian influenza" in paragraph 2(1) meant. In other words, India drafted its measure so that importation could only take place from territories that were free from avian influenza, meaning both HPAI and LPAI. This also explains why in S.O. 2337(E) there is no conjugate to Article 10.4.4 of the OIE Terrestrial Code, which concerns territories that are free from just HPAI. Thus, the structure and content of the measure is to preclude importation from territories reporting LPAI. This explanation, which draws from the text of the measure, is far more credible than the explanation offered by India.

Article 10.4.4.

Country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry

A country, *zone* or *compartment* may be considered free from *infection* with high pathogenicity avian influenza viruses in *poultry* when:

1) it has been shown that *infection* with high pathogenicity avian influenza viruses in *poultry* has not been present in the country, *zone* or *compartment* for the past 12 months, although its status with respect to low pathogenicity avian influenza viruses may be unknown; or

> 2) when, based on *surveillance* in accordance with Articles 10.4.27. to 10.4.33., it does not meet the criteria for freedom from avian influenza but any virus detected has not been identified as high pathogenicity avian influenza virus.
>
> The *surveillance* may need to be adapted to parts of the country or existing *zones* or *compartments* depending on historical or geographical factors, industry structure, population data, or proximity to recent *outbreaks*.
>
> If *infection* has occurred in *poultry* in a previously free country, *zone* or *compartment*, the free status can be regained three months after a *stamping-out policy* (including *disinfection* of all affected *establishments*) is applied, providing that *surveillance* in accordance with Articles 10.4.27. to 10.4.33. has been carried out during that three-month period.

82. The United States notes that India did delete the "free from avian influenza" text, after the United States raised concerns with it.[83] However, India did not delete paragraph 2(3) and 2(4) or try to incorporate new paragraphs to reflect Article 10.4.4 of the OIE Terrestrial Code. As the United States explained in its first written submission, the U.S. position is that the deletion of "free from avian influenza" was simply cosmetic. There is no evidence that this measure, which was clearly designed to prevent imports from Members reporting LPAI, has substantively changed. India's lack of candor as to the purpose of this text only further reinforces that its unsupported representations regarding the consistency of the Revised Avian Influenza Measure with the OIE Terrestrial Code should be rejected.

Question 2.18: **Does India recognize a distinction between AI-freedom and HPAI-freedom in its domestic regulations, e.g. through NAP 2015?**

Comment:

83. The United States notes that India's response claiming it domestically only recognizes AI-freedom does not cite any particular instrument for such a proposition. The more telling instance is how NAP 2015 actually operates. For example, NAP 2015 provides that authorities should *only* be notified in cases of unusual sickness or mortality:

> The following guidelines are extremely important. States should adhere to these guidelines:
>
> (i) The States/ UTs must distinguish at their level between unusual sickness/ mortality and normal incidences of sickness and mortality in poultry. Only in case of unusual sickness/ mortality raising suspicion of AI, forward the samples immediately either to respective Regional Disease Diagnostic Laboratory or directly to National Institute of High Security Animal Diseases (NIHSAD), Bhopal through special messengers under

[83] United States' First Written Submission, paras. 43-44.

> intimation to the Joint Secretary (Livestock Health), in the Department of Animal Husbandry, Dairying and Fisheries, Government of India.[84]

In other words, India is explicitly saying that it is very important that surveillance focus only on the type of avian influenza that is associated with HPAI, not the type associated with LPAI.[85] This suggests that there is indeed, at least *de facto*, a distinction in India's system: India is not going to have restrictions imposed domestically on account of LPAI because it is not likely to detect it.

Question 2.19: Paragraph 2(1) of S.O. 2337(E) as amended states that "import of poultry and poultry products into India shall be allowed from the country, zone or compartment in accordance with product specific recommendations of the Terrestrial […] Code…"

a. What is the legal significance of publishing veterinary certificates on the website of DADF? Why are some of the sample veterinary certificates contained in Exhibit IND-45 not on the website? Why were the veterinary certificates concerning poultry and poultry products removed from the website in late 2016?

Comment:

84. The United States refers to its oral closing statement in noting the various inconsistent reasons proffered by India regarding the absence of veterinary certificates from DADF's website. India's current claim that India removed the certificates to update them and inadvertently failed to upload them is not credible. There are at least two pieces of evidence that confirm India was made aware that the United States was raising the issue of the missing certificates from DADF's website.

85. First, at the October 26, 2016 meeting of the Dispute Settlement Body, the United States explicitly raised the issue of the missing veterinary certificates.[86] Second, the United States'

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84 NAP 2015, pp. 6-7 (Exhibit USA-14).

85 *See e.g.,* Transcript of Expert Panel's Meeting with the Experts and Parties (Dec. 16, 2013), para. 1.142 ("You mentioned that LPNAI outbreak; you don't see this infection as an outbreak in domestic poultry. You very rarely see any dramatic clinical signs, you sometimes see a slightly increased mortality, slightly decreased egg production, but it's not different to what you would see with any other endemic problem that's around. It's not a matter of detecting outbreaks, it's a matter of going and looking for the virus, so it's a completely different thing, from any HPAI, whether it is H5N1 or any HPAI, with those you see dramatic disease. LPAI, you've got to go and look for it. It is not an outbreak; it's almost a hidden infection. And the reason we worry about LPNAI, is because it can convert into HPAI. That's why we worry about it; there is no other reason to worry about it."); Illaria Capua and Calogero Terregino, "Clinical Traits and Pathology of Avian Influenza, Infections, Guidelines for Farm Visit and Differential Diagnosis," AVIAN INFLUENZA AND NEWCASTLE DISEASE: A FIELD AND LABORATORY GUIDE, Eds. Illaria Capua & Dennis J. Alexander (2009), p. 45 (Exhibit USA-30).

86 WT/DSB/M/387, para. 6.2 (Exhibit USA-8).

Article 5.8 Request, directed to India's Ambassador to the WTO, also explicitly noted the issue of missing certificates:

> [t]he United States continues to lack market access. One important reason relates to veterinary certificates. We understand that veterinary certificates are required by India for importation. However, veterinary certificates previously used by India have been removed from the website of India's Department of Animal Husbandry, Dairying, and Fisheries ("DAHD"), and no alternate certificates have been agreed with the United States.
>
> A situation in which the United States cannot export products to India is not consistent with the guidelines of the World Animal Health Organization's ("OIE") Terrestrial Animal Health Code ("OIE Code") or with the WTO *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement").[87]

India's decision not to even address the issue of missing certificates under these circumstances – failing to responded to repeated entreaties from a trading partner that brought a WTO case on the matter – cannot be deemed to be "inadvertent." The more logical inference was that the removal was deliberate.

b. At the hearing, India referred to model veterinary certificates as well as bilaterally negotiated veterinary certificates. Please explain under what circumstances model veterinary certificates will be used and under what circumstance bilaterally negotiated veterinary certificates will be used.

Comment:

86. The United States notes that India's response fails to include any certificates actually used in the course of trade, whether model or bilaterally agreed.

c. At the time of the panel's establishment, how could an exporting Member have access to India's model veterinary certificates?

Comment:

87. India's response ignores that the United States made a request to India for a copy of its veterinary certificates. Specifically, Question 1 of the United States' Article 5.8 Request asked

[87] United States' Article 5.8 Request, p. 1 (Exhibit USA-25).

India to provide copies of various documents, including veterinary certificates. India did not provide a copy of veterinary certificates or any other documents.[88]

d. Please confirm the Panel's understanding that according to India, the United States could have traded following resolution of the outbreak of HPAI in Tennessee. If so, on the basis of which veterinary certificate could the United States have traded?

88. India's assertion that the United States could have "easily" traded following resolution of the outbreak is unsupported. India has not provided one communication whereby it informed the United States that it could trade on the basis of the purported model certificates. As the United States noted above, the United States raised the issue of missing certificates with India. The absence of any communication from India about the ability to use model certificates is particularly striking in that regard.

89. India's invocation of its June 14, 2017 communication to the U.S. Department of Agriculture is unavailing in that regard. That communication simply reflects that the parties were trying to negotiate a certificate: the United States had proposals; so did India for two products. India did not suggest that there were certificates available that could be used immediately. Indeed, the cover letter from DADF actually noted the following:

> It is also requested that to start the trade subject to clarification stated herein, the USA may propose the potential exporters and their facilities/processing plants for inspection by India.[89]

U.S. officials read that statement as consistent with its plain meaning and the text of paragraph 2(1) of S.O. 2337(E): that to start trade, India would first need to undertake site visits as part of its regionalization determination.

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

[89] Exhibit IND-17.

Question 2.21. With reference to paragraphs 21 and 22 of the United States' second written submission, please respond to the United States' arguments concerning the lack of evidence reflecting a revised interpretation of the OIE Terrestrial code.

Comment:

90. India seems to have misread this question on the purported basis that it refers to paragraphs 21 and 22, instead of 20 and 21, even though the question explicitly references the U.S. argument concerning the lack of evidence that India revised its interpretation of the OIE Terrestrial code.[90] Accordingly, India's answer is non-responsive to the actual question.

91. However, with respect to the point India does make concerning application of the Revised Avian Influenza Measure, the United States briefly addresses the "adequate evidence" India invokes:

- model veterinary certificates pursuant to which poultry and poultry products have been entered; India does not however point to any example of such a model certificate that was actually used for trade;
- bilaterally agreed certificates; again, India fails to show any such certificates have been used for trade; and
- recognition of disease free areas in the United States; India fails to note that trade has still not commenced in light of outstanding issues or that it has acknowledged that it "hurried" the process specifically to raise it before the Panel.

This is not adequate evidence of application; this is, if anything, simply evidence that India is striving very hard to improve its position in this dispute.

[90] India's Response to Panel Questions, para. 89.

LEGAL CLAIMS

3 ARTICLE 3.1 AND 3.2

Question 3.2: Regarding the presumption of consistency in Article 3.2 of the SPS Agreement does the content of the relevant international standard at issue determine what are the "relevant provisions" under Article 3.2 of the SPS Agreement?

Comment:

92. The United States disagrees with India's position that the presumption of conformity extends to all provisions of the SPS Agreement identified in a panel request.[91] The text of Article 3.2 of the SPS Agreement provides that measures that conform to international standards shall be "presumed to be consistent with the *relevant* provisions of this Agreement and of GATT 1994" (emphasis added). The inclusion of the word "relevant" means that not all provisions in the SPS Agreement are subject to the presumption of consistency.

93. The United States understands that it is the nature of the obligations in the provision itself that determines whether the provision is one to which the presumption extends. The nature of the obligations in Article 2.3 of the SPS Agreement is an example of obligations that would not lend themselves to the presumption. Even if a Member bases its measure on the international standard, there is also the possibility that it remains an arbitrary and unjustifiable sanitary barrier if the Member imposes no corresponding controls to manage the relevant risk domestically. If the Member applies controls for foreign producers but no corresponding controls at home, the Member would be providing more favored treatment to domestic producers.

Question 3.3: Which specific articles of the Terrestrial Code constitute the relevant standard for purposes of assessing India's revised AI measure under Articles 3.1 and 3.2 of the SPS Agreement? In this context:

a. What, if any, are the relevant provisions in the Terrestrial Code pertaining to the procedure for recognizing disease free status established under Paragraph 3 of S.O. 2337(E) as amended and the Guidelines submitted by India in Exhibit IND-7?

b. Is Article 5.1.2.2 a relevant standard for the purposes of assessing the revised AI measure under Articles 3.1 and 3.2?

c. Is post-shipment inspection covered by the OIE Terrestrial Code? If so, is it part of the relevant international standard?

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[91] India's Responses to Panel Questions, para. 99.

Comment on Part (a):

94. The United States agrees with India that Chapter 4.4 contains relevant provisions with respect to compartmentalization, and thus is a relevant international standard by which to evaluate the conformity of paragraph 3 of S.O. 2337(E), as amended.

95. India's response, however, omits Articles 10.4.2, 10.4.3, 10.4.4, and Article 5.3.7 of the OIE Terrestrial Code. Articles 10.4.2, 10.4.3, and 10.4.4 contain specific recommendations regarding how to determine the avian influenza status of a zone, and how it should be designated (free from avian influenza or free from HPAI) depending on particular criteria. These recommendations are accordingly relevant in determining and characterizing the status of areas with respect to avian influenza. Article 5.3.7 specifies the steps for establishing and recognizing a zone for international trade purposes. Accordingly, this is the international standard by which to assess India's Guidelines for regionalization.

Comment on Part (b):

96. India asserts that the recommendations in Chapter 10.4 and Article 5.1.2.2 of the OIE Terrestrial Code have no correlation with one another.[92] This assertion is not supported by the OIE Terrestrial Code. To the contrary, the link though is clear in the text of Article 5.1.2.2 itself:

> The international veterinary certificate should not include requirements for the exclusion of pathogenic agents or animal diseases which are present in the importing country and are not subject to any official control programme. The measures imposed on imports to manage the risks posed by a specific pathogenic agent or disease should not be more stringent than those applied as part of the official control programme operating within the importing

Chapter 10.4 of the OIE Terrestrial Code clearly concerns requirements on veterinary certificates, and is thus directly correlated to Article 5.1.2.2.

97. Moreover, support for the connection is also reflected in the OIE User's Guide. The User's Guide notes that:

> Chapters 5.1. to 5.3. describe the obligations and ethical responsibilities of importing and exporting countries in international trade. Veterinary Authorities and all veterinarians directly involved in international trade should be familiar with these chapters.[93]

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92 India's Responses to Panel Questions, para. 103.

93 OIE User's Guide, C.5.

The User's Guide to the OIE Terrestrial Code thus recognizes that the recommendations in these chapters are applicable to measures concerning international trade, such as those in Chapter 10.4 of the OIE Terrestrial Code that manage the risk for avian influenza arising from international trade.

Comments on Part (c):

98. With respect to India's statement that post-shipment inspection is not relevant for this dispute,"[94] the United States refers to its consolidated response to Questions 1.2 and 1.3.

Question 3.4: If the revised AI-measure were in full conformity with Chapter 10.4 of the OIE Terrestrial Code, could it still be found to contradict the Terrestrial Code on the basis of failure to conform to provisions in a different chapter of the Code, in particular the horizontal recommendations contained in Volume I of the Code?

Response:

99. The United States refers to its comments on India's response to Question 3.3(b), specifically the linkage between Article 5.1.2.2 and the recommendations in Chapter 10.4 of the OIE Terrestrial Code.

Question 3.5: Does the Terrestrial Code use the concept of "low pest or disease prevalence"? If so, what meaning, if any, does it have in the context of Chapter 10.4 of the Terrestrial Code?

Response

100. India's response appears to misconstrue the concept of low pest or disease prevalence. India appears to assert that the OIE Terrestrial Code's recognition of low pathogenicity avian influenza virus is perhaps an example of low disease prevalence.[95] Low pathogenicity avian influenza is referred to as such not because of the low prevalence of the disease, but because its pathogenicity – ability to cause disease – is comparably low.

101. Low prevalence reflects the specified level (pervasiveness) of a disease or pest. Typically, the concept of low prevalence has been addressed more in the context of plant pests rather than animal diseases. For example, ISPM 22 addresses requirements for establishment areas of low pest prevalence in the context of plant pests.[96]

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94 India's Response to Panel Questions, para. 104.

95 India's Response to Panel Questions, para. 108.

96 ISPM 22 (Exhibit USA-31).

Question 3.6: India submits that paragraphs 2(3) and 2(4) of S.O. 2337(E) as amended "fully embody" or "fully adopt" Articles 10.4.3 and 10.4.4 of the Terrestrial Code. However, the text of paragraphs 2(3) and 2(4) replicates *verbatim* only Article 10.4.3, but not Article 10.4.4 of the Terrestrial Code. Please explain.

Question 3.7: Does India agree that Articles 10.4.3 and 10.4.4 define two types of disease free statuses? Does S.O. 2337(E) reflect the same two different statuses? If so, where?

Consolidated Comments on Question 3.6 and Question 3.7:

102. With respect to both of India's responses, the United States refers to it comments on India's response to Question 2.16. With respect to India's argument that the elements in Articles 10.4.3 and 10.4.4 are not "significantly different," the United States disagrees.[97] The provisions specify two distinct statuses: territories that can be considered free of avian influenza and territories that can be free of HPAI. There is of course similar language concerning avian influenza, but the distinctions that exist lead to two fundamentally different outcomes. Depending upon which outcome is reached – free from avian influenza or free from HPAI – a different product recommendation in Chapter 10.4 of the Terrestrial Code may apply.

4 ARTICLE 5.1 AND 5.2

Question 4.1: With respect to India's alternative claim under Article 5.1 of the SPS Agreement, is India claiming that the revised AI-measure is based on the risk assessment underlying the OIE Terrestrial Code? If so, (a) please indicate where that risk assessment can be accessed or provide a copy; and (b) please discuss the relationship between the risk assessment and the measure.

Comment:

103. India's response appears to confirm that India has not seen the OIE's risk assessment, and cannot provide a copy to the Panel. In order to evaluate India's claim of consistency, the Panel would need to see this risk assessment in order to conduct the requisite evaluation:

> As we have already observed, in *US/Canada – Continued Suspension*, the Appellate Body identified two aspects of a panel's review of a risk assessment under Article 5.1 of the SPS Agreement: (i) a determination that the scientific basis of the risk assessment comes from a respected and qualified source and can accordingly be considered "legitimate science" according to the standards of the relevant scientific community; and (ii) a determination that the reasoning of the risk assessor is objective and coherent and that, therefore, its conclusions find sufficient support in the underlying scientific basis. A panel should first determine whether the scientific basis relied upon by the risk assessor is "legitimate" before reviewing whether the

[97] India's Responses to Panel Questions, paras. 106 &109.

> reasoning and the conclusions of the risk assessor that rely upon such a scientific basis are objective and coherent.[98]

In light of India's inability to present the risk assessment, India's contention that its measure is based on the OIE's risk assessment fails *ab initio*.

Question 4.2: With reference to paragraph 89 of the United States' second written submission, please clarify whether, if India maintained post-import inspection procedures at the time of the Panel's establishment, such procedures were based on a risk assessment.

Comment:

104. India's response confirms (1) that it does maintain post-import testing *in addition* to any other requirements it may impose with respect to avian influenza and (2) that the post-import testing requirement is not based on a risk assessment. Accordingly, India's claim that the Revised Avian Influenza Measure conforms with the OIE Terrestrial Code – and that the Revised Avian Influenza Measure is entitled to be presumed consistent under Article 3.2 – fails. India's post-import testing is a breach of Article 5.1, 5.2, and 2.2 of the SPS Agreement.

105. The United States raises three other points in its response to this question that merit attention. First, India argues that post-import testing imposed by India is not relevant because India did not include the procedure in certain bilaterally agreed certificates, and that India began negotiating such certificates prior to panel establishment. India's argument is not persuasive for at least three reasons:

(1) the United States does not agree that bilaterally agreed certificates exist;

(2) the fact that negotiations may have commenced prior to the Panel's establishment does not change that the relevant situation is that on May 28, 2017 – and no certificates existed on that date; and

(3) the findings against India are "as such" rather than simply "as applied" against the United States.

In short, India has no legal basis to argue that the Panel should not consider the existence of India's post-import testing.

106. Second, India's argument that post-import testing addresses scenarios not envisioned by the OIE Terrestrial Code is misplaced.[99] As an initial matter, if an international standard does not call for post-import testing (and the relevant standard does not), then India would need a risk

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[98] *Australia – Apples (AB)*, para. 220.

[99] India's Responses to Panel Questions, para. 114.

assessment per Article 5.1. But India has presented no evidence that it has relied on any such risk assessment in adopting this requirement. For this reason alone, India's post-import testing is inconsistent with India's SPS obligations.

107. Furthermore, the imposition of this requirement is in fact inconsistent with the OIE Code. Here, there are relevant recommendations – the OIE Terrestrial Code – and they do not call for post-import testing. As the panel in the original dispute found, the OIE Terrestrial Code does envisage trade from countries that previously (or even currently) report avian influenza both through the product specific recommendations, and through the use of zoning.[100] Moreover, India's assertion of post-import testing being necessary to address a "valid threat" is not only unsupported, but also contrary to the findings from the original proceeding.[101] The panel in the original proceeding found that the application of the OIE Terrestrial Code

> if correctly applied, provide for trade in animals and animal products to take place with an "optimal level" of animal health security, based on the most up to date scientific information and available techniques. Furthermore, the recommendations in Chapter 10.4 specifically address the measures necessary to ensure safe trade because of concerns of AI.[102]

India's unsupported assertions that there is a threat of some sort cannot validate India's claim that the testing is somehow *ipso facto* consistent with Article 2.2 of the SPS Agreement.[103]

108. Third, India's assertion that other countries employ post-import testing is misplaced for two reasons.[104] First, the purported measures maintained by other Members are not at issue here, and have no import on the claims made with respect to the measure at issue here.[105] Second, India's characterization of those measures is facially incorrect. India's post-import testing appears to be laboratory testing for avian influenza. The examples India cites to, however,

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100 *See e.g.*, *India – Agricultural Products (Panel)*, para. 7.258, 7.262-7.263.

101 India's Responses to Panel Questions, para. 114.

102 *India – Agricultural Products (Panel)*, para. 7.580.

103 India's Responses to Panel Questions, para. 115.

104 India's Responses to Panel Questions, paras. 116-117.

105 *See India – Agricultural Products (AB)*, para. 5.104 ("India has not explained why express consideration of the instances it identified before the Panel was necessary to ensure the objectivity of the Panel's assessment. The mere fact that one or several countries have adopted a particular measure does not mean that such a measure is based on, or conforms to, the relevant international standard. It may be, for instance, that these measures were adopted in a manner inconsistent with the relevant standard, or adopted so as to maintain a higher level of protection than would be achieved by basing them on the relevant standard, as provided for under Article 3.3 of the SPS Agreement. Indeed, the arguments and evidence advanced by India offer a limited account of the practice of these countries and do not identify or discuss the grounds upon which the various countries adopted their respective measures.")

appears to be an ordinary customs inspection by inspectors. For example, the Canada example India cites is organoleptic inspection for at least 10 shipments, after which such inspection will decrease. An organoleptic inspection is simply an inspection made according to basic senses: smell, taste, and visual inspection.[106] It is not the type of testing at issue here. Likewise, India's characterization of the FSIS inspection fails to recognize that it is basic border inspection, not what India is imposing when an export comes from a zone free from avian influenza simply because some other part of the country has avian influenza: a *laboratory test of every single consignment for avian influenza at the importer's expense*. Accordingly, not only are India's arguments about the purported practices of other countries legally irrelevant, they are factually wrong.

5 ARTICLE 2.3

Question 5.1: **Does the legal standard under Article 2.3 of the SPS Agreement require the Panel to consider whether any allegedly differential treatment has an effect on the conditions of competition?**

Response:

109. The United States does not disagree with India that different treatment – standing alone – may not necessarily constitute discrimination.[107] It is the nature of the treatment. Products entering a market through international trade versus via domestic production will of course be subject to different procedures. For example, imported products will be subject to customs clearance while domestic products will not. A Member addressing food safety risks will likely conduct inspections for its own producers, but will have to rely on some other mechanism to ensure food safety for foreign products. The treatment will be different, but it may not amount to discrimination.

110. India invokes the panel's analysis from *US – Animals* which found:

> The focus of a discrimination analysis is whether the measure at issue alters the conditions of competition to the detriment of products originating in the territories of Members other than the Member imposing the measure or between the territory of the Member imposing the measure and that of another Member[108]

The United States has some concerns with the categorical nature of this analysis. A measure may discriminate simply based on the face of the measure. For example, if the measure

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106 India's Responses to Panel Questions, para. 117.

107 India's Responses to Panel Questions, para. 122.

108 *US – Animals (Panel)*, para. 7.573.

precludes any inquiry into the appropriateness of the regulatory regime of a trading partner, it can still amount to discrimination.[109]

111. Nonetheless, there is a change in the competitive conditions here if India does not impose any control for LPAI domestically, and requires producers in exporting countries to be subject to such form of restriction or control on account of the disease. In such circumstances, foreign producers are required to undertake some form of control for a risk for which domestic producers are exempt. A inquiry into discrimination does not examine the ultimate impact of the discrimination, but the nature of the relationship:

> An acceptance of the argument that measures which have only an insignificant effect on the volume of exports do not nullify or impair benefits accruing under Article III:2, first sentence, implies that the basic rationale of this provision - the benefit it generates for the contracting parties- is to protect expectations on export volumes. That,, however, is not the case. Article III:2, first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products.
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> Moreover, it is conceivable that a tax consistent with the national treatment principle (for instance, a high but non-discriminatory excise tax) has a more severe impact on the exports of other contracting parties than a tax that violates that principle (for instance a very low but discriminatory tax). The case before the panel illustrates this point: the United States could bring the tax on petroleum in conformity with Article III:2,first sentence, by raising the tax on domestic products, by lowering the tax on imported products or by fixing a new common tax rate for both imported and domestic products.[110]

Accordingly, the fact that India has not controlled for avian influenza at home, while it requires exports to be subject to restrictions on account of avian influenza, is the type of discrimination that Article 2.3 was intended to address.

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109 *US – Shrimp (AB)*, para. 165.

110 GATT Report, *US – Superfund*, para. 5.1.9.

Question 5.7: **In India's view, is the United States' argument in paragraph 142 of its first written submission that "even applying the limited controls of the OIE Terrestrial Code with respect to products originating from territories with LPAI outbreaks would constitute a form of unjustifiable discrimination" within the Panel's terms of reference?**

Comment:

112. The United States refers to its comments on Question 1.1. Moreover, the United States notes that India acknowledges that in the original proceeding, the discrimination was because of India's treatment of foreign goods (the ban) in comparison to the controls domestically.[111] The United States' arguments on why India remains out of compliance with Article 2.3 still concern that foreign products are discriminated against because India lacks domestic controls for avian influenza. The purportedly "new" form of discrimination is simply an argument that Article 2.3 remained breached because India did not properly address the findings from the original dispute.

Question 5.9: With reference to paragraph 133 of the United States' first written submission, does India agree that the "conditions" under the first sentence of Article 2.3 are unchanged from the original proceedings?

Comment:

113. India's response appears to ignore the precise conditions that the Panel found in the original proceeding:

> The Panel considers that the relevant "conditions" in this analysis refer to the presence of NAI in India or another Member. Under conditions where NAI is present in a country other than India (and is notified to the OIE), India's AI measures apply. Thus when NAI is present in an exporting country, India applies an import prohibition. Under conditions where NAI is present in India, the relevant provisions of the NAP 2012 apply, allowing movement and trade outside the surveillance zone. Unlike in the situation between Canada and Australia referred to above, this is not a case of a "substantial difference in disease status" between India and the United States justifying different treatment. In this dispute, the measures in question address the same condition – the presence of NAI – and they do so differently.[112]

India has not argued in this dispute that avian influenza is no longer present in India. Moreover, the Revised Avian Influenza Measure is a measure that imposes controls on account of avian influenza. While the parties may dispute precisely what those controls are, there can be no dispute that they are imposed on account of avian influenza.

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111 India's Response to Panel Questions, para. 136.

112 *India – Agricultural Products (Panel)*, para. 7.463

Accordingly, India's measures cannot "remove" the conditions at issue for assessing India's claim of consistency under Article 2.3.[113]

Question 5.10. With reference to paragraph 113 of the United States' second written submission, please respond to the Unites States' argument that "India would require its trading partners to be subject to [the OIE Terrestrial Code] regime, but excuse its own domestic industry".

Comment:

114. As the United States noted in response to Question 5.1, the precise burden imposed by a measure is irrelevant; the issue is whether it discriminates. The United States does not dispute that because of U.S. controls, U.S. producers are subject to controls for avian influenza. That has no bearing on the analysis of whether India's measure demands different competitive conditions. It does.

115. The United States has explained that India's measure is far more restrictive than India asserts. Assuming *arguendo* that India's avian influenza controls were "light" for foreign producers, it remains the case that there are none for domestic producers with respect to LPAI. The United States has explained that NAP 2015 does not control for LPAI in India. India has not provided any evidence that it is actually engaged in surveillance for LPAI. Moreover, even under India's view, U.S. producers in contrast would undergo the expense of maintaining controls that satisfy India's regime, such as paying for official veterinary certificates (if they are ever agreed and usable for trade.)[114] Once the change in competitive conditions has been established, there is no requirement that it be quantified or pass a certain threshold.

6 ARTICLE 6

Question 6.1: If the Panel were to find that India's revised AI measure "conforms to" the relevant international standard, would the presumption of SPS-consistency extend to a presumption of consistency with Article 6 of the SPS Agreement? In other words, would the Panel need to conduct a separate analysis under Article 6 even if the measure conforms to the OIE standard?

Comment:

116. As an initial matter, the United States respectfully refers the Panel to the U.S. answer to this question.

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[113] India's Responses to Panel Questions, para. 141.

[114] *See* APHIS Fees for Health Certificates (Exhibit USA-31).

117. The United States would also note that with respect to any finding that India's measures conform to OIE Code Chapter 10.4 (which they do not), this conformity with international standards could not support a presumption that extends to Article 6.

118. The theoretical matter not at issue in this dispute involves a situation where the international standard has specific recommendations with respect to regionalization. The OIE Terrestrial Code provides that regionalization can be applied for AI (e.g., the recommendations can be applied for AI). However, the basic principles for regionalization are set elsewhere. Specifically, the OIE Code contains a chapter – Chapter 4.3 (Exhibit US-15) – on zoning and compartmentalization.

119. In this dispute, India has not demonstrated that its measures on regionalization are consistent with Chapter 4.3. The question of whether a measure that conformed with Chapter 4.3 would speak to conformity with SPS Article 6 is a complex one, and would appear to depend on specifically what the possible WTO inconsistency might be. For example, if the international standard addressed a specific scientific issue regarding regionalization, that could be relevant for consistency with a specific question of consistency with SPS Article 6. In any event however, given that India's argument relates to Article 10.4 of the OIE Code, these types of issues do not arise in this dispute.[115]

120. Indeed, as discussed in the U.S. comment on India's answer to question 2.14(c), India's measure does not establish that India in fact has substantive criteria for the assessment of regionalization requests. In the absence of substantive regionalization criteria, there is no way to establish consistency with any international standards involving regionalization.

Question 6.2: What is the relationship between the relevant international standard and the obligation in Article 6.2 to provide an "effective opportunity"? If a hypothetical AI measure provided a real and meaningful opportunity for Members to seek recognition of AI-free areas, but not of HPAI-free areas as envisioned in OIE Terrestrial Code, could such a measure be said to afford an "effective opportunity" and therefore comply with Article 6.2?

Comment:

121. As the United States explained in its response to this question, there is not necessarily a relationship between the relevant international standard and the Article 6.2 obligation to provide an effective opportunity. In particular, the United States pointed out that where a Member's appropriate level of protection (ALOP) requires a level of protection higher than would be achieved by compliance with international standards, a Member could refuse to regionalize in

[115] India's Response to Panel Questions, para. 100 ("The specific articles in the OIE Terrestrial Code that constitute the relevant international standard for the purposes of assessing India's revised AI measure under Article 3.1 and 3.2 of the SPS Agreement are those articles contained in Chapter 10.4 of the OIE Terrestrial Code.")

circumstances where international standards might call for doing so without denying an effective opportunity.

122. India's answer to this question appears to take the position that a measure denying regionalization opportunities in circumstances where international standards provide for them could not in any circumstances result in denial of an effective opportunity, in breach of Article 6.2 Yet it is not the case that standards are necessarily unrelated to the effective opportunity requirement. In particular, where, as in this dispute, it has been established that measures in conformity with international standards will satisfy a Member's ALOP, but a Member refuses to regionalize with respect to a disease notwithstanding international standards that call for such regionalization, a denial of effective opportunity would result.

123. This is exactly the situation presented here. International standards call for regionalization not just with respect to AI-freedom but also with respect to HPAI freedom. The DSB has found that India breached Article 5.6 of the SPS Agreement by maintaining measures more stringent than international standards when measures in conformity with international standards would satisfy India's ALOP. Taken together, this finding and the content of the relevant international standards indicate that in this case, provision of an effective opportunity consistent with Article 6.2 would require an opportunity to regionalize with respect to HPAI specifically and not just with respect to AI.

Question 6.3: To India, please elaborate on your argument that the questionnaire sufficiently reflects or indicates the criteria against which requests for regionalization will be assessed. To the United States, please respond to this argument.

Comment:

124. As the United States explained in its comment on India's response to question 2.14(c), India's measures do not establish that India has established criteria against which requests for regionalization will be assessed. The United States also responded in that comment to India's baseless argument that the United States is somehow estopped from claiming that India's measures fail to establish regionalization criteria.

125. With respect to the questionnaire specifically,[116] as the United States noted in its response to question 2.14(a), the questionnaire merely provides information that India is seeking, not criteria against which India will assess a regionalization request. Nothing about the text of the questionnaire indicates that it establishes criteria against which applications will be considered as opposed to simply a lengthy list of pieces of information that India is seeking to gather. Indeed, the mere fact that India has requested a particular piece of information is not necessarily indicative that it constitutes a criteria for assessment of an application in all, some, or any cases.

[116] Exhibit IND-8.

126. This is particularly true for India's questionnaire here. The questionnaire poses approximately one hundred questions or information requests. This offers little insight into how the decision-maker will assess the submitted information, and accordingly little constraint on the discretion of the decision-maker and little guarantee of consistency in decision-making.

127. Additionally, the questionnaire seeks information that is not discernably relevant to AI, and that would appear to concern other matters. For instance, "Part III" of the questionnaire is entitled "Public Health," suggesting that the section in question related to food safety and not AI control. The section seeks information on the exporting country's public health service and asks questions that appear to relate to food safety. For instance, question 10.9 asks about "adherence to the relevant microbiological food safety criteria." It is accordingly unlikely that some of the questions seek information to be used in a regionalziation assessment, and to the extent India does intend to use that information in a regionalization assessment, such use would appear inappropriate.

128. As discussed elsewhere in these comments, India bears the burden of establishing that it has complied with its regionalization obligations under the SPS Agreement. The questionnaire does not meet India's burden of making such a demonstration.

Question 6.4: In the parties' view, what, if anything, is the relevance of the WTO document "Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures" of 16 May 2008 (G/SPS/48)?

U.S. Comment:

129. The United States respectfully refers the Panel to the U.S. answer to this question. The U.S. understanding of the document's significance – which appears to be somewhat different from that of India – is correct for the reasons articulated in that answer.

Question 6.10: With reference to paragraph 112 of the United States' first written submission, please respond to the United States' argument that "India does not demarcate which arguments relate to" Article 6.1 and which relate to Article 6.2.

Question 6.11: With reference to paragraph 117 and 118 of the United States' first written submission, please respond to the United States' arguments that (a) "the Guidelines do not demonstrate that an opportunity actually exists"; and (b) "[t]he existence of the questionnaire does not demonstrate that the proposal will be considered and acted upon in a fashion that demonstrates a genuine opportunity exists".

Combined Comment on India's Answers to Questions 6.10 and 6.11:

130. India's responses to questions 6.10 and 6.11 reflect India's continued misunderstanding of the fact that India, as the Member that brought this Article 21.5 proceeding, bears the burden

of establishing that it has achieved compliance. India's misunderstanding plays a particularly large role in its arguments with respect to the Article 6.2 question of whether it has provided an effective opportunity to regionalize, and the question of whether it has complied with the requirements of Article 6.1, including Article 6.1's requirement to ensure adaptation of measures to the SPS characteristics of areas from which products originate.

131. Having adopted a vague measure that does not show, on its face and in light of other components of India's legal regime, that India has established an effective opportunity to regionalize or ensured that its measures are adapted to the SPS characteristics of areas from which products originate, India complains that because the measure is new, India could not provide practical evidence of adaptation.[117] India also appears to be complaining, in its response to question 6.11, that in some circumstances practical evidence of an effective opportunity may take time to develop – i.e., that time for applications to be submitted and evaluated would be necessary.

132. India, however, is the Member that chose the timing of the present Article 21.5 proceeding by seeking establishment of the Panel. India assumed the burden of establishing the compliance that it was claiming. India cannot now demand a beneficial presumption as to the effect of its measures as a result of its own failure to take the time to establish through application what its measures did not establish on their face: compliance with the obligations in Article 6 of the SPS Agreement.

133. India also appears to misunderstand what it needs to demonstrate with respect to Article 6.1. India appears to take the position that because the original dispute resulted in a finding that India had breached Article 6.1 as a consequence of India's failure to even recognize the concepts of disease free areas with respect to AI, in breach of Article 6.2, a finding of compliance in this Article 21.5 proceeding would mean that India had also resolved the breach of Article 6.1. This does not follow, however, from reasoning of the original Article 6.1 finding. Rather, as the party with the burden in this dispute, India must establish that it has achieved compliance with Article 6.1 regardless of whether it has or has not also complied with Article 6.2. It does not benefit from a presumption that its revised measure would be consistent with Article 6.1 in the event that it does recognize the concepts of pest or disease free areas (including providing an effective opportunity for regionalization). India's failure to make arguments specifically addressed at compliance with Article 6.1 is accordingly fatal to its claim of compliance with respect to Article 6.1.

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[117] India's Responses to Panel Questions, para. 166. Contrary to what India appears to suggest in its response to question 6.11 (para. 168), the United States has not argued that an effective opportunity for purposes of Article 6.2 in all circumstances may be demonstrated only through practical consideration of regionalization requests and implementation of regionalization decisions. Rather, the U.S. argument has focused on the circumstances of this particular Article 21.5 proceeding, where India bears the burden of proof and India's measures themselves clearly do not establish an effective opportunity.

134. With respect to the actual contents of the Guidelines and questionnaire, India continues not to engage with the deficiencies highlighted by the United States throughout this proceeding. Instead, it merely quotes language from the guidelines and S.O. that constitutes well-trodden ground in this dispute.

135. Further, it remains unclear whether or how India's purported willingness to recognize U.S. disease-free areas will be operationalized. But even more significantly, the fall 2017 activity concerning the U.S. regionalization request serves, in the context of this dispute, merely as evidence of discretionary action by Indian authorities when faced with the prospect of imminent dispute settlement proceedings. It does not constitute evidence of an effective opportunity for regionalization or adaptation to regional conditions.

Question 6.12: With reference to paragraph 75 of India's second written submission, please elaborate on India's position that the "factors" in Article 6.1 of the SPS are the criteria against which requests for recognition of disease-free or low disease prevalence areas will be assessed. How does India interpret and apply these factors in the specific context of the procedure under paragraph 3 of S.O. 2337(E)?

Comment:

136. As the United States noted in its comment on India's response to question 2.14(c), the text of India's measure does not provide that the "factors" in Article 6.1 constitute the criteria against which requests for recognition will be assessed. There is no reference to Article 6.1 in S.O. 2337(E), nor is there any such reference in India's Guidelines or Questionnaire. There is simply no reason for any exporting country to suspect that the "factors" in Article 6.1 supply the relevant criteria, nor would there be any reason for an Indian official to feel bound to apply those factors as criteria when evaluating a request. Had India sought to set out the Article 6.1 factors as evaluation criteria, it could have done so. It is simply not tenable to suggest that an oblique reference to "the requirements of the World Trade Organization Agreement on Sanitary and Phytosanitary Measures" establishes these factors as the relevant criteria.

137. Likewise, it is not tenable to suggest that the existence of a few questions in the questionnaire that may be relevant to the "factors" in Article 6.1 somehow establishes that India is using these "factors" as evaluation criteria. As noted in the U.S. comment on India's answer to question 6.3, the questionnaire poses approximately one hundred questions or information requests on a wide variety of subjects, including some that appear unrelated to avian influenza or even animal health.

138. It is, moreover, noteworthy that India's response to question 6.12 offers no indication of how India "interpret[s] and appl[ies] these factors in the specific context of the procedure under paragraph 3." This provides further reason for scepticism that these "factors" in fact function as India's evaluation criteria.

139. Moreover, the DSB findings in the original dispute concerned, in part, India's misinterpretation of international standards. India's interpretation and application of Article 6 was also found to be incorrect in the original proceeding. Particularly in light of these facts, India's failure to explain how it is interpreting and applying its purported criteria reinforces the fact that India has not met its burden of establishing that it meets its Article 6 obligations to offer effective opportunities for regionalization and to ensure adaptation of measures to the SPS characteristics of areas from which products originate.

Question 6.13: With reference to paragraph 99 of the United States' second written submission, please respond to the United States' argument that a Member incorporating provisions of the WTO agreements into its domestic measures "would still need to demonstrate how the actual conduct comported with the substantive obligations in those agreements".

Comment:

140. The United States would clarify that India has not "incorporate[ed] provisions of the WTO agreements" into its domestic measures. Rather, S.O. 2337(E) merely asserts that "adaptation to the sanitary and phytosanitary characteristics of the area of the exporting country … shall be made in accordance with the requirements of the" SPS Agreement. This simply constitutes an assertion that India will comply with its obligations under those agreements – something that Members already committed to do when they formed or joined the WTO – not a statement of what India considers to be the relevant obligations. India is in essence arguing that it should be deemed to have achieved compliance because it has asserted that it is in compliance.

141. Moreover, as the United States has noted, including in paragraph 99 of the U.S. Second Written Submission, it is highly relevant that in the original proceeding, India's interpretation and application of Article 6 was found to be incorrect, as was India's interpretation of relevant international standards. In these circumstances, a mere assertion that India will act consistently with the SPS Agreement carries little weight.

142. Further, and particularly in light of the previous findings concerning India's misinterpretation of SPS Agreement Article 6 and international standards, the United States would again recall the placement of the burden of proof in this Article 21.5 proceeding. India was the Member that requested establishment of the Article 21.5 panel and India thus bears the burden of affirmatively proving that it has achieved compliance. A mere assertion that India will act in accordance with WTO obligations does not suffice to meet this affirmative burden.

143. Finally, as discussed in the U.S. Comment on India's answers to questions 6.10 and 6.11, India's handling of the U.S. regionalization does not assist India in meeting its burden. As noted, it remains unclear whether or how India's purported willingness to recognize U.S. disease-free areas will be operationalized. Furthermore, the fall 2017 activity concerning the U.S. regionalization request serves, in the context of this dispute, merely as evidence of discretionary action by Indian authorities when faced with the prospect of imminent dispute settlement

proceedings. It does not constitute evidence that India's measures provide an effective opportunity for regionalization or that they ensure adaptation to regional conditions – and it certainly does not constitute evidence that India had achieved compliance with its obligations under Article 6 as of the date that the Article 21.5 Panel was established. Indeed, evidence post-dating the establishment of the Article 21.5 Panel has only limited relevance in assessing whether India has brought itself into compliance as of the date that the Panel was established.[118]

Question 6.14: With reference to paragraph 100 of the United States' second written submission, please respond to the United States' argument that "[a]n effective opportunity to do something requires understanding the relevant criteria at issue … The opportunity is effective because a party knows what is expected".

Comment:

144. As explained above, the U.S. regionalization request, and India's handling of it, do not suffice to meet India's burden of showing compliance. The United States would add here that its completion of India's questionnaire in no way suggests that the United States has an understanding of the criteria that India uses for assessing requests for recognition of regional conditions. As noted, the questionnaire requested a large volume of information on various topics, including some information with no discernable relevance to avian influenza. As a result, its questions are of little assistance in illuminating the actual criteria used by India for assessing applications. U.S. completion of the questionnaire evidences only U.S. knowledge that provision of the requested information amounted to a procedural requirement for recognition of its disease-free areas.

145. India's erroneous contention that the United States is stretching the "effective opportunity" requirement further reflects India's misunderstanding of the burden of proof. While India's answer appears to contend that a Member's regulations need not set out criteria for evaluating regionalization, India does not appear to dispute the proposition that a Member must have some criteria. Criteria enable an exporting Member to know what is expected and officials of the importing country to know how to make consistent decisions, avoiding outcomes that are arbitrary, reflective of discretion, or reflective of improper considerations. Where requests can be denied on the basis of improper considerations, exporting Members do not have an effective opportunity to seek recognition of regional conditions.

[118] *See* U.S. Second Written Submission, paras 107-108.

Question 6.15: Please respond to the question posed by the United States in paragraph 110 of its second written submission, viz. "has India presented evidence concerning the mechanisms and flexibilities in the revised Avian Influenza Measure that will be utilized to achieve adaptation".

Comment:

146. India's answer to this question merely restates points that India made in response to other questions, and that U.S. comments above have shown to be without merit.

147. The United States has already explained, both above and in its submissions, why S.O. 2337(E) does not indicate how India will actually ensure adaptation of its measures to the SPS characteristics of exporting areas with respect to AI. The United States has further explained that neither the guidelines nor questionnaire provide evidence that India has complied with its obligations under Article 6, including India's obligation to ensure adaptation to the SPS characteristics of areas from which products originate. The United States has explained why its completion of India's questionnaire in no way constitutes evidence that India has established regionalization criteria; why the United States was in no way required to raise India's lack of assessment criterial bilaterally with India when completing India's questionnaire as a precondition for raising that lack of assessment criteria now; and why that lack of criteria leaves India unable to meet its burden of showing that it has complied with its obligation under Article 6 of the SPS Agreement. The United States has additionally explained why evidence postdating the establishment of the Article 21.5 Panel fails to show that India had achieved compliance with its obligations under Article 6.

In sum, India has not presented evidence showing that its revised Avian Influenza Measure ensures adaptation to the SPS characteristics of areas from which products originate – or, for that matter, that the measure offers an effective opportunity to secure recognition of disease-free areas.

7 ARTICLE 7 AND ANNEX B

Question 7.1: Did the finding of violation of Annex B and Article 7 of the SPS Agreement in the original proceedings entail an implementation obligation for India? What would be the actions required for India to bring itself into compliance in this respect?

Comment:

148. India is claiming that it would be "materially impossible" to comply with the breach of Annex B and Article 7.[119] Apparently, India claims this exception is drawn from the International Law Commission's Draft Articles on Responsibility of States for Intentionally Wrong Acts ("Draft Articles"). If India wishes to describe its breach as intentionally wrongful

[119] India's Response to Panel Questions, para. 184.

act from which reparations should flow, India is entitled to describe it as such. However, the Draft Articles have no relevance for WTO dispute settlement.[120] The mechanisms for finding breach and the remedies are set forth in the DSU – full stop. The DSU does not have any notion that nullification and impairment of obligations is excused in the manner India suggests. To the contrary, the DSU recognizes that:

> In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.[121]

149. Moreover, India's position though would appear to make any breach of Article 7 and Annex B impossible to find. For example, India claims that Annex B(5)(a) requires publication at an early stage, but that is apparently impossible once a measure has been in place for several years. Such argument is unavailing. A panel can of course find a breach of Annex B(5)(a) if a measure has been in force for years if it was never notified properly. The original Panel did precisely that.[122]

150. Furthermore, while India has discretion to how it chooses to bring itself into compliance, there were clearly options. To begin with, it could ensure that Revised Avian Influenza Measure was developed and enacted consistent with Article 7 and Annex B. In this dispute, India, which has the burden of establishing compliance, did not even initially try to claim compliance with these provisions. That is not surprising, because as the United States as demonstrated, India's measures were not developed in the transparent manner called for under these provisions.

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[120] The commentary to the Draft Articles makes clear that the type of material impossibility India invokes is fundamentally different. Draft Articles, p. 99 (Exhibit USA-33) ("Under article 35, subparagraph (a), restitution is not required if it is "materially impossible". This would apply where property to be restored has been permanently lost or destroyed, or has deteriorated to such an extent as to be valueless. On the other hand, restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these. Under article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility.")

[121] DSU Article 3.8.

[122] *India – Agricultural Products (Panel)*, para. 8.1.

151. Finally, India claims – without citation to the text of the covered agreement, prior legal analysis by a panel or the Appellate Body, or even a piece of commentary – that it is the United States' burden to prove inconsistencies with Annex B.[123]

Question 7.2: In interpreting the expression "urgent circumstances" in Annex B(2) of the SPS Agreement, could the Panel have regard to the situations described in Article 2.10 of the TBT Agreement?

Comment:

152. The United States notes that "urgent" whether in the context of the TBT Agreement or the SPS Agreement reflects a practical problem that goes to ensuring the effectiveness of the measure.[124] It is not the situation India invokes: that it needs to meet an RPT deadline. Moreover, in the present dispute, the United States notes that India had complete control over how it chose to notify its measure. It chose not to claim its measure was either an emergency or trade facilitating.[125] There is no reason to give more credence to India's post hoc justifications than the one it proffered when it actually notified the proposed measure.

Question 7.4: Could India clarify where in its written submissions or oral statement at the meeting it has made a prima facie case of compliance with the original panel's finding and recommendation regarding Annex B(5)(a) of the SPS Agreement?

Comment:

153. The United States wishes to emphasize the entirety of the argument invoked by India[126] with respect to its *prima facie* case:

> India recalls that the opening paragraph of Annex B(5) establishes the conditions for the application of the obligations listed in sub-paragraphs (a) through (d): that an international standard does not exist; or that the SPS measure is not substantially the same as the international standard. In this dispute, an international standard exists (Chapter 10.4 of the Terrestrial Code) and the revised AI measure conforms to the international standard. Accordingly, none of the conditions precedent for the application of the obligations in sub-paragraphs (a) through (d) arises. Therefore,

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123 India's Responses to Panel's Question.

124 The United States recognizes that certain aspects of the agreements where the textual basis is similar may have relevant analysis. *See India – Agricultural Products (Panel)*, para. 7.266-7.269. In this case, it would the term "urgent." As the United States explained in its response to this question though, the scope of SPS measures is different than TBT measures.

125 Exhibit USA-1.

126 India's Response to Panel Questions, para. 201.

> as a threshold matter, India is not acting inconsistently with Article 7 and Annex B(5)(b) and (d) as it was not required to comply with those obligations.[127]

India also asserts in response to Question 1.4 that the burden of proof articulated in *US/Canada – Continued Suspension (AB)* is the appropriate burden of proof to apply to its claims.[128] To recall, that burden required a clear description of the measure and an adequate explanation to put a panel in a position to make an objective assessment.[129] The argumentation India cites does not meet that standard.

154. India also make the puzzling argument that the Revised Avian Influenza Measure is consistent with Annex 5(B)(a) "not as an implementation obligation, but rather as an obligation generally applicable to SPS Measures."[130] Apparently, per India, the consequence of this is that the burden is somehow on the United States to prove an inconsistency exists. India's attempt to characterize this claim, like others, fails. This is an Article 21.5 proceeding where India must show that the measure taken to comply is fully consistent with all of the provisions found to have been breached in the original proceeding. India cannot simply assign burdens as it sees fit. If it does not supply the proper argumentation and evidence to meet its burden, it simply loses and India must be found to still not be in compliance with the DSB's recommendations and rulings.

Question 7.5: With reference to India's statement in paragraphs 151 to 154 of its second written submission, could India please explain on what legal basis the Panel may "not read so strictly" the requirement in Annex B(2) of the SPS Agreement to allow a reasonable interval? In particular, does India consider the "duty to comply within the shortest period possible" and the alleged trade-permissive nature of the revised AI measure to constitute urgent circumstances?

Response:

155. India's argument that "urgency" in the context of Annex B(2) includes its need to implement its measure is unsupported. An urgent SPS problem is one that poses a risk to achieving the actual SPS objective, not forestalling a failure to have a measure in place by the end of the RPT. In this case, the United States notes that India agreed to the RPT, and that it was 12 months, or twice as long as India has historically updated its SPS measures. India should have factored the reasonable interval and other notification obligations when agreeing to the

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127 India's Second Written Submission, para. 143.

128 India's Response to Panel Questions, para. 14.

129 *US/Canada Continued Suspension (AB)*, para. 362.

130 India's Response to Panel Questions, para. 204.

RPT. Put plainly, India cannot claim its original non-compliance stemming from the original measure entitles it to further non-compliance with respect to the measure taken to comply.

156. The United States notes India's response does not address how post-import testing was promulgated consistent with India's obligations under Article 7 and Annex B of the SPS Agreement. Is it because it is part of one the measures that was notified and is at issue in this dispute or because India failed to comply with its notification obligations?

Question 7.6: **Could India please clarify the implications of its characterization of publication and notification obligations under Annex B as "consummated acts"?**

Response:

157. The United States focuses on one point made by India: that because the damaging effects have ceased, breaches of Annex B(2), B(5)(a), B(5)(b), and B(5)(d) are not amenable to implementation.[131] This dispute highlights precisely that the damaging effects have not ceased. As the United States noted in its letter to India concerning its notification, India's lack of proper notification of the Revised Avian Influenza Measure impeded the United States' right to have a transparent understanding of a Member's measure in several respects:

> The United States also has several comments and concerns with respect to the notification (SPS/N/IND/143):
>
> 1) As noted above, in field 8 (relevant international standard) India has ticked the "none" box, even though India has recognized that the OIE Code provides the relevant international standard. We respectfully ask India to amend its notification to identify the relevant international standard, and to indicate the ways the measure deviates from that standard.
>
> 2) With respect to field 3 (Products covered), India's identification of the products covered by the measure – "Animal products" - is unreasonably vague. The description is inconsistent with the notification form issued by the SPS Committee, which requests that ICS numbers be provided where applicable. The description is also more vague than what India has provided in its prior notification of avian influenza measures. We respectfully ask India to amend its notification to identify the ICS numbers of all products that would be covered by the proposed new measure.
>
> 3) The United States has concerns with the fact that India's notification states that the final date for interested parties to submit comments (field 12) and the date that India proposes to adopt the measure (field 10) is the same: June 19, 2016. That the date for the close of the comment period and the proposed date of adoption are the

[131] India's Responses to Panel Questions, para. 211.

> same unfortunately suggests that India will not be taking any comments into account or entertaining any possibility for the regulation to be revised. The United States asks India to ensure that these comments and any others received by India are in fact taken into account in the formulation of the final measure. [132]

92. Moreover, many of the factual uncertainties in this dispute are also a function of India's failure to properly notify its measure. For example, if India has notified post-import testing – or acknowledged that it was a component of S.O. 2337(E) – we would not be having this debate about when it was promulgated. Moreover, the United States and other Members would have had the opportunity to at least raise with India why the testing requirement is problematic and inconsistent with the OIE Terrestrial Code.

8 JUDICIAL ECONOMY

Question 8.1: If the Panel were to find that India's revised AI measure does not "conform to" an international standard and is not "based on" a risk assessment, should it exercise judicial economy with respect to Articles 2.3, 6, and 7 of the SPS Agreement?

Response:

158. The United States addresses one point: India's assertion that judicial economy is inappropriate because this is a compliance proceeding is incorrect. To a certain extent, the policies that underlie judicial economy militate more powerfully in a compliance proceeding. Because there are existing DSB recommendations and rulings, and because the task of a compliance panel is to see if a measure taken to comply resolves those recommendation and rulings, it would seem that a panel should conserve its resources the sooner it finds that consistency has not been achieved. Specifically, whether there is one breach or six, India still has to go back and fix its measure in order to comply.

159. The United States recognizes that judicial economy is within the discretion of the Panel and has no objection if it chooses to address all of India's claims. The United States simply notes, as it has in other proceedings, that at a time when the WTO dispute settlement is under stress, panels and the Appellate Body should carefully consider whether judicial economy can be a part of the solution.

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[132] Letter from J. Doherty to Dr. Prasad, dated June 10, 2016 (Exhibit USA-2).