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

(DS430)

EXECUTIVE SUMMARY OF

THE UNITED STATES OF AMERICA

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U.S. First Written Submission

I. INTRODUCTION

1. The United States would welcome India's compliance in this dispute. India's submission, however, further confirms that more than two years after the Dispute Settlement Body (DSB) adopted its recommendations in this dispute – and more than five years since the United States initiated this dispute – India has yet to render its avian influenza measures consistent with its WTO obligations. There is simply no evidence from India to establish that it has responded to each of the original panel's findings by making the necessary changes. India's failure to provide evidence in support of its contentions is consistent with the fact that India's supposed compliance rests simply on excising certain text in its measure that openly contradicted the OIE Terrestrial Code. India's actual conduct though confirms that India acts in a manner that contradicts the OIE Terrestrial Code.

II. THE MEASURES TAKEN TO COMPLY

A. History of India's Claims of Compliance

2. India began by asserting compliance with no instruments in place, and then proceeded to make a new claim of compliance whenever it adopted a new or additional instrument. India's various claims of compliance have a common feature: at no time did India indicate that India had abandoned its interpretation that the OIE Terrestrial Code allowed it to require a territory to be free from avian influenza as a condition of import.

3. The text of paragraph 2(1) of S.O. 2337(E), as issued prior to amendment, was explicit that complete freedom from AI was required as a condition for export. In particular, it provided that importation was allowed only from a 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." The inclusion of this text – "free from avian influenza" – in the measure as originally published is consistent with India's position from the original proceeding: Under the OIE Terrestrial Code, an exporting territory needs to be free from avian influenza in order to export poultry products.

4. The United States draws the Panel's attention to the fact that paragraph 2(1) provides that paragraph 3 needs to be "fulfilled" to allow import of "poultry and poultry products" into India. The use of "and" in paragraph 2(1) as in "allowing trade in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health *and* subject to fulfilment of requirements in paragraph 3 …" indicates that paragraph 3 is an additional condition for importation into India. To the extent India claims S.O. 2998(E)'s textual deletions result in a measure that no longer limits market access to exports from AI-free Members, India's claim is belied by the evidence. The deletion is merely cosmetic. India has simply adduced no evidence to indicate that it has done anything to inform its relative authorities that the ban has in fact ended.

5. Indeed, the sanitary imports and trade data that India submits are indicative that India's evidence does not establish that the avian influenza restrictions have actually been lifted. It is telling what India says about these countries: "These countries have not applied for the recognitions of pest or disease-free areas as they have not had any outbreaks of avian influenza." If the countries are not reporting avian influenza, then whether there have been SIPs issued to exporters from them or even trade is irrelevant to whether India has actually lifted its restrictions from countries reporting avian influenza.

III. LEGAL DISCUSSION

A. The Revised Avian Influenza Measure Breaches Article 3.1 of the SPS Agreement

6. Rather than maintain a measure that explicitly states that India will apply import prohibitions – and then claim the prohibitions are consistent with the OIE Terrestrial Code – the Revised Avian Influenza Measure simply proclaims that India acts consistently with the OIE Code – and nothing more. Evidence, including India's decision to remove veterinary certificates from public access, demonstrates that India continues to restrict trade on account of avian influenza in a manner that contradicts the OIE Terrestrial Code.

7. In the original proceeding, India stated that it used the OIE's website to determine the avian influenza status of a country and impose its restrictions. India has not adduced any evidence to indicate that it reversed this long-standing practice. In light of this process, India is still maintaining a ban on agricultural products on account of avian influenza, which encompasses LPAI as well. Such a ban, as found by the panel in the original proceeding, contradicts the OIE Terrestrial Code. Thus, India cannot claim its measure is based on the OIE Terrestrial Code, let alone conforms to it. India has not put forward any evidence that the Revised Avian Influenza Measure actually effectuates the product specific recommendations of the OIE Terrestrial Code. Those recommendations require that veterinary certificates with particularized conditions be utilized – and India has not provided any evidence they exist. Indeed, the United States raised this concern with India months before the Panel was established, and the certificates were still not on DADF's website when the Panel was established. A hypothetical import certificate held internally by an importing Member, and not available to potential exporters, is irrelevant to issues of compliance with WTO rules.

8. Under the OIE Code, countries should not apply measures with respect to diseases that they do not control for domestically. Specifically, Article 5.1.2.2 of the OIE Terrestrial Code disclaims imposing import conditions for diseases that are not subject to any control domestically. Yet, the Revised Avian Influenza Measure is imposing a restriction because of LPAI outbreaks even though there is not an effective system for surveillance of LPAI domestically. Nothing in India's submission indicates that India has made any effort to create a surveillance system capable of reliably detecting avian influenza domestically.

B. The Revised Avian Influenza Measures Breaches Articles 5.1, 5.2, and 2.2 of the SPS Agreement

9. Because India's claim of compliance rests entirely on its argument that the Revised Avian Influenza Measure is based on or conforms to the OIE Terrestrial Code, India's failure to put forward a risk assessment on which the Revised Avian Influenza Measure is based means that India remains in breach of its obligations under Articles 5.1, 5.2, and 2.2 of the SPS Agreement.

1. India Has Failed to Base the Revised Avian Influenza Measure on a Risk Assessment as Defined by Article 5.1 and Annex A, Paragraph 4

10. India's claim of compliance with respect to Articles 5.1 and 5.2 rests upon three arguments, each of which is premised on conformity with the OIE Terrestrial Code. First, India claims that the Revised Avian Influenza Measure "conform[s] to the relevant provisions of the Chapter 10.4 of the Terrestrial Code…." Second, India claims incorporating the OIE Code means its measure is based on "the latest scientific evidence." Third, India claims it can rely on risk assessments undertaken by the OIE since its measure conforms to the OIE Terrestrial Code. Each of these arguments fails for the same reason: the Revised Avian Influenza Measure is significantly different and more trade restrictive than the recommendation of the OIE Terrestrial Code.

2. India Has Not Rebutted That a Breach of Article 2.2 of the SPS Agreement Arises as Well

11. India asserts that the "Appellate Body found that India's AI measures to be inconsistent with Articles 5.1 and 5.2 of the SPS Agreement but not with Article 2.2 of the SPS Agreement." There were only two products with which the Panel's finding under Article 2.2 was reversed: poultry meat and eggs. The findings for the remaining products were not disturbed. Accordingly, since the Revised Avian Influenza Measure breaches Article 5.1 and 5.2 of the SPS Agreement, there is a presumption that India is also in breach of Article 2.2. Here, India has not even attempted to rebut that presumption.

C. The Revised Avian Influenza Measure Breaches Article 5.6 and Article 2.2 of the SPS Agreement

12. The only argument India provides with respect to its claim of consistency under Articles 5.6 and 2.2 of the SPS Agreement is that the Revised Avian Influenza Measure "fully conforms to Chapter 10.4 of the OIE Terrestrial Code." As explained above, that argument is incorrect. Despite India's claims of conformity, the Revised Avian Influenza Measure is a fundamental departure from Chapter 10.4 of the OIE Terrestrial Code. In particular, its operation contains restrictions that effectively preclude trade from being initiated or completed from territories reporting avian influenza. With respect to the initiation side, India requires that the exporting territory be free from avian influenza before DADF will issue a sanitary permit. On the completion side, India requires a veterinary certificate to allow importation. There are no veterinary certificates that permit trade from territories reporting avian influenza. Accordingly,

there is effectively a ban on importation from countries reporting outbreaks of avian influenza, including outbreaks of LPAI.

13. In comparison to the Revised Avian Influenza Measure, Chapter 10.4 of the OIE Terrestrial Code is a significantly less trade restrictive alternative that can achieve India's ALOP and is technically and economically feasible. By contrast, the Revised Avian Influenza Measure does not allow trade to occur in those scenarios. Because any measure that allows trade is less trade restrictive than an import prohibition, the OIE Terrestrial Code is less trade restrictive than the Revised Avian Influenza Measure. Accordingly, the United States has demonstrated that the Revised Avian Influenza Measure is more trade restrictive than required and accordingly breaches Article 5.6 of the SPS Agreement.

14. India is not ensuring than its SPS measure is applied only to the extent necessary to protect animal health. India has not presented any reason to rebut this presumption. Thus, the Revised Avian Influenza Measure breaches Article 2.2 of the SPS Agreement.

D. The Revised Avian Influenza Measure Breaches Articles 6.1 and 6.2 of the SPS Agreement

15. Specifically, with respect to Article 6.1, the United States explains that India's requirements for sanitary import permits and its lack of veterinary certificates require the exporting territory to be free of avian influenza altogether rather than allow for trade from those areas reporting LPAI, but not HPAI. The failure to make such adaptation is inconsistent with Article 6.1 of the SPS Agreement. With respect to Article 6.2, the United States explains that India has provided certain instruments that indicate a Member can make a proposal for regionalization to India. India, however, has not provided any evidence that confirms India will act upon such a proposal, such as elucidating the criteria that India needs to be satisfied or providing evidence that India has actually granted any proposals.

1. The Revised Avian Influenza Measure Does Not Recognize Concepts of Disease Free Areas or Areas of Low Disease Prevalence

16. As an initial matter, the United States notes that there is some difficulty ascertaining which arguments in India's first written submission relate to Article 6.1, Article 6.2, or both. India does not demarcate which argument relates to which provision. This may be the case because India mistakenly conflates what Article 6.2 requires as being a requirement of Article 6.1 or that the obligations in the provisions are the same. But, as recognized by the Appellate Body, it is from the text of Article 6.2 itself that Members must afford an "effective opportunity." Recognizing the concept of regionalization requires showing that the opportunity exists. Here, the relevant evidence put forward by India does not indicate that an opportunity actually exists.

17. First, India points to paragraph 1(b) and paragraph 1(d) of S.O. 2337(E) because they incorporate the definitions of "zones and compartments" and "pest- or disease-free areas and areas or low pest or disease prevalence." Assuming *arguendo* that India did incorporate the

definitions correctly – and there is no evidence that India has done so – such incorporation does not mean India recognizes the relevant concepts because the terms do not afford an opportunity.

18. Second, India points to paragraph 3 of S.O. 2337(E), as amended. Neither subparagraph indicates that another WTO Member has a meaningful opportunity to have its disease free areas recognized. The first subparagraph is a circularity. India asserts that it will follow the SPS Agreement obligation in Article 6.1. India does not explain what that means or how it will be accomplished. All WTO Members, by virtue of being WTO Members, have an obligation to act consistently with their WTO obligations. The second subparagraph notes that an exporting country will provide a written request and necessary evidence for recognition. In other words, India is indicating a Member may make a proposal to India. India made that same claim in the original dispute. India's argument is not bolstered by its pointing to either the guidelines it has promulgated or its questionnaire.

19. With respect to the guidelines, the guidelines do not contain any guidance on when India will actually accept a proposal, or indication otherwise what India is seeking to assure itself regarding. Moreover, there is no historical practice provided by India to demonstrate that it actually will accept a proposal. Accordingly, the Guidelines do not demonstrate that an opportunity actually exists. The questionnaire simply reflects that the proposal must come in a certain form and contain certain information. The 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. In this respect, India's assertion that other countries use questionnaires similar to the one it has issued is of no moment. India does not prove that it recognizes concepts of disease free areas by simply maintaining similar paperwork.

20. Third, India invokes the conformity of its measures with the OIE Terrestrial Code as establishing its consistency with Article 6 of the SPS Agreement. As demonstrated above, India's measure do not conform to the OIE Terrestrial Code and India cannot obtain the rebuttable presumption of consistency.

2. The Revised Avian Measure Is Not Adapted to the Particular Sanitary Characteristics of an Area

21. India's first written submission fails to explain how it has ensured the Revised Avian Influenza Measure is adapted per the requirements of Article 6.1 of the SPS Agreement. Because there is no evidence that India provides an effective opportunity for recognition of disease free areas, the Panel would be entitled to find likewise that India's measures are not appropriately adapted per Article 6.1 of the SPS Agreement.

22. With respect to India's assertion that it effectively adapts measures when conditions are met, the United States recalls again that India has not specified what those conditions are. In any event, two pieces of evidence confirm that such adaptation is not feasible. First, the United States notes India's earlier assertion in its submission that the DADF – if it has recognized regionalization – would grant a sanitary import for a zone free from avian influenza, even if another part of the exporting country were reporting avian influenza. Requiring freedom from avian influenza altogether is not consistent with having appropriately adapted a measure. The

second piece of evidence is the lack of veterinary certificates. Absent such certificates, India acknowledges there is no trade. India cannot claim that it allows trade from areas of disease freedom when trade is precluded altogether. Thus, the Revised Avian Influenza Measure remains inconsistent with Article 6.1 of the SPS Agreement as well.

E. The Revised Avian Influenza Measure Breaches Article 2.3 of the SPS Agreement

23. In the original proceeding, the panel found India breached Article 2.3 of the SPS Agreement on account of two forms of discrimination: (1) India restricts products from its trading partners outright if there is a detection of avian influenza while only imposing a 10km restriction when it has an outbreak of avian influenza and (2) India prohibits the importation of the affected products if LPAI is detected in its trading partners, even though India does not maintain surveillance sufficient to detect LPAI in India's domestic poultry. Those forms of discrimination continue to exist under the Revised Avian Influenza measure.

24. The United States notes that in light of the breaches of Article 2.3, India had potentially three approaches it could take to address the finding. First, it could seek to align its treatment of imported products to that afforded domestic products. Second, it could align the treatment afforded to domestic products to the treatment accorded to imported products. Finally, it could align the treatment of both imported products and domestic products to a new standard. Whichever option is taken, an assessment of compliance requires knowing the treatment is presently being afforded domestic products.

25. India focuses its claim of consistency with respect to its revised treatment of imported products through the Revised Avian Influenza Measure. The United States has explained above that India has not provided any instrument such as a veterinary certificate that would allow for trade on such terms. Moreover, India's acknowledged requirement that it grants SIPs only if the exporting territory is not reporting avian influenza undercuts such a claim. In other words, India is still not allowing trade from countries reporting LPAI. Thus, India has not changed its treatment of imported products.

26. India, despite the silence in its submission, has not changed its treatment of domestic products either. In the original proceeding, the panel considered an instrument called "National Action Plan 2012" (NAP 2012) to evaluate India's treatment of domestic products. In particular, the panel's findings in the original proceeding examined how under NAP 2012, restrictions applied to limited geographic areas such infected zones and surveillance zones. India continues to maintain controls identical to those in the original dispute through an instrument known as the National Action Plan 2015 (NAP 2015). In particular, the United States notes that India continues to have (1) requirements that relating to only reporting unusual sickness and mortality (which could exclude LPAI detections) and (2) limited geographic controls in the event of an outbreak.

1. The Two Forms of Discrimination Breach Article 2.3 of the SPS Agreement

27. India continues to breach its obligations under Article 2.3 of the SPS Agreement because it arbitrarily discriminates against imported products by requiring they originate wholly outside areas reporting avian influenza, while domestic products are free to move outside a very limited geographic limit. In particular, domestic products are only subject to controls within a 10 kilometer radius of an outbreak. Trade outside that radius in completely unaffected. The Revised Avian Influenza Measure, like the original measure, raises these exact same concerns. By simply examining the avian influenza status of the exporting territory rather than the products at issue and measure to mitigate risk – and allowing trade in domestic products to be controlled in only a limited fashion – India has engaged in unjustified discrimination even though identical conditions prevail. Accordingly, continuing this form of discrimination breaches Article 2.3.

28. India also breaches Article 2.3 of the SPS Agreement because it imposes controls with respect to LPAI, but does not even have a surveillance program capable of detecting LPAI at home, resulting in arbitrary discrimination. India does not contend otherwise and the NAP 2015 confirms that is indeed the case. In particular, the United States notes that NAP 2015 only requires reporting unusual sickness or mortality. As the panel's findings have noted, because LPAI can have mild symptoms, infections may pass unnoticed. India thus continues a surveillance system that is not designed to detect and control for LPAI.

29. Accordingly, 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 since India is seeking to control for a disease only with respect to imports. Here though, India is applying broad restrictions from countries reporting LPAI. Thus, India has not brought itself into compliance with respect to the findings made under Article 2.3 of the SPS Agreement.

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

30. The two forms of discrimination identified above demonstrate that the Revised Avian Influenza Measure constitutes a disguised restriction on international trade in breach of the second sentence of Article 2.3. In particular, the Panel, like the panel in the original proceeding, can note three salient features of the measure in making the determination:

1. it arbitrarily discriminates;

2. it contradicts the OIE Terrestrial Code; and

3. it lacks a risk assessment.

All of these features taken together suppose a finding that the Revised Avian Influenza Measure is a disguised restriction on international trade.

F. The Revised Avian Influenza Measure Breaches Article 7 and Annex B of the SPS Agreement

31. India has made no claim that it has brought itself into compliance with respect to the findings adopted under Article 7 and Annex B of the SPS Agreement. This would be sufficient for the Panel to conclude that India has not demonstrated that its measure taken to comply in fact achieves compliance with WTO rules. Despite that India has not even addressed how it has brought itself into compliance with respect to the findings adopted with respect to Article 7 and Annex B of the SPS Agreement, the United States, in the interest of completeness, demonstrates that the Revised Avian Influenza Measure is inconsistent with India's obligations under these provisions.

32. The content of the Revised Avian Influenza Measure is not the same as the international standard, guideline, or recommendation. Moreover, it has a significant impact on trade since it continues effectively to foreclose trade in the affected products. Accordingly, the requirements in the subparagraphs of Paragraph 5 are applicable. With respect to subparagraph 5(b), the notification made by India for its proposed measure simply provided that the products covered were "animal products." This description is on its face too vague to permit interested Members to know what products will be affected. The United States notes that the relevant notification form in fact asks for detail at the level of the tariff line, which India omitted. With respect to subparagraph (d), India did not allow a reasonable amount of time for Members to provide comments. With respect to the original notification, the United States notes that India provided a comment period of 60 days, but also declared that the adoption date would be the same as the close of the comment period. This indicates that India did not intend to take the comments submitted towards the end of the comment period into account. The United States notes that the other notifications that India made also did not provide for any comment periods whatsoever. In light of this, India breached Annex B, paragraph 5(b) and (d), and accordingly Article 7 of the SPS Agreement. Moreover, the United States notes that India did not allow a reasonable amount of time before the entry into force of the Revised Avian Influenza Measure from its adoption per paragraph 2 in Annex B. India's notification forms do not identify any urgent circumstances that excuse a reasonable interval. Nor can the Revised Avian Influenza Measure be viewed as a form of trade liberalization since it continues to restrict trade. Accordingly, the United States believes that India has breached Annex B, paragraph 2 as well.

U.S. Second Written Submission

I. INTRODUCTION

33. India's second written submission, like its first, does not show that India has brought its original Avian Influenza measure into compliance with India's SPS Agreement obligations. India still fails to provide evidence in support of its assertions. Rather than speak to these evidentiary issues, India's second written submission speaks about matters unrelated to the WTO consistency of the Revised Avian Influenza Measure, such as its views of the current state of negotiations with the United States, or trade arrangements the United States purportedly has with other countries.

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

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

34. India claims the U.S. showing that India maintains freedom from avian influenza as a condition of entry is a mischaracterization. The United States' argument rests on a straightforward analysis of the situation. India's measure in the original dispute required freedom from avian influenza as a condition for entry – and asserted such a condition conformed to the OIE Terrestrial Code. India explicitly noted in the original proceeding that it checked the OIE's website to implement this condition of entry. India has not provided any evidence that the requirement has been eliminated nor that its interpretation of the OIE Terrestrial Code had changed. Indeed, the evidence belies India's assertion. S.O. 2337(E) as originally promulgated explicitly stated that India would allow trade from countries "free from avian influenza in accordance with the Terrestrial Animal Health Code," thereby plainly indicating India's interpretation of the OIE Terrestrial Code and a requirement for avian influenza freedom as a precondition for trade. Although India subsequently excised that blatantly problematic phrase, India has not demonstrated that the excision was anything other than cosmetic. Indeed, in this respect, it is telling that India acknowledges *in its submission* it continues to check the OIE's website before granting a sanitary import permit to see if the exporting territory is free from avian influenza.

35. The United States notes three aspects of the original measure that are relevant here: (1) India maintained avian influenza freedom as a condition of entry; (2) India operationalized this condition of entry requirement through formal instruction to its government authorities; and (3) India explicitly and vigorously claimed that such a requirement conforms to the OIE Terrestrial Code. Absent any affirmative action, there was no reason for this situation to change.

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

36. India does not – because it cannot – argue that any certificates that reflected the OIE Terrestrial Code's recommendations were issued and in operation on May 22, 2017 when the Panel was established. On this fact alone, India cannot claim that the Revised Avian Influenza Measure conforms to the OIE Terrestrial Code. Rather than address this problem with its position, India again relies on mere assertions; that is, India simply asserts the United States is incorrect, and asserts that OIE consistent veterinary certificates do somehow exist.

37. First, India asserts that because it requires SIP for imports, and any SIP granted requires a veterinary certificate to accompany the shipment, India has fulfilled the requirement to maintain veterinary certificates. This argument is unconvincing. Simply having a requirement for a veterinary certificate to accompany shipments does not mean that veterinary certificates actually exist, or that those hypothetical certificates are consistent with the OIE Code. Moreover,

relevant trade data for poultry meat with respect to India shows that the sanitary import permits do not confirm that trade is actually taking place. Second, India asserts "the most important element of the sanitary certificate is its *content*." If one assumes that certificate actually exists, the United States would agree with this statement. The problems with India's argument are (1) that – as explained in the prior section – the evidence shows that no such certificates were available (at least at the time of panel establishment), and (2) India has not shown that any certificate that India might use is in fact consistent with the OIE. Finally, India asserts that there is no certificate because the United States and India are presently in negotiations – and India views the United States as being unreasonable in the negotiations. The very existence of negotiations demonstrates that India had no certificates in place for trade when the Panel was established.

38. India has provided examples of veterinary certificates for certain products. India does not explain what precisely they prove. For example, India fails to state when they were promulgated, whether they have been made available to trading partners, whether these certificates are valid for trade, and if they have ever been utilized. In other words, India has not explained whether these example certificates are simply models India developed for the purposes of this dispute, for negotiations with trading partners, or whether they are actually valid instruments. In the absence of such information, India has no basis for asserting that they are of any relevance to any issue in this dispute. Indeed, in this respect, the United States notes that it is striking that India, which focuses extensively on matters following the Panel's establishment, ignores a notable moment that preceded it – and concerned certificates: the United States providing OIE Model Certificates to India on March 22, 2017 as a basis for trade. However, the United States did not receive a response until after the Panel in this proceeding was established.

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

39. The United States explicitly submitted the NAP 2015 in this dispute to show that India's present regime – like its predecessor NAP 2012 – does not reflect a surveillance regime that is capable of reliably detecting LPAI. The United States notes three problems with India's sweeping claim that this excerpt shows that India now conducts active surveillance. First, India has not provided any results of such testing to indicate that this is anything other than aspirational. Second, India has not explained what are these "areas of high risk" that are being surveyed. Finally, it lacks the details the experts above said was necessary for an active surveillance system. It does not identify the demography of poultry, the number of holdings, the selection process, testing methods, frequency, statistic design, etc. In sum, although India claims the United States mischaracterizes NAP 2015, the United States' assessment is based on the information before it. That information shows that NAP 2015, like its predecessor, does not reflect a surveillance system that can reliably detect LPAI.

III. INDIA'S NEW LEGAL ARGUMENTS ARE WITHOUT MERIT

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

40. The U.S. position is that "India has not put forward any evidence that the Revised Avian Influenza Measure actually effectuates the product specific recommendations of the OIE Terrestrial Code." This is particularly important in a situation, such as the one here, where the original measure was shown to be inconsistent with the OIE Code, and where the revised measure contains only cosmetic changes. To validate its claim of conformity with the OIE Terrestrial Code, India needs to demonstrate that the Revised Avian Influenza Measure embodies the international standard completely. The United States provided a reprint of the OIE Terrestrial Code to highlight precisely what a measure that conforms to the OIE Terrestrial Code would need to reflect.

41. Thus, India's grievance on transposition is misplaced. The United States would agree for example that if a Member transposed an international standard word for word into municipal law, that does not necessarily establish conformity with the international standard either. A Member could have one thing written in its law, but act completely contrary to the actual content of the standard. India has not provided guidance documents, instructions, veterinary certificates issued prior to the Panel's establishment, or even evidence that trade from countries reporting avian influenza is taking place in a manner that reflects the OIE Terrestrial Code. Accordingly, in the complete absence of evidence, India is not able to support its contention that the Revised Avian Influenza Measure conforms to the OIE Terrestrial Code.

42. As the United States has explained, any veterinary certificates India has promulgated since the Panel was established are not within the scope of this proceeding. However, to the extent these certificates are to be examined for some purpose in this dispute, the United States notes that they contradict the OIE Code. For example, these certificates reference new requirements for testing of consignments for avian influenza. These testing requirements may have been in force at the time the Panel was established. The requirements can be found in the certificates India has provided with its second written submission for (1) the import of feathers and down and poultry and of birds other than poultry and (2) the import of poultry meat and poultry meat products. Thus for feathers, all consignments regardless of the avian influenza status of the exporting country will be subject to testing at the border, *even though veterinary attestations have been provided.* For poultry meat and poultry meat products, testing will occur even if the zone or compartment from which the export takes place is free of avian influenza if there is an avian influenza outbreak somewhere else in the country. This requirement again is *in addition to provision of the required veterinary attestations.* The OIE Terrestrial Code does not impose any requirements for such testing.

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

43. A post-import testing requirement is a sanitary measure subject to the disciplines of the SPS Agreement. Accordingly, India needs to demonstrate that the measure is based upon a risk

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

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

44. A breach of Article 5.6 is established when there is (1) a reasonably available alternative measure that (2) achieves the Member's appropriate level of protection (ALOP), which is (3) less trade restrictive than the measure at issue. Here that measure readily exists: require only OIE-consistent veterinary certificates. The measure is technically and economically feasible because it requires India to abandon an unnecessary requirement, and instead use veterinary certificates that reflect the recommendations of the OIE Terrestrial Code. As the panel found in the original dispute, the use of OIE-consistent veterinary certificates is economically and technically feasible. Likewise, the panel in the original dispute found that measures based on the OIE Terrestrial Code would achieve India's ALOP of very high or very conservative. Finally, such a measure is less trade restrictive. India's post import testing requires importers to pay the cost of testing thus raising the costs of trade. Abandoning such a requirement in favor of OIE consistent certificates would eliminate costs, potential delays in clearing customs, and thus better facilitate trade.

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

45. India has acknowledged that it cannot provide an example of the Revised Avian Influenza Measure being adapted to the sanitary characteristics of a particular area, but suggests such an adaptation may happen soon with respect to the United States. For the reasons noted previously, India's attempt to enlarge the scope of this dispute by considering actions taken by India after panel establishment must be rejected. Instead, the United States asks a more basic question: has India presented evidence concerning the mechanisms and flexibilities in the Revised Avian Influenza Measure that will be utilized to achieve adaptation? Absent such evidence, there is no reason to accept that the Revised Avian Influenza Measure is consistent with Article 6.1 of the SPS Agreement.

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

46. India has produced evidence in its second submission that it now requires imported goods – feathers, poultry meat, and poultry meat products – to be tested for avian influenza. To the extent that this measure existed at the time of panel establishment, it would be another basis for

finding a breach of Article 2.3. There is no evidence that India has any similar requirement for domestic products. Indeed, it would likely make domestic trade infeasible.

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

47. The United States notes a threshold problem with how India characterizes the issues concerning the consistency of the Revised Avian Influenza Measure with India's transparency obligations under Article 7 and Annex B of the SPS Agreement: India continually describes it as a U.S. claim. This is inaccurate. Here, India, as the Member asserting that the Revised Avian Influenza Measure has brought it into compliance with the Panel and Appellate Body's findings, bears the burden of establishing so with respect to *all* of the findings made in the original dispute – including the findings concerning the transparency obligations in Article 7 and Annex B of the SPS Agreement.

U.S. Opening Oral Statement at the Substantive Meeting of the Panel

48. India maintains at least three WTO-inconsistent barriers that continue to block trade:

- a requirement that the exporting territory be free of avian of influenza before a sanitary import permit, or SIP, be granted;
- a requirement that a consignment be accompanied by a veterinary certificate, which is impossible to fulfill because India did not issue veterinary certificates; and
- to the extent the Panel examines new measures adopted after panel establishment, a post-import testing requirement whereby each consignment must be tested at importer's expense for avian influenza.

The existence of these barriers is proved by the evidence on the record in this dispute, including the text of the Revised Avian Influenza Measure, India's own statements and actions, and trade data.

49. With respect to India's statement today that it has recognized our zones yesterday, we will of course evaluate it. If it does lead to recognition of disease free areas – and trade – we will welcome it. This dispute, however, concerns the Revised Avian Influenza Measure as it existed on May 22, 2017 – the date the Panel was established. This dispute does not involve evaluation of ongoing bilateral efforts. Neither common sense nor the DSU require or permit the Panel to assess a moving target. Neither side can move the target in a way that tries to favor its interests – only an examination of the measure at the time of panel establishment is consistent with the DSU and neutral to the parties' interests.

U.S. Closing Oral Statement at the Substantive Meeting of the Panel

50. There are various assertions concerning the existence – and ability to use – model certificates for trade. The assertions made in India's interventions include these:

- The certificates existed, but could not be used since the United States had an outbreak of HPAI in spring and summer of 2017, so there was no point in India noting their existence to the United States;
- The certificates existed and could be used, but were not on DADF's website because DADF was updating them to reflect the new edition of the OIE Terrestrial Code; and
- The certificates existed and could be used, but the process only involves importers and traders, so there was no reason the United States would need to know about certificates.

We think those assertions appear to contradict one another. Moreover, there is an issue of common sense. If you have just been through a major WTO dispute where your veterinary requirements were at issue, what reason do you have to conceal new veterinary requirements if you truly believe they are WTO consistent? Why not share such requirements prior to initiating an Article 21.5 proceeding? These failings notwithstanding, the way to evaluate these allegations – and make the most objective assessment – is to see if there is any evidence for them.

51. Assertion 1: *The certificates existed, but could not be used since the United States had an outbreak of HPAI in spring and summer of 2017, so there was no point in India noting their existence.* The evidence is that the certificates were removed at least as early as fall of 2016 – when the United States was not afflicted with HPAI – and that they were still missing on DADF's website in June of 2017. Specifically, you can look at the record of the October 22, 2016 DSB meeting. That record reflects that the United States raised its concerns that the certificates were removed from DADF's website, and our view that they were "essential" in understanding India's measure. You can also look at the web archive site's record we provided that confirms that at least as of June 2017, certificates were still missing from DADF's website.

52. Assertion 2: *The certificates existed and could be used, but were not on DADF's website because DADF was updating them to reflect the new edition of the OIE Terrestrial Code.* The evidence is that the OIE updates its Terrestrial Code in May of each year – and had no major updates to its avian influenza recommendations in recent years. You know that because the OIE Terrestrial Code has been provided to you and it is clear that the new edition is finalized at the May conference each year. Accordingly, the actual timing of when the current edition of OIE Terrestrial Code is promulgated negates India's allegation that it took these certificates down for that reason – and why there were missing until only a few weeks ago.

53. Assertion 3: *The certificates existed and could be used, but the process only involves importers and traders, so there was no reason the United States would need to know about*

certificates. The evidence is that India requires veterinary certificates to be fulfilled by the competent authority of its trading partners, not by a trader. In other words, a certificate is useless to a private trader unless the competent authority in the country of export is aware of the certification requirements – and is able to confirm that it can fulfill them. That is why the United States sent its own model certificates to India on March 21, 2017. India responded on May 15, 2017 by noting that it would provide a "preliminary assessment" in 4-8 weeks on the U.S. *regionalization proposal*. India said nothing on the certificates, including whether it had model certificates that the United States might be already able to fulfill. In other words, the evidence highlights that the United States was indeed involved in certification – and that India never raised that model certificates were already available for use.

54. In short, India has made many allegations. The consideration of any them can be kept relatively brief because they lack any supporting evidence. Allegations that remain unsupported by evidence are simply speculation – and have no place in the resolution of this dispute.