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INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS430/R.

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LIST OF ANNEXES
ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

UNITED STATES

INDIA

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES FOR THE PANEL

Adopted on 15 March 2013

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. Upon indication from any party, at the latest on the first substantive meeting, that it shall provide information that requires protection additional to that provided for under these Working Procedures, the Panel shall, after consultation with the parties, decide whether to adopt appropriate additional procedures. Exceptions to this procedure shall be granted upon a showing of good cause.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, India shall submit its response to the request in its first written submission. If India requests such a ruling, the United States shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel

shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised in writing as promptly as possible. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered US-1, US-2, etc. If the last exhibit in connection with the first submission was numbered US-5, the first exhibit of the next submission thus would be numbered US-6.

Questions

12. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.30 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite India to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall have an opportunity to orally answer these questions. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask India if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite India to present its opening statement, followed by the United States. If India chooses not to avail itself of that right, the Panel shall invite the

United States to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall have an opportunity to answer orally these questions. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.30 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies to the interpreters. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.30 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to these questions within a deadline to be determined by the Panel.

d. The Panel may subsequently pose questions either orally or in writing to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Panel consultation with experts

19. In the course of the proceedings, the Panel shall determine if there is a need to seek expert advice. In addressing matters concerning scientific and/or technical advice from experts[1], the Panel shall have regard to the provisions of the DSU and may have regard, *inter alia*, to the objective of conducting these proceedings in an efficient and timely manner and at a reasonable cost. In such a case, the procedures described below shall apply.

20. Consistent with Article 13 of the DSU and Article 11.2 of the SPS Agreement, the Panel may seek expert advice from experts and from international organizations, as appropriate.

21. The Panel may ask any relevant institutions, as well as the parties, for suggestions of possible experts. Parties shall not engage in direct contact with the individuals suggested, for the purpose of this dispute.

22. The Panel shall provide the parties with a list of possible experts, their *curricula vitae* and declarations of potential conflicts of interest. In this declaration, each potential expert will be instructed to disclose information which may include the following:

a. financial interests (e.g. investments, loans, shares, interests, other debts); business interests (e.g. directorship or other contractual interests); and property interests relevant to the dispute in question;

b. professional interests (e.g. a past or present relationship with private clients, or any interests the person may have in domestic or international proceedings, and their implications, where these involve issues similar to those addressed in the dispute in question);

c. other active interests (e.g. active participation in public interest groups or other organisations which may have a declared agenda relevant to the dispute in question);

d. considered statements of personal opinion on issues relevant to the dispute in question (e.g. publications, public statements);

e. employment or family interests (e.g. the possibility of any indirect advantage or any likelihood of pressure which could arise from their employer, business associates or immediate family members); and

f. any other relevant information.

23. Parties shall have the opportunity to comment and to make known any compelling objections to any particular expert.

24. The Panel shall select the experts on the basis of their qualifications and the need for specialized scientific expertise, and shall not select experts who have declared a conflict of interest. The Panel shall decide the number of experts in light of the number and type of issues on which advice shall be sought, as well as of the different areas on which each expert can provide expertise.

25. The Panel shall inform the parties of the experts and international organizations it has decided to consult, in accordance with the timetable adopted by the Panel. Experts shall act in their personal capacities and not as representatives of any entity. However, should the Panel seek advice from an international organization, the advice received shall be deemed to be received from the international organization and not the individual staff members or representatives of the international organization. Moreover, any staff members of such international organization that attend a meeting with the Panel, shall be deemed to do so in a representative capacity, on behalf of the respective international organization.

[1] For the purpose of these Working Procedures, the term "expert" may be used to refer to individuals, institutions, research bodies, or international organizations.

26. The experts shall be subject to the DSB's Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (WT/DSB/RC/1), a copy of which shall be provided to them by the Panel.

27. The Panel shall prepare written questions for the experts. The experts shall be requested to provide responses in writing within a time-period specified by the Panel. The experts shall be requested to respond only to questions on which they have sufficient knowledge. The responses of experts shall be part of the Panel's record but shall not be attached to the Panel report as annexes. Copies of the responses shall be provided by the Panel to the parties, in accordance with the timetable adopted by the Panel. The parties shall have the opportunity to comment in writing on the responses from the experts and to pose written questions to the experts in advance of the meeting, to be answered orally during such meeting.

28. The Panel may provide the experts, on a confidential basis, with relevant parts of the parties' submissions, including exhibits, as well as with any additional information deemed necessary. The experts shall have the opportunity to request, through the Panel, additional factual information or clarifications from the parties, if it shall aid them in answering the Panel's questions.

29. The Panel may schedule a meeting with the experts, prior to the second substantive meeting with the parties. Prior to the Panel's meeting with the experts, the Panel shall ensure that:

a. the parties' comments on the experts' responses are provided to all experts;

b. each expert is provided with the other experts' responses to the Panel's questions; and

c. each expert is provided with advance questions from the parties to the experts, as described in paragraph 30.b below, if any.

30. The Panel's meeting with the experts would be conducted as follows:

a. The Panel shall invite each expert to make an opening statement. This statement may include, but is not limited to, any clarification of their written responses to the Panel questions requested by the Panel or the parties, or information complementary to these responses. The experts that intend to make an opening statement shall provide the Panel with written versions of their statements, before they take the floor. The Panel shall make available, to the other experts, and to the parties, each expert's written statement, no later than 5.30 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask the experts questions or make comments through the Panel. To facilitate this, each party may send in writing in advance of the meeting, within a timeframe to be determined by the Panel, any questions to the experts to which it wishes to receive an oral response at the Panel's meeting with the experts. Each expert shall be invited to respond orally to the parties' questions and to react to the parties' comments.

c. The Panel may subsequently pose questions to the experts. The expert to whom the question is addressed shall be invited to respond orally to the Panel's questions.

d. Once the questioning has concluded, the Panel shall afford each expert an opportunity to present a brief closing statement.

e. The Panel may schedule additional meetings with the experts if necessary.

31. The Secretariat shall prepare a compilation of the experts' written replies to the Panel's questions, as well as a full transcript of any meeting with the experts for inclusion in the record of the Panel proceeding. This transcript shall not be annexed to the Panel report. The experts shall be given an opportunity to verify, before the texts are finalized, the drafts of these texts to ensure that they accurately reflect the information they provided. The parties shall likewise be given an opportunity to verify that the transcript of any meeting with the experts accurately reflects the parties' own interventions.

Descriptive part

32. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of the executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

33. Each party shall submit an executive summary of its arguments as presented in its written submissions and oral statements. The parties shall submit the executive summaries of their written submissions at the latest 10 calendar days following the delivery to the Panel of the written submission. The parties shall submit the executive summaries of their oral statements, at the latest 10 calendar days following the deadline for submission of responses to questions from the Panel. The parties may also include their responses to questions in their executive summaries. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions. The total number of pages of the executive summaries, all four parts combined, shall not exceed 30 pages. Parties can request permission to file longer summaries upon showing of good cause.

34. The third parties shall submit executive summaries of their written submissions and oral statements within 7 calendar days from the date of the third-party session. The summary to be provided by each third party shall incorporate its written submissions and oral statement and shall not exceed 5 pages in total.

Interim review

35. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

36. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

37. The interim report shall be kept strictly confidential and shall not be disclosed.

Service of documents

38. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 6 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 4 CD-ROMS/DVDs and 6 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****@wto.org, and cc'd to *****.*****@wto.org, *****.*****@wto.org, *****.*****@wto.org, and*****.*****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance

of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.30 p.m. (Geneva time) on the due dates established by the Panel.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES FOR THE PROTECTION OF STRICTLY CONFIDENTIAL INFORMATION

1. Pursuant to paragraph 3 of the Panel's Working Procedures adopted on 15 March 2013, the Panel adopts the following additional procedures that shall apply to all strictly confidential information (SCI) submitted in the course of these proceedings. These procedures are intended to supplement but not replace the provisions of Article 18.2 of the DSU and paragraph 2 of the Panel's Working Procedures.

2. These procedures apply to any SCI, defined as information (i) not otherwise available in the public domain, and (ii) clearly designated as SCI by the United States or India in their submissions to the Panel.

3. A party submitting SCI in any written submission (including in any exhibits) shall inform the Panel and the other party (and the third parties where applicable) of precisely which information the party is designating as SCI by enclosing the information in double brackets and including on the cover page and each page of the relevant document the statement: "Contains SCI". In the event that an entire exhibit is designated as SCI, the party submitting such exhibit shall clarify this by including the following statement on the cover page: "This Exhibit is SCI". The Panel will not disclose in its Report any information designated as SCI under these procedures. The Panel may, however, make statements or conclusions based on such information.

4. Before the Panel circulates its Report to Members, the Panel shall give each party an opportunity to ensure that the Report does not contain any information that it has designated as SCI. The removal of any designated SCI by the Panel will be indicated in the Report through the use of double brackets.

5. Each party and third party shall keep confidential SCI submitted by another party or third party and shall use such SCI only for purposes of the current proceeding or future proceedings under the DSU with respect to *India – Measures Concerning the Importation of Certain Agricultural Products* (DS430).

6. Submissions and exhibits containing information designated as SCI under these procedures will be included in the Panel record forwarded to the Appellate Body in the event of an appeal.

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ANNEX B

ARGUMENTS OF THE PARTIES

UNITED STATES

INDIA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. A fundamental requirement of the SPS Agreement is that a Member's SPS measures be based on scientific principles and scientific evidence. A Member generally complies with these obligations by basing its measures either on relevant international standards, guidelines, or recommendations, or on a risk assessment. With respect to the measures at issue here – measures that have been in place for over six years – India has done neither.

2. India's measures prohibit the importation of various agricultural products from countries that report outbreaks in poultry and wild birds of what is known as NAI, including a subset known as LPNAI. The OIE, the organization whose standards, guidelines and recommendations the SPS Agreement designates as the international standards, guidelines and recommendations for animal health and zoonoses, has issued recommendations for reporting NAI and for the safe trade of poultry and poultry products with respect to NAI. Those scientifically based recommendations explicitly disclaim the types of import prohibitions India maintains.

3. Moreover, India treats its *own products* differently from imported products. India does not engage in surveillance activities that are likely to detect LPNAI, a disease, which if found in other countries, triggers application of its import prohibitions. India also does not impose any comparable restrictions on the internal movement of the products that it prohibits for import.

4. In sum, India has failed to comply with the most basic obligations in the SPS Agreement, and no detailed scientific analysis is required to reach this conclusion.

II. SUMMARY OF ARGUMENTS

5. This dispute can be distilled to a few central facts that clearly establish India's breaches of its WTO obligations. Specifically, there are facts that establish that India needed to undertake a risk assessment and failed to do so; that India's measures hold the exports of other Members to severe requirements that India's own products can ignore; and that India was obligated to notify its measures and allow a reasonable interval before putting them in force, but did not do so.

III. BIOLOGY OF AVIAN INFLUENZA

6. AI does not refer to a single or homogenous disease, but rather different diseases caused by an assortment of different viruses. Some variants of AI viruses cause HPAI, a highly contagious disease that can decimate poultry flocks. There is also LPAI, a much milder, often asymptomatic disease in poultry. Most AI strains do not affect humans because they do not readily transmit to humans. Human infection has typically occurred in circumstances involving the close handling and contact of infected birds.

7. With respect to the parties' AI situations, the United States has detected LPNAI – H5 and H7 subtypes of LPAI – in poultry. India, however, has not notified a single outbreak of LPNAI. In contrast, India has detected over 90 outbreaks of HPAI during a period in which the United States has had no HPAI outbreaks.

IV. INTERNATIONAL STANDARDS FOR AVIAN INFLUENZA CONTROL

8. The OIE Code sets forth recommendations for the control of AI. These recommendations recognize distinctions between HPAI and LPAI and that control measures will need to be tailored to the specific product at issue. Of particular note, the OIE Code explicitly provides that most of the products that India prohibits from import, such as poultry meat and eggs, can be safely imported from territories reporting LPNAI through the use of the proper control measures.

9. The OIE Code's system for the control of AI can be roughly divided into five components for the purpose of this dispute: (i) proper reporting; (ii) classifying a territory; (iii) applying the appropriate control measure based on the classification of that territory; (iv) zoning to ensure the impact of restrictions is appropriately tailored; and (v) surveillance. The fifth component is essential to ensuring the prior four mechanisms function properly.

10. When it comes to its own exports, India invokes the OIE Code to justify their safety. First, after it has suffered an outbreak of HPAI, India routinely argues that it has regained NAI freedom. Second, India recognizes compartments within its own territory that it holds out as being entitled to take advantage of the OIE's recommendations regarding zoning.

V. INDIA'S MEASURES

11. In the fall of 2006 – without prior warning – India proceeded to prohibit the import of various U.S. poultry and pork products. On February 2, 2007, months after U.S. imports have been subject to import prohibitions, India finally published a document in the Gazette of India Extraordinary, S.O. 102(E), which reflected the measures prohibiting U.S. imports on account of LPAI. Other notifications subsequently followed. The most recent notification issued by India's DAHD is S.O. 1663(E). Unlike prior DAHD notifications, it has no set expiration date. These notifications are issued pursuant to the India' Livestock Importation Act, 1898 (9 of 1898).

12. Before initiating this dispute, the United States made every reasonable effort to resolve its concerns. In addition to bilateral talks, discussions in the SPS Committee, and offers for technical discussions, the United States also asked India to provide an explanation as the reasoning behind its measures pursuant to SPS Article 5.8. Over 14 months have passed since this request, yet India has not provided the requested explanations.

VI. INDIA'S INTERNAL AVIAN INFLUENZA CONTROL MEASURES

13. India's surveillance and control policies for AI are set forth in DAHD's AI Action Plan. This plan does not mandate surveillance necessary for effective detection of LPNAI, resulting in a failure to apply any controls on the movement of products due to LPNAI in India. Moreover, India's AI Action Plan only imposes control measures that extend a few kilometers from the site of an HPAI outbreak. Accordingly, occurrences of NAI in India will not result in restrictions on the movement of domestic products within India provided the products come from locations outside of the small zone where these control measures are applied.

VII. STANDARD OF REVIEW

14. DSU Article 11 provides that a panel should "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." Further, since there is no risk assessment in this dispute, there is also no scientific evidence needing scrutiny with expert assistance.

VIII. LEGAL CLAIMS

A. India's Measures Are Subject To The SPS Agreement

15. Because India's measures are sanitary measures as defined under Annex A of the SPS Agreement (their objectives include those provided for in subparagraphs (a) through (c)), and because the measures affect international trade by imposing import prohibitions, the measures are subject to review for consistency with the SPS Agreement.

B. India Breached Articles 5.1, 5.2, And 2.2 Of The SPS Agreement By Failing To Undertake A Risk Assessment And Failing to Consider The Relevant Scientific Evidence

16. Because India has stated that its measures were adopted to address risks associated with both diseases and food safety, the SPS Agreement obliges India to base its measures on both types of risk assessment – a Pest Risk Assessment and a Food Safety Risk Assessment. India has done neither. The United States has requested for India to provide a risk assessment without any

success. As India's measures are not based on a risk assessment, India is in breach of SPS Article 5.1. Additionally, without a risk assessment, India could not have taken into account the factors noted in SPS Article 5.2, thereby breaching that provision as well.

17. With respect to the document that India provided at the October 2010 meeting of the SPS Committee – which India subsequently disavowed as a risk assessment – it does not constitute a Pest Risk Assessment or a Food Safety Risk Assessment either. That document is deficient with respect to all of the elements required for either assessment.

18. A finding that SPS Article 5.1 or 5.2 has been breached results in a violation of Article 2.2. Therefore, in the absence of *any* risk assessment, and, thus, in the absence of sufficient scientific evidence, supporting India's measures, India also breaches Article 2.2. India's ban on the identified avian products, moreover, is not maintained with sufficient scientific evidence because there is no scientific evidence that these products may not be safely traded under any circumstances. To the contrary, the scientific evidence establishes that LPAI virus is not present in poultry meat or inside eggs and thus LPAI cannot be transmitted through these products.

19. The United States notes that India may not invoke SPS Article 5.7 to avoid its obligations under Articles 5.1 and 5.2. Although it is India's burden to establish such a defense, the facts here are sufficiently defined as to confirm the unavailability of Article 5.7. In particular, relevant scientific evidence exists and it does not support the imposition of import prohibitions.

C. India Breached Article 3.1 By Failing to Base Its Measures on the OIE Code

20. SPS Article 3.1 imposes a positive obligation on a Member to base its measures on international standards unless the Member's measure is justified through another provision of the SPS Agreement. The relevant international standards in this dispute, per Annex A of the SPS Agreement, are those set out in the OIE Code.

21. A defining characteristic of the OIE Code is that it distinguishes between HPNAI and LPNAI with respect to trade. India's measures refuse to make such a distinction and impose a complete ban for certain products regardless of whether the country is reporting HPNAI and LPNAI. In short, the OIE Code allows trade; India's measures do not. Under these circumstances, there can be no dispute that India's measures are not based on the OIE Code.

22. India's failure to abide by Article 3.1 is not excused by Article 3.3. India cannot avail itself of this provision because it lacks a risk assessment. Moreover, India cannot invoke Article 3.3 as a result of its ALOP. Although India has not elucidated its ALOP, it may be possible to infer it from measures India is applying. India does not require surveillance that would effectively detect LPNAI and, even with respect to the more dangerous HPAI, imposes only a simple quarantine zone of a few kilometers. Viewed together with the minimal restrictions on movement of domestic products that India imposes following domestic HPAI outbreaks, it is clear that measures based on the OIE international standard would achieve India's ALOP.

D. India Breached Articles 5.6 and 2.2 By Maintaining Sanitary Measures That Are More Trade Restrictive than Required to Achieve its Appropriate Level of Protection

23. A complainant must establish three cumulative elements for a breach of SPS Article 5.6. First, there must be an alternative measure that "is reasonably available taking into account technical and economic feasibility." Here, the OIE Code provides a reasonably available alternative. Second, the measure must achieve "the Member's appropriate level of sanitary or phytosanitary protection." The OIE Code achieves India's ALOP because some products India prohibits are not vectors for transmission, and in any case, the OIE control measures have proven effective. Also, the OIE Code's provisions for AI containment, and trade in products originating outside the area where AI was detected, through the use of zoning and compartmentalization, is consistent with India's measures with respect to *domestic* products, which impose controls and restrictions on products only within a limited area following an AI outbreak. Third, the measure must be "significantly less restrictive to trade than the SPS measure contested." As the OIE Code allows for trade from countries reporting LPNAI detections and India's measures do not, the OIE Code is less trade restrictive. Thus, all three elements are satisfied.

24. A breach of SPS Article 5.6 may also indicate a breach of Article 2.2. The first component of Article 2.2 is that a measure be "applied only to the extent necessary to protect human, animal or plant life or health …" A finding under Article 5.6 necessitates a determination that a viable alternative measure that achieves a Member's ALOP exists and is less trade restrictive. The existence of such an alternative measure – and the concomitant finding that the Member has declined to adopt it – may lead to the conclusion that a Member has adopted a measure that is applied to a greater extent than necessary and is accordingly inconsistent with Article 2.2.

E. India Has Breached Its Obligations Under Article 6 of the SPS Agreement

25. India's measures ban products from all parts of a country whenever NAI is detected anywhere in the country. This precludes the application of AI restrictions on a regionalized basis, as provided for in the OIE Code, and as required under SPS Article 6.

26. By applying its measures exclusively on a country-basis, India breaches both the first and second sentences of Article 6.1. First, India fails to ensure that its measures are adapted to the sanitary characteristics of the areas from which covered products originate, contrary to the first sentence of Article 6.1. Even if there has been no detection of NAI within thousands of kilometers of the area from which covered products originate, and regardless of how rigorous a country's AI-control mechanisms are, India bans the shipment of those products based on a single detection of NAI anywhere in the country of origin.

27. Second, by applying its measures on a country-basis, India has failed to take into account the considerations specified in the second sentence of Article 6.1. India's measures preclude it from accounting for "the level of prevalence" (*i.e.*, the lack of prevalence) of NAI in areas within a country that are far from a detection. Under its measures, India is also precluded from accounting for "the existence of [disease] eradication or control programmes." Also contrary to the second sentence of Article 6.1, India has not taken into account the relevant international AI guidelines in OIE Code Chapter 10.4, which provide for the application of AI-related trade restrictions at the zone or compartment level when appropriate surveillance, control, and biosecurity measures are in place.

28. India's measures are also contrary to Article 6.2. The first sentence of Article 6.2 requires Members to recognize the concept of disease-free areas. Yet India's measures explicitly preclude recognition of such areas upon notification of a detection of NAI anywhere in the territory of a Member. The second sentence of Article 6.2 requires countries to determine disease-free areas "based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls." By precluding recognition of disease-free areas with respect to AI, India's measures preclude it from determining HPAI-free and LPNAI-free areas based on these factors, contrary to Article 6.2's second sentence.

29. Further, India's country-based application of its measures is contrary to Article 3.1, which provides that "Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3." India's measures are not applied on a zone or compartment basis, as provided for in the OIE Code, and India has no scientific justification for its more-trade-restrictive approach. Further, India's country-based measures cannot be justified by virtue of India's ALOP, which may in the circumstances be inferred from India's measures governing trade in domestic products following domestic AI detections—measures that do not restrict trade in domestic products beyond the ten-kilometer zone surrounding an AI detection.

F. India Has Acted Inconsistently With Its Obligations Under Article 2.3 of the SPS Agreement by Treating Imported Products Differently from Domestic Products Without Justification

30. When it comes to regulating trade in its own products on account of AI, India takes a diametrically different approach from that which it applies to imported products. India's measures therefore serve, not as a buffer against AI, but as a means of arbitrarily or unjustifiably discriminating against imported products and applying a disguised restriction on trade. In so doing, India breaches SPS Article 2.3.

31. India's arbitrary or unjustifiable discrimination against imports, in breach of the first sentence of Article 2.3, takes two key forms. First, India imposes a ban on all imports of covered products from an exporting country whenever there is a notification of AI occurring anywhere in the country. By contrast, when India detects AI within its own borders, it imposes no controls on the movement of these products within its own borders, aside from a ban on the movement of such products to or from a ten kilometer zone surrounding the detection.

32. Second, India bans products from countries that notify detections of LPAI. Yet India has not put in place mechanisms that would provide effective detection of instances of LPNAI within its own territory. As a result, despite having had over ninety outbreaks of the far rarer HPAI since 2006, India has never notified a detection of LPAI. India's reliance on the detection of LPNAI thus only affects imported products. India's measures only serve to block imports from countries that have taken steps necessary to detect LPNAI effectively.

33. India's measures not only run contrary to the anti-discrimination discipline in the first sentence of Article 2.3, but they also constitute a disguised restriction on trade, in breach of the second sentence. Various facts, taken together, establish that India's measures constitute such a disguised restriction, including: India's application of drastically more stringent measures to foreign products than to domestic products; India's shifting position on whether its measures are justified by OIE guidelines or a risk assessment; India's failure to offer either a risk assessment or scientific evidence that would justify LPAI-based import bans or India's application of AI measures to entire countries; and India's aborted attempt to justify its measures by taking analysis from a risk assessment drafted by another country in support of a different conclusion.

G. In the Alternative, India Could be Viewed as Having Breached Its Obligations Under Article 5.5 of the SPS Agreement, with a Resulting Consequential Breach of Article 2.3

34. To the extent that transmission of AI by foreign agricultural products is viewed as a "different situation" than the transmission of AI by India's domestic agricultural products, India is maintaining arbitrary or unjustifiable distinctions in its appropriate levels of sanitary protection in different situations, and these distinctions result in discrimination or a disguised restriction on international trade.

35. As India's AI measures with respect to imported products are far more restrictive than those applied with respect to domestic products, the level of protection that would be inferred from the measures applied to imported products would far exceed that which would be inferred from India's measures for domestic products. Further, the maintenance of different levels of protection based on whether products presenting the same risks are imported or domestic would be unjustifiable. Moreover, in the circumstances here, the measures that India applies to imported products amount to a disguised restriction on trade.

36. Accordingly, if the Panel were to view transmission by way of foreign and domestic products as different situations for purposes of Article 5.5, India's measures would be contrary to Article 5.5. Moreover, as a finding of a breach of Article 5.5 necessarily implies a breach of Article 2.3, first sentence, or Article 2.3, second sentence, then considering transmission by way of foreign and domestic products to be different situations for purposes of Article 5.5 leads to the conclusion that India's measures result in a consequential breach of Article 2.3.

H. India Has Acted Inconsistently With Its Obligations Under SPS Agreement Article 7 and Annex B By Failing to Notify Properly Its AI Restrictions

37. India breached the obligations in SPS Agreement Article 7, and Annex B, paragraphs 2 and 5(a)-(d). India notified S.O. 1663(E) to the WTO almost three months after it took effect, and published S.O. 1663(E) the day it took effect. This prevented other Members from having a meaningful opportunity to provide comments.

I. India Has Breached GATT Article XI

38. India has breached GATT Article XI because India's measures that are inconsistent with the SPS Agreement constitute import prohibitions or restrictions other than duties, taxes, or other changes.

IX. INDIA'S PRELIMINARY RULING REQUEST IS WITHOUT MERIT

39. Contrary to what India argues in its Preliminary Ruling Request, the U.S. Panel Request identifies the measures and claims in accordance with DSU Article 6.2. With respect to measures, it clearly identifies the measures at issue: India's import restrictions imposed on countries because of NAI. It also cites specific legal instruments that reflect these measures, thus providing additional clarification. The United States has done so notwithstanding India's failure to respond to the U.S. request under SPS Article 5.8. With respect to claims, the Panel Request identifies the precise treaty provisions at issue, not simply the parent articles. It also provides a textual explanation after each cited provision as to the nature of the breach. It even previews certain arguments. The Panel Request includes more information about the U.S. claims than is legally required. It provides fair notice to India and other Members of both the specific measures at issue and the legal basis of the complaint.

X. CONCLUSION

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

ANNEX B-2

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS
OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

I. INTRODUCTION

1. India's measures do not conform to the OIE Code. Most notably, the Code does not recommend imposing a ban on imports on account of LPNAI. In fact, the OIE Code explicitly provides that most of the products affected by India's measures can be safely traded with respect to avian influenza. And the Code allows for zoning in recognition of the geographic limitations of AI outbreaks and efficacy of control measures to minimize trade disruptions even further. Despite the passage of over six years since the adoption of the measures, India has still not conducted a risk assessment that would be needed to justify a departure from the OIE Code, has not adopted any measures that allow for regionalization with respect to avian influenza, and has not properly notified its measures.

2. What India has done during those six years is allow its domestic producers to engage in poultry trade without meaningful LPNAI restrictions, while imposing trade bans on producers from foreign countries whenever they notify the presence of LPNAI. The discrimination is exacerbated by India's failure to require the sort of systematic surveillance testing used elsewhere to detect LPNAI, prompting resulting notifications to the OIE. In short, India's measures fail to comply with some of the most basic obligations in the SPS Agreement.

II. INDIA'S MEASURES CONTRADICT THE OIE CODE

A. United States relies on what is in the OIE Code

3. The United States and India agree that the OIE Code is the relevant international standard for purpose of applying the SPS Agreement to India's measures. An examination of the plain text of the OIE Code in comparison to India's measures shows that they do not conform to the Code. India's measures prohibit the importation of products, while the OIE Code provides that these same products – with respect to the risk of avian influenza – can be safely imported.

4. The United States does not understand how India could assert that the OIE Code states anything differently. To the extent that India attempts to extrapolate from OIE reporting requirements to OIE-recommended restrictions, India's approach has no basis in the text of the OIE Code, or otherwise. In fact, a delegate of the OIE at a 2007 WTO Committee meeting explained the important difference between OIE reporting requirements and OIE-recommended restrictions. In short, what the OIE Code says is that while LPNAI outbreaks should be reported, products from reporting countries can be safely imported.

B. India argues based on what is absent from the OIE Code

5. India imports into the OIE Code something that is said nowhere – that it recommends bans when LPNAI is detected in poultry. In other words, since the Code does not expressly claim that India cannot use notifications to impose bans, its measures conform to the OIE Code and are entitled to a presumption of consistency under Article 3.2 of the SPS Agreement. As an initial matter, we think this approach puzzling. India's reading of "conform to" appears to be "is not expressly prohibited by." That reading is not in keeping with the ordinary meaning, in context, and in light of the object and purpose of the SPS Agreement. If India chooses measures that are different from, or not found in, the OIE Code, then those measures do not "conform to" the relevant international standards. From what we can discern, India's approach is based on three assumptions that have no support in either the OIE Code or the SPS Agreement.

6. First, India asserts the various recommendations in the OIE Code are but options by which India can decide how to best achieve its appropriate level of protection, or "ALOP." Thus, according to India, it has chosen the option of a ban, which achieves a purportedly higher ALOP than the

control measures that constitute most of the OIE Code chapter on avian influenza. But there is nothing in the OIE Code that suggests its recommendations amount to some sort of menu that sets out options for achieving varying degrees of protection.

7. Second, India claims each recommendation of the OIE Code should be read in isolation from the rest of the OIE Code. Nothing in the OIE Code suggests that should be the case. Indeed, the provision India cites as recommending a ban, Article 10.4.1.10, is located in a section of the avian influenza chapter whose heading is "General Provisions." As is evident from a cursory review, many of the provisions in this section are meant to impart meaning to others.

8. To justify its approach, India misconstrues the Appellate Body's findings in *EC – Hormones*. India incorrectly asserts that each recommendation must be read individually because to do otherwise would make them mandatory contrary to the Appellate Body findings. The Appellate Body made no findings that international standards are to be read in isolation. It found in pertinent part that "an SPS measure that conforms to an international standard … would embody the international standard completely and, for practical purposes, converts it into a municipal standard." Far from finding that a standard may be followed piecemeal, the Appellate Body found it must be adopted "*completely*" to obtain the rebuttable presumption of consistency.

9. Finally, India argues that Article 10.4.1.10's admonishment not to impose bans on account of NAI in wild birds is actually a recommendation to impose bans on poultry products. India's logic is flawed. A road sign that recommends driving carefully when it rains does not mean a driver is recommended to drive carelessly when conditions are dry. India's argument is particularly misplaced when one considers that the OIE Code is meant to be used practically by veterinary authorities. Clarity as to the precise recommendations is critical. Where the OIE Code recommends prohibitions, it *explicitly so provides*.

10. In addition to having important implications for Article 3.2 of the SPS Agreement, the fact that India's measures are inconsistent with the OIE Code is also important for the application of Article 3.1. In this instance, the failure of India's arguments to establish that its measures conform to the OIE Code also establishes that India has not based its measures on international standards, thereby breaching Article 3.1. Because India's arguments rely only on Article 10.1.4.10 of the OIE Code – and because India's interpretation of that provision cannot be sustained – India has no basis for any assertion that its measures are based on the OIE Code.

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

11. There are two basic contrasts between the avian influenza measures that India applies to imported products and those that India applies with respect to domestic products:

1) India imposes import bans when an exporting country reports detections of LPNAI. Yet India does not have in place surveillance mechanisms capable of reliably detecting LPNAI when it occurs in India. Hence, when LPNAI occurs in India, no restrictions on domestic trade are imposed.

2) When either HPAI or LPNAI is detected in an exporting country, India applies an import ban covering the entirety of that country. By contrast, when NAI is detected in India—really HPAI, as India does not detect LPNAI—India restricts trade in products only from a limited zone.

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

12. Regarding the first contrast, India argues that it does not have LPNAI. However, India has had over 90 outbreaks of the far rarer HPAI. As a matter of epidemiology it is not a reasonable or scientifically valid hypothesis to suggest that India does not have LPNAI. Further, the United States is submitting a study noting the detection of H5 and H7 antibodies in domestic ducks in India. Most crucially, however, India does not have in place a system for reliably detecting LPNAI. Without a valid detection system, India is not in fact applying measures to contain LPNAI when it occurs in India. India does not dispute that it has no mandatory requirement for the conduct of random laboratory tests in apparently healthy flocks for LPNAI, even though LPNAI's

lack of symptoms makes visual observation inadequate for its detection. As India is not even taking steps necessary to detect LPNAI, it is contradictory for India to claim that the disease is so serious that it must impose import bans on poultry products when other countries detect LPNAI. This is particularly so because the products that India bans are not vectors for transmission of the disease, and the OIE has found they can be safely traded even after detections of LPNAI.

13. Regarding the second contrast, it makes no sense for India to say that, whereas it will allow trade of domestic products from areas only 10.1 kilometers from an HPAI detection, its lack of knowledge of what happens in other countries prevents it from even considering whether other countries' surveillance and control systems are strong enough to contain outbreaks in those countries. If India thinks that it can control NAI, even in HPAI form, Article 2.3 requires it to at least admit the possibility that products from other countries with NAI detections can be safely traded in the same way that Indian products are traded following an HPAI outbreak.

14. India tries to argue that its purported absence of LPNAI gives it carte blanche to impose differential measures on domestic and imported products. Its argument is simply false. This is not a situation where an importing Member has no need to worry about domestic spread of a disease because it exists only in another part of the world. India itself believes that it has a significant risk for domestic LPNAI incidents. India cannot plausibly claim that its conditions are so dissimilar from those elsewhere that a lack of effective domestic surveillance and control measures, alongside measures for imported products far more stringent than recommended by OIE guidelines, simply reflect differences in disease conditions between India and elsewhere.

IV. INDIA'S MEASURES CONSTITUTE A DISGUISED RESTRICTION ON INTERNATIONAL TRADE

15. India's measures result in an additional breach of Article 2.3 because they amount to a disguised restriction on trade. This can be inferred from the totality of how these measures operate, including the ways that they discriminate against imported products—*i.e.,* the forms of discrimination discussed in the context of the U.S. claim under the first sentence of Article 2.3. There are, moreover, further indicia that India's discriminatory measures constitute disguised restrictions on international trade. The *Australia – Salmon* panel relied on considerations similar to those here to identify a disguised restriction under Article 5.5.

V. INDIA'S MEASURES DO NOT PROVIDE FOR REGIONALIZATION

16. India's measures do not allow for regionalization. S.O. 1663(E) on its face precludes imports of listed products from a "country" if that country has reported NAI. The United States has not been silent over the years about the need for India to apply its AI measures on a less-than-country-wide basis. India has refused. In 2007, India told the United States that it would "insist on country freedom" and that its conditions for import are "uniform." India's failure to apply its AI measures on a less-than-country-wide basis has been mentioned repeatedly in SPS Committee meetings, and India's delegate has never indicated that this complaint was ill-founded. Just last year, India's delegate to the OIE stated that for India "the concept of zoning looked irrelevant as far as avian influenza was concerned."

17. India's unwillingness to even "recognize the concept[] of … disease free areas" with respect to AI is what places India in breach of Article 6.2 of the SPS Agreement. Similarly, by refusing to recognize the possibility that an NAI incident anywhere in a large country like the United States may not warrant a ban on all products from the entire country, India is not ensuring that its measures "are adapted to the sanitary … characteristics of the area[s]" from which products originate, in violation of Article 6.1. India is in breach of Article 6, regardless of how much or how little information any other Member might have submitted to India. India argues that it need not recognize the differences in the sanitary characteristics of areas from which a product is exported, while it is free to treat different areas in India differently based on the different sanitary characteristics of those areas, by asserting that it has information about domestic disease outbreaks, but not about foreign outbreaks. India's approach would mean that, in effect, a failure to recognize disease-free areas is never discriminatory. India's approach cannot be reconciled with the text of Articles 6.1 and 6.2.

VI. INDIA CANNOT EXCUSE ITS FAILURE TO COMPLY WITH ARTICLE 7 AND ANNEX B

18. India's only response to the claim under Article 7 is that its measures conform to international standards. Yet India's measures do not conform to international standards.

ANNEX B-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

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

II. LEGAL ARGUMENT

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

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

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

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

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

5. With respect to India's first assertion, the WTO recognizes the rights of Member to set their own ALOP; international organizations do not have that role. Where a Member chooses measures that achieve a higher ALOP than international standards provide, the Member has the obligation to ensure that the measure is supported by scientific evidence. The User's Guide to the OIE Code takes a similar approach. For the second assertion, India does not explain how it can be reconciled with the specific text in the OIE Code. India's so-called condition of entry is not an ALOP, but rather a factor to be taken into account in applying any measure. With respect to India's third assertion, India cannot reconcile its position against the text of Article 10.4.1.10. Moreover, it is also legally untenable for India to pick only certain aspects of OIE recommendations and successfully invoke SPS Article 3.2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21. The OIE Code also has recommendations with respect to zoning and compartmentalization. A Member rather than apply its trade measures broadly against a country as a whole can apply them simply to an affected area without unnecessarily disturbing trade elsewhere. India's only response is that it is under no obligation to recognize zones on its own authority. But no one is asking it to do so. India's measures on their face impose country-wide bans rather than considering the possibility of regionalization.

3. The Recommendations in the OIE Code Are Reasonably Available

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

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

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

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

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

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

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

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

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

28. India argues that it had no need to comply with SPS Articles 6.1 and 6.2 because no other Member presented a proposal, and supporting information, for the recognition of specific disease-

free areas. After refusing over many years to apply the principle of regionalization to AI, giving no indication that requests to recognize disease-free areas would be entertained, India cannot rely on the failure of other Members to conclude that "no" really means "yes" and to submit applications that India had made clear it would reject out of hand.

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

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

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

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

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

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

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

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

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

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

36. India also appears to argue that the OIE Code supports requiring that all of an exporting country be free of a disease whenever that disease is not present in the importing country. The OIE Code does not do so. Rather, for each product discussed in the OIE Code Chapter on AI, the recommended import requirements apply either a) "for importation from an HPNAI free country, zone, or compartment," b) "for importation from an NAI free country, zone, or compartment," or c) "[r]egardless of the NAI status of the country of origin." Thus, under the OIE Code, AI-related requirements can be applied on a zone or compartmental basis—and nothing in the Code qualifies this conclusion based on an importing country's disease status.

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

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

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

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

39. India's measures unjustifiably discriminate against imported products by banning them following detections of LPNAI in the exporting country while India does not even maintain surveillance requirements that would result in reliable detection of LPNAI cases occurring in India's poultry flocks. As one piece of evidence of the deficiency of India's surveillance, the United States highlighted that India has never notified a detection of LPNAI, despite notifying over ninety outbreaks of HPAI in recent years. It is not plausible that, during a period when India had over ninety HPNAI outbreaks, there was no LPNAI in India. India has responded to the U.S. assertions about India's surveillance by arguing that LPNAI is exotic to India. India's evidence does not

demonstrate this. Further, India's imposition of import bans based on LPNAI detections discriminates against imports not because LPNAI has occurred in India, but because India's surveillance for LPNAI is inadequate, resulting in a situation where controls on trade in domestic products due to domestic LPNAI will not be imposed.

40. India advances the hypothesis that South Asia is somehow unique with respect to LPNAI, and that accordingly all HPAI incidents in India resulted from introduction of HPAI into India by migratory birds, not mutations from LPNAI in India. India offered no evidence that this is the case. But, even if it were correct, there is no reason to think the ecology of the region is unique in a way that would lead wild birds to spread HPAI but not H5 or H7 LPAI. As HPAI results from mutations from LPAI, bird migrations that bring into India H5N1 HPAI – the kind of HPAI that India has experienced – are likely to also bring birds exposed to H5 or H7 LPAI. Further, the large number of H5N1 HPAI outbreaks in India's poultry would serve as an indicator of the high level of interaction occurring between wild birds and poultry, and thus of the likelihood of transmission of H5 or H7 LPAI from wild birds to poultry in India—thereby producing LPNAI.

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

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

2. India's Unwillingness to Regionalize is Discriminatory

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

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

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

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

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

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

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

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

48. Similarly, the comparability of the different situations at issue in the U.S. claim under Article 5.5 needs no elaboration. They involve trade in the *same* products and control of the *same* diseases. The arbitrariness of application of different ALOPs to different situations based exclusively, as here, on whether the otherwise identical products involved are imported or domestic likewise needs no elaborate proof. Moreover, the United States has established that India's measures cause discrimination and amount to a disguised restriction on international trade, satisfying the third element of a claim under Article 5.5. In sum, to the extent that transmission of NAI through imports and through domestic products are viewed as distinct situations for which India maintains separate ALOPs, then India is in breach of Article 5.5—with a resulting consequential breach of Article 2.3.

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

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

K. India Has Breached Article XI of the GATT 1994

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

III. CONCLUSION

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

ANNEX B-4

EXECUTIVE SUMMARY OF THE OPENING STATEMENT
OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

I. INTRODUCTION

1. The United States would recall that in its first written submission, we provided extensive record evidence concerning the proper interpretation of the OIE Terrestrial Animal Health Code ("OIE Code" or "Code"), and the inadequacy of India's domestic surveillance program. This evidence includes:

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

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

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

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

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

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

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

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

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

3. The OIE Code notes that the importation of products from countries reporting LPNAI is possible regardless of the exporting country's disease status. India's contrary interpretation is a misstatement of both Article 5.1.2 of the OIE Code and the User's Guide. Article 5.1.2 is an admonition to an importing country not to ban an imported product to protect against a disease already present in that country and not to impose requirements that are stricter than what the country applies to domestic products. Similarly, the User's Guide provides that "[t]he recommendations in … the Terrestrial Code are designed to prevent the disease in question being introduced into the importing country, taking into account the nature of the commodity and the animal health status of the exporting country."

4. In trying to defend its untenable arguments, India describes the responses by the OIE as "evasive, highly ambiguous and contradictory." In particular, India purports not to understand why the OIE said notification helps countries address "diagnostic and management challenges of avian influenza" and why the OIE did not instead explain that notification should result in trade

consequences. This criticism reflects why India's position is so misguided. India fails to recognize that notifications may be used to advance scientific understanding and not just protectionist objectives.

1. The Proper Understanding of the OIE Code

5. India appears to argue that the plain reading of the OIE Code, as explained by the United States, would vitiate (1) Article 10.4.1.10's admonishment not to impose bans in respect to NAI detections in wild birds; (2) the Code's notification provisions; and (3) the language – which India calls "NAI freedom" – at the beginning of various control or mitigation measures.

6. All three provisions serve a clear purpose. First, Article 10.4.1.10 is an affirmative statement not to impose bans on account of wild birds. Second, regarding the Code's notification provisions, they remain significant because notifications are important to further scientific understanding and help lead to the appropriate mitigation measures. The OIE Responses support this understanding. And third, with respect to the control or mitigation measures for particular products in the OIE Code, these provisions address different scenarios and are intended to provide appropriate mitigation measures that allow for safe trade.

7. That India is ignoring significant – indeed most – of the OIE Code is established by contrasting its arguments against its own veterinary certificates. India's veterinary certificates do not actually conform to OIE guidelines the way India says they should.

2. The Purported Positions of Other Members

8. India also seeks support for its reading of the OIE Code by referring to purported positions and measures of the United States and some other Members. India errs with respect to the United States. There is no reason to believe India is any more accurate with respect to other Members. Furthermore, India's argument is misplaced because interpretation of the OIE Code does not, as India suggests, involve an application of the customary rules of treaty interpretation. In any event, India's characterization of a handful of measures adopted by certain WTO members cannot be said as establishing the agreement of the OIE membership regarding the OIE Code.

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

9. With respect to the question of a risk assessment, the record continues to show that India has no risk assessment within the meaning of the SPS Agreement. When India notified S.O. 1663(E) to the WTO, its notification form stated that the purpose of the measure was: (1) food safety; (2) animal health; and (3) to protect humans from animal pest or disease. Accordingly, India's avian influenza measures require both types of risk assessments provided for in paragraph 4 of Annex A of the SPS Agreement. Thus, India breaches Articles 5.1 and 5.2 of the SPS Agreement because it was required to base its measures on both types of risk assessments provided for in paragraph 4 of Annex A and its measures are based on neither. India has consequentially breached Article 2.2 by failing to base its measures on a risk assessment.

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

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

11. First, India submits that reliance on the control measures would not achieve its ALOP. But, India never identifies its ALOP. As previously explained, India is not controlling for LPNAI at home, and its domestic restrictions for HPNAI contain limitations such as zoning. At best, India's ALOP can be described as very modest. Accordingly, while it appears India's ALOP is modest, even a high one would be achieved by application of the OIE Code.

12. The second point India raises is that such measures would be technically infeasible since India cannot trust the veterinary certificates – and that would mean more work for its authorities since there would actually be imports entering India. This is interesting because India claims that it allows imports if countries are free from NAI for three months. If India is willing to accept that a veterinarian can make an attestation regarding the entire LPAI situation in the exporting country, then India should be prepared to rely on a veterinarian attesting to things that might actually be in that person's personal knowledge.

13. The last point India raises is that the OIE Code is more trade restrictive than the import prohibitions it maintains now. India claims that would be the case because it would take it longer to confirm that other countries maintain adequate surveillance systems than to accept imports from a country if it does not report NAI for three months. India's position has no basis in fact or common sense. There would be far less potential disruptions to trade by adopting the OIE Code, rather than leaving it perpetually to the possibility of suspension.

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

14. The parties and the Panel's experts have spent substantial time exchanging views related to the U.S. claims under Article 2.3. These exchanges have confirmed that India's measures discriminate against imported products without justification. The United States recalls that there are in fact two separate ways that India's measures discriminate against imported products. One of these forms of discrimination exists independently of India's surveillance deficiencies. When either HPAI or LPNAI is detected anywhere in an exporting country, India applies an import ban covering the entirety of that exporting country, even where the detection is thousands of kilometers away from the area where the exported product is produced. By contrast, when NAI is detected in India—and in practice that means HPAI, as India does not detect LPNAI—India restricts trade in products only from a limited zone surrounding the detection.

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

16. The inadequacy of India's domestic surveillance regime to reliably detect LPNAI is clear from the NAP and from the other evidence reviewed by the Panel's experts, as those experts' answers confirmed. As India has acknowledged, "LPNAI is largely asymptomatic in poultry." The Panel's experts have confirmed that systematic active surveillance involving laboratory testing of samples from apparently-healthy flocks is therefore necessary to reliably detect LPNAI. India does not appear to be disputing this point.

17. The United States has explained that India's NAP sets out a surveillance regime that relies on clinical signs for the detection of avian influenza, and that does not require any routine laboratory testing of samples from apparently healthy flocks for AI. Indeed, apart from "physical/clinical" surveillance, routine surveillance in accordance with the NAP involves only the use "where possible" of *virological* testing. In its instructions on "Guidelines for Collection, Packing and Transportation of Samples," the NAP instructs that samples should be forwarded to a Regional Disease Diagnostic Laboratory or to HSADL Bhopal "[o]nly in case of unusual sickness/ mortality raising suspicion of AI."

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

19. Although India attempted to challenge the experts' conclusion and belatedly add to the record 76 new exhibits, these new exhibits make no difference at all. India's new exhibits simply contain more of the same kinds of evidence that India submitted previously, and that is not illustrative of an active, systematic surveillance regime capable of reliably detecting LPNAI –

reinforcing the fact that India does not have one. Some of India's new exhibits are requests to test small numbers of samples of different types collected in individual Indian states, districts, and localities for unknown reasons. There are similar requests explicitly referencing HPAI surveillance, as well as reports of surveillance following HPAI outbreaks. There are reports of projects to monitor for AI in migratory birds in certain isolated locations. There are four letters from long ago, predating India's NAPs, its AI-based import prohibitions, and even the notifiability of LPNAI, simply requesting that, in light of HPAI, states collect some samples for routine testing, but specifying nothing more about number of samples, number of flocks to sample, or frequency of collection. And there are a handful of documents requesting tests on, or reporting results of tests on, small numbers of samples collected in individual districts or localities as part of routine surveillance performed in them at particular times. These documents evidence nothing more than temporally and geographically sporadic, ad hoc surveillance testing activities.

20. In its Comments on the Expert Responses, India cites the fact that it has submitted a handful of gene sequences for non-reportable AI strains to GenBank—a Genetic sequence database run by the U.S. National Institutes of Health. Contrary to India's arguments, the submission of some gene sequences to GenBank does not indicate the existence of adequate AI surveillance.

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

22. Having said this, not only does India have no surveillance basis on which to claim that it has never had cases of LPNAI, but the Pawar study provides strong evidence that domestic ducks in India have been infected with a type of LPNAI known as H7, either at the time of the study or in the past. India's failure to perform virological follow-up testing meant that there was no way to know definitively that the ducks were infected *at the time of testing*, which would trigger an obligation to inform the OIE of an ongoing LPNAI incident. But this failure confirms that India is not taking the surveillance steps that would be necessary to reliably detect and report LPNAI.

23. The Pawar study's strong evidence of LPNAI infections in India is entirely expected: India lies in the flyways of wild birds coming from places with LPAI, including H5 or H7 LPAI; India has a large backyard poultry population, opening an avenue for AI transmission from wild birds to poultry; India had 35 million domestic ducks in 2007, and ducks are a key host species for preservation and perpetuation of LPNAI; and India has experienced non-notifiable LPAI strains, and there is no reason to believe they circulate differently from notifiable LPAI strains. The key point, however, is that India bans imported products due to LPNAI even though it does not have surveillance requirements or plans capable of reliably detecting LPNAI.

V. INDIA'S MEASURES DO NOT PROVIDE FOR REGIONALIZATION

24. India argues that SPS Article 6 obligations can be triggered only by an application for recognition of specific zones or compartments. India's theory would mean that the United States and other exporting Members had an obligation not to accept the plain meaning of the words of India's measure. India's theory, moreover, suggests that the United States had an obligation not to believe the statements of India's own officials, who made clear that regionalization simply was not an option for countries exporting to India the products covered by S.O. 1663(E).

25. India's insistence that Article 6 obligations can be triggered only by an application for recognition of specific zones or compartments ignores the phrasing of that article. Article 6.1 does not provide for Members to "adapt their sanitary or phytosanitary measures" to the sanitary characteristics of an area at some point in the future. Rather, it provides that "Members *shall ensure* that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area … from which the product originated" (emphasis added). This wording would make no sense if the paragraph was not intended to require maintenance of an ability

(existing independently of and antecedent to any regionalization request), to account for the disease conditions of sub-national areas from which traded products originate.

26. Similarly, Article 6.2 requires that "Members shall, in particular, recognize *the concepts* of pest- or disease-free areas and areas of low pest or disease prevalence" (emphasis added). It does not require recognition of specific areas, but rather of concepts: those of pest- or disease-free areas. It would make no sense for an obligation to recognize these *concepts* to be triggered only in the event of a request to recognize specific compartments or zones. The United States has explained how India rebuffed various requests that it accept the possibility of applying its measures not on a countrywide basis. For this reason, India's argument that the United States should have inquired "on its laws and procedure that India might adopt to recognize an exporting country's zones or compartments" is disingenuous at best.

27. As the United States explained, it explicitly asked that India apply its measures on a less-than-country basis with respect to products from the United States. India's response was not to provide information on laws and procedures that could be used to secure the recognition of zones and compartments. Rather, India's response was that its requirement of country-freedom "is uniform." Indeed, India's erroneous assertions in this dispute that it has an ALOP of "NAI country freedom" of the exporting country from NAI, that "India's level of protection as reflected in S.O. 1663(E) is to prevent ingress of LPNAI and HPNAI from disease notifying *countries* through imports of products that are clearly identified as risk factors even by the OIE, and that "India's ALOP is met by maintaining import restrictions against *countries* notifying HPNAI or LPNAI," thoroughly belie its contention that it would consider recognizing zones and compartments if only another country submitted a properly documented request.

28. In its regionalization argument, India urges the Panel to presume that the United States must not have procedures in place that would allow for the limitation of trade restrictions on U.S. products to a limited zone around the outbreak. As the United States has explained, while the United States does have such procedures, U.S. procedures are irrelevant to the question of whether India recognizes "*the concepts* of pest- or disease-free areas and areas of low pest or disease prevalence" (emphasis added), and is "*ennsur[ing]* that [its] sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area … from which [a] product originated" (emphasis added).

VI. THE UNITED STATES HAS NOT LIMITED ITS CLAIMS

29. India alleges that the United States has limited its claims to poultry meat and eggs. The Panel has already heard a variant of this argument – and rejected it in the Preliminary Ruling. India's argument makes no sense – the presentation of certain examples regarding some of the products covered by a measure is no indication of a withdrawal or limitation of a claim. And more generally, India does not – because it cannot – identify any legal basis to require a complaining party to repeat every product covered by a measure at every portion of its submissions in order to maintain a challenge to the entire scope of a measure.

VII. CONCLUSION

30. This dispute can be distilled to a few simple points:

- India's measures are not based on either type of risk assessment prescribed by the SPS Agreement;
- India's measures are maintained without sufficient scientific evidence because the evidence does not support prohibitions on account of LPNAI;
- India's measures are more trade restrictive than necessary to achieve its appropriate level of protection because measures conforming to the OIE Code are reasonably available;
- India's measures unjustifiably discriminate as India does not have a surveillance regime capable of reliably detecting LPNAI yet bans imported products on account of LPNAI and since India restricts trade in domestic products from only a very limited

area following a domestic HPAI outbreak, yet whenever a trading partner reports LPNAI or HPAI, India bans importation from the entire country;

– India's measures do not take into account the possibility of regionalization; and

– India has no justification for its failure to properly notify and publish its measures.

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

ANNEX B-5

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF INDIA

A: INTRODUCTION

1. The WTO Agreement on Sanitary and Phytosanitary Measures (**the SPS Agreement**) strongly encourages Members to harmonize SPS measures on as wide basis as possible by basing their respective SPS measures on international standards, guidelines and recommendations developed by relevant international organizations as international organizations, in developing these standards are deemed to have taken into account relevant current scientific information concerning the risk to human or animal health arising from international trade in animal or animal products.

2. Thus it was the understanding of India that having adopted an OIE recommendation, it was not required to further conduct a risk assessment. The measure at issue, S.O. 1663(E) implements the *Office International des Epizootics* (**OIE**) standard which recommends that importing countries may impose an immediate ban on the trade in poultry and poultry products if an exporting country notifies an outbreak of High Pathogenic Avian Influenza (**HPAI**) or Low Pathogenic Avian Influenza (**LPAI**) in poultry. Yet United States sought from India a risk assessment as a further justification that its measure is based on science.

3. Therefore in October 2010, India informally and in good faith provided a document to the United States and the European Communities which contained a brief summary of scientific material which India believed formed the basis of the OIE recommendation and hence also the justification behind India's measure. India also categorically stated that this was not India's risk assessment and should not be treated as one. However in spite of India's clarification, United States together with the European Communities specifically sought an opinion from the OIE as to whether the document qualified as a risk assessment, this despite the fact that India had not sought OIE's opinion on the matter and shared the document with the OIE only for information purposes.

4. Even though the OIE does not have a separate mandate to assess, judge or comment on the existence or content of a Member's risk assessment and is only an observer at SPS Committee meetings, the OIE took the floor and proceeded to opine on the document stating that it was severely deficient in many aspects. India took strong objection to the OIE taking the floor as did Chile, Argentina and Peru. Thus it is clear that the OIE has already made known its opinion. This coupled with its inappropriate interjection at the SPS Committee meeting casts serious doubt over the OIE's ability to provide guidance to the Panel and India submits that the Panel should not rely on the OIE as an expert in this case.

A(I): NATURE OF INDIA'S AVIAN INFLUENZA MEASURES

5. S.O. 1663(E) was implemented under Section 3 and 3A of the Livestock Importation Act, 1898 and prohibits import of certain livestock and livestock products from countries reporting High Pathogenic Notifiable Avian Influenza (**HPNAI**) or Low Pathogenic Notifiable Avian Influenza (**LPNAI**) or Notifiable Avian Influenza **(NAI)** in poultry. Hence imports are prohibited upon a notification of NAI, but when a country declares freedom after culling (or slaughter), disinfection and surveillance, which generally takes three months as recommended by the OIE, the country is no longer considered to be *"reporting Notifiable Avian Influenza"* and imports from such countries are permitted. Further the United States assertion that India imposes measures on account of LPNAI in wild birds is incorrect. The measure specifically states that imports will be prohibited from countries reporting HPNAI or LPNAI in poultry.

6. As noted above, once the country is free from avian influenza in poultry, imports from such countries are permitted under permits called sanitary import permits (**SIPs**) which are issued under S.O. 655 (E). This is evident from SIPs granted for imports of products such as unprocessed duck and goose meat, turkey meat and chicken meat from countries such as France, Spain, United Kingdom, United States, Italy, Netherlands, Thailand and Malaysia which did not report any

outbreak of HPAI or LPAI on the date of approval of the SIP. Further India on a number of occasions in the SPS Committee meetings and at bilateral forums has clarified that S.O 1663(E) and its predecessor measures provide for a temporary ban against countries reporting NAI in poultry and that the ban is lifted once the country notifies freedom.

B: INDIA'S DOMESTIC AVIAN INFLUENZA MEASURE FOR CONTROL & SURVEILLANCE

7. The Government of India implements the control and surveillance procedure through the National Action Plan (**NAP**), 2012 which has been issued pursuant to the Prevention and Control of Infectious and Contagious Disease in Animals Act, 2009 (**Prevention of Disease Act).** The schedule of diseases under the Act indicates that highly pathogenic avian influenza and low pathogenic avian influenza in poultry are regulated by the Act and contained in accordance with measures taken in the NAP 2012.

8. With respect to the surveillance, India under NAP 2012 and in accordance with the OIE Code conducts three different types of surveillance system. First among them is the Random clinical surveillance wherein surveillance of population and density of poultry in each block, both in backyard and commercial establishments, flyways of migratory-birds, live-bird markets including wet-markets, existence of wildlife sanctuaries/ national-parks/ water-bodies visited by migratory/ wild birds is carried out and any unusual sickness or mortality in poultry or wild birds is taken into account. Further NAP 2012 also identifies and lays down signs for identifying unusual sickness such as swelling around the eyes, neck, head, nasal discharge, discoloration of the wattles, combs, legs, drop in egg production, sudden weakness, drooping wings and lack of movement among birds. These symptoms are also similar to what has been prescribed by the United States Department of Agriculture.

9. The second type of surveillance being carried out by India is the Random Laboratory Surveillance. Under this, samples including tracheal and cloacal from both poultry and wild birds are regularly/weekly screened for NAI using virological methods. The faecal and/or tracheal swabs from poultry is collected by officials of the State Department of Animal Husbandry, and from wild birds is collected by officials of the State Forests Department and the same are sent to the High Security Animal Disease Laboratory (**HSADL**), Bhopal or Regional Disease Diagnostic Laboratory **(RDDLs)**. Currently India has five RDDLs. Such surveillance for NAI has resulted in the testing of about 8, 49,332 samples by HSADL, Bhopal and the various RDDLs.

10. The third type of surveillance is the targeted surveillance wherein surveillance is undertaken for areas adjacent to international land-borders, especially those affected with avian influenza, interstate borders with the avian influenza affected States and in live bird markets including wet markets. The samples collected from these are sent to either HSADL, Bhopal/RDDLs for testing. The fact that avian influenza is not found in other regions of the country and is localized predominantly within India's eastern states is also an indication that India's control and containment measures are effective.

11. Further the control measures applied by India pursuant to NAP 2012 are also in conformity with the OIE Code. India employs control measures in two situations. Firstly control measures are employed in suspected avian influenza outbreaks wherein upon reporting of unusual sickness and mortality in birds, an officer visits the site to conduct a preliminary investigation. During the pendency of the investigation and the results of the test, an alert zone is created to prevent further ingress or spread, if any, to villages and habitations within a 10 km radius from the affected place.

12. The second type of control measures are employed upon occurrence of confirmed cases of outbreak of NAI. Once an occurrence of NAI is confirmed, the government immediately notifies the same to the OIE and subsequently carries out the control measures as prescribed under Chapter III of NAP 2012 upon occurrence of a NAI and which are also in consonance with the OIE Code. Post operative surveillance is carried out as per the procedure laid down in Chapter IV of NAP 2012 and which is in conformity with the OIE Code. It should also be noted that the control measures maintained by India are similar to control measures maintained by other countries such as Chinese Taipei, China and Canada.

C: RELEVANCE OF THE ARTICLE 5.8 REQUEST BY UNITED STATES

13. The United States made a request under Article 5.8 of the SPS Agreement on 17 January 2012 for certain information. As per the letter, the information was to be provided within 1 month even though Article 5.8 does not provide any time line within which the information is to be provided. India replied on 16 February 2012 requesting for some more time. However India did not receive any further communication from the United States and instead within 2 weeks received a request for consultations from the United States. Based upon these facts, United States alleges that India has refused to provide information under Article 5.8 even after 14 months of the request being made.

14. However argument of the United States is legally and factually incorrect. Firstly India never refused to provide information but instead requested for more time, to which it never received any reply. Secondly, Article 5.8 is a pre dispute measure and is not applicable in a dispute settlement situation. Hence it is inapposite that the United States complains that 14 months have passed since it made its request, when this period includes 12 months under dispute procedure itself. In view of the above, no adverse inference, as alleged by the United States, should be drawn against India.

D: SECOND REQUEST FOR PRELIMINARY RULING UNDER ARTICLE 6.2

15. The United States First Written Submission (FWS) alleges a violation of the national treatment obligation by India under Article 2.3 of the SPS Agreement. Therefore the object of the challenge, i.e. the discrimination, is alleged to be caused by India's domestic measures which do not allegedly apply similar controls with respect to like domestic products. Thus in this situation, United States has to necessarily adduce and impugn such of India's measures which it believes are the cause of this arbitrary or unjustifiable discrimination.

16. However nowhere in the panel request, there is any mention of the NAP, whereas in the FWS, the United States now claims that India does "not apply similar avian influenza related controls with respect to like domestic products and their internal movement within India". The National Action Plan was enacted in 2006 **(NAP 2006)** and later amended in 2012 and is promulgated under the Prevention of Diseases Act. The United States has brought to India's notice its challenge of the NAP 2012 for the first time in its FWS, while making no mention of it in its panel request.

17. Since the NAP is the object of the United States challenge under Article 2.3, it was imperative that the NAP was identified with precision in the panel request. The panel request does not mention the NAP explicitly by name and there is nothing in the description of the measure at issue in the panel request which would have provided notice to India that the United States did in fact intend to challenge the NAP. This is in spite of the fact that attendant circumstances indicate that the United States was well aware of the NAP and yet the panel request is devoid of any reference to it.

18. Further the United States cannot take umbrage under the reference to 'related or implementing measures' to raise claims with respect to NAP as it is not an implementing measure of S.O. 1663(E) or the Livestock Importation Act, 1898 because it does not implement the prohibition on imports of livestock and livestock products from NAI positive countries. The sphere of activity of S.O. 1663 (E) and the NAP is entirely different and it cannot be said that there is a significant degree of overlap between the two measures.

19. In addition to the NAP, United States has also adduced health certificates for livestock products as a new measure for the first time in its FWS on the ground that these health certificates implement the import prohibition laid out in S.O.1663 (E). However the argument of the United States is incorrect. The requirement to provide a health certificate with every consignment of livestock products emerges from SIPs which are issued under a separate notification, namely, S.O. 655 (E). Thus while S.O. 655 (E) governs conditions to be met by exporting consignments, S.O. 1663 (E) prohibits imports of certain livestock products from countries reporting NAI. Thus, though the two notifications are enacted under the same statute they deal with the dissimilar subject matters.

20. S.O. 655 (E) and S.O. 1663 (E) cannot also be said to be related measures merely because both notifications were enacted under the Livestock Act. The objective of the Livestock Act is to regulate, permit or prohibit the trade in livestock products. Hence, while S.O.655 (E) regulates the trade in livestock products, S.O. 1663 (E) prohibits the trade in livestock products under specific conditions. Thus the United States must not be permitted to raise claims concerning the health certificates in its submissions.

E (I): ORDER OF ANALYSIS

21. United States has raised claims under the following provisions of the SPS Agreement and GATT 1994: Articles 5.1, 5.2, 2.2, 3.1, 5.6, 6.1, 6.2, 2.3, 5.5, 7, and Annex B of the SPS Agreement and GATT Article XI. Though the United States has commenced its submission with a claim with Article 5.1 of the SPS Agreement, it is India's submission that the Panel must commence its analysis under Article 3 as India being the party imposing the SPS measure is claiming that its measure conforms to the international standards. In the event, the SPS measure at issue is held to be in conformity with international standards, the Panel need not examine compatibility of the SPS measure at issue with other provisions of the SPS Agreement.

22. The above is equally applicable if the SPS measure is found to be 'based on' international standards and only that aspect of the law which the Panel holds is not 'based on' the international standard will need to be further examined under Article 2.2, 5.1 and 5.2.

23. Further if the Panel were to find that India's measure is not consistent with Article 3, then India submits before the Panel that it should analyze the claim of consistency by India with Article 2.2 as it provides for an overarching principle and is applicable to the entire SPS Agreement. Further Article 2 informs Article 5.1 and Article 2.3 informs Article 5.5 and if the Panel were to find that India's measure is based on scientific principles and not maintained without sufficient scientific evidence pursuant to Article 2.2 of the SPS Agreement, a further analysis under Article 5.1 would be unnecessary. Hence India would submit before the Panel that it should commence its analysis with Article 3 of the SPS Agreement.

E (II) & E (III): INDIA'S MEASURE CONFORMS TO THE OIE CODE

24. The OIE recognizes the prerogative of every Member to set its own level of protection and in view of the same has formulated a code wherein it has provided various situations in which products may be traded. For instance for poultry products mentioned within the chapter, the importing country may condition the entry of a poultry product upon the exporting country being free from both HPNAI and LPNAI. Alternatively the OIE also enables countries to condition the entry of the poultry product only from the specific zone or compartment which has been recognized by the importing country.

25. Hence an importing country is free to choose the 'condition of entry' upon the fulfillment of which it will allow poultry products to be imported. Because the 'condition of entry' for each poultry product stated in the OIE Code provides several options, the condition of entry that an importing country implements will depend on its appropriate level of protection (**ALOP**). The OIE Code does not stipulate what level of freedom a country must seek from the exporting country, it leaves that choice to the importing country but only recommends sanitary conditions which should be fulfilled by the consignment and which should further be attested to by the veterinary authority of the exporting country.

26. The United States has adduced claims starting with Article 5.1 and 5.2 and 2.2 specifically alleging that as far as fresh meat of poultry and eggs are concerned, there is no scientific basis to maintain a temporary import suspension of the type maintained by S.O. 1663(E). Thus India's claim stating that India's measure is in conformity with the OIE Code will be limited to standards pertaining to eggs and fresh meat of poultry as it is evident that the United States claims pertain only to these products. However, if the United States makes substantive submissions in this regard, India reserves the right to respond to such further submissions.

27. Article 10.4.1.10 of the OIE Code stipulates that if a country notifies HPAI or LPAI in poultry, Member countries can impose immediate ban on trade in poultry commodities depending on the condition of entry they have selected based on the level of protection they have deemed appropriate. Further the OIE Code also provides for condition of entry for each poultry product

mentioned therein. Hence if a country has decided based on its ALOP that it will condition entry of eggs and fresh meat of poultry from the exporting country upon NAI country freedom then if the exporting country notifies either HPNAI or LPNAI in poultry, the said products can be banned from the exporting country upon the notification and will be allowed once the country notifies freedom again to the OIE. Likewise if a country has decided based on its ALOP that it will condition entry of eggs and fresh meat of poultry from the exporting country from specified zones which are free of NAI, then if the exporting country notifies either HPNAI or LPNAI in poultry in areas outside a recognized zone, the said products will be banned from the entire exporting country except the recognized zone and will be allowed once the country notifies freedom again to the OIE.

28. India's sanitary regime for imports of poultry products is governed by S.O. 1663(E) as per which the condition of entry for poultry products into India is NAI freedom in poultry. If the exporting country is not free from NAI in poultry, it provides for import restrictions on commodities mentioned therein till the time the exporting country regains NAI freedom. Once the country regains NAI freedom, poultry products can be imported by applying for SIPs which are valid for 6 months. Imports can then be made on the basis of the SIP and every consignment is required to be accompanied by a veterinary certificate attested to by the official veterinarian of the exporting country.

29. The veterinary certificates contain several sanitary conditions which are required to be attested by the veterinary authorities of the exporting country so that every consignment is safe for import. Hence in effect, S.O. 1663(E) implements the 'condition of entry' requirement reflected in each product specific recommendation and in Article 10.4.1.10. On the other hand the veterinary certificates implement the health certificate requirements under each product specific recommendation.

30. Thus S.O. 1663 (E) provides for immediate suspension of import of livestock product from countries reporting NAI and which conforms to Article 10.4.1.10 of the OIE Code. Similarly according to the condition of entry for livestock products under S.O. 1663 (E), NAI freedom is required for imports into India and which conforms to the condition of entry for the same product under the OIE Code. In view of the above, India submits that its measure conforms to the OIE Code. Since India has established that its measure conforms to the OIE Code, the measure is presumed to be consistent with the SPS Agreement and the GATT 1994. Hence the United States claim under GATT Article XI is not sustainable. Further the United States claim that India's measure violated Article 3.1 by not allowing imports from zones or compartments is also not made out as India has clearly established that the OIE Code and the SPS Agreement permit a country to determine its ALOP and the OIE Code permits countries to condition the entry of a poultry product upon the exporting country being free from both HPNAI and LPNAI.

31. Alternatively India also submits that its measure is based on the OIE Code. As per the Appellate Body (AB), a domestic SPS measure can be found to be "based" on the international standard, if it adopts a part of the international standard or is supported by the international standard. In such a scenario, the part of the domestic measure which adopts the international standard should have the presumption of "conforming" to the international standard and be presumed to be consistent with the SPS Agreement and the part of the domestic measure which does not adopt the international standard should be justified under other provisions of the SPS Agreement.

E (IV): THE UNITED STATES CLAIM UNDER ARTICLE 2.2, 5.1 AND 5.2

32. The United States in its claim under Article 2.2 has adduced scientific evidence with respect to eggs and fresh meat of poultry. As per the statement of David Swayne adduced by United States, since LPNAI virus is only present in the respiratory and digestive tract of chicken and not in the meat, bone and inside eggs, fresh meat of poultry does not present any risk. However because HPNAI virus causes a systemic infection and the HPNAI virus is present in various parts of the chicken, therefore a restriction on fresh poultry meat and eggs products (and other products) originating from an HPNAI infected countries is justified. Thus as per the United States except for systemic distribution, in other respects such as efficacy of transmission and modes of transmission, LPNAI and HPNAI viruses are exactly alike

33. However the study adduced by India, i.e. Post et al. clearly rebut the above argument of United States. The study Post et al. clearly establishes that LPAI viruses (H5N2, H7N1, H7N7,

H9N2. H7N7) can cause systemic infection and can spread to internal organs of the bird. Thus the fact that LPNAI virus can spread systemically within various internal organs clearly puts the risk emanating from the LPNAI virus on the same pedestal as the HPNAI virus. Since Post et al., establishes the systemic spread of LPNAI in the bird, keeping Swayne's statement in mind, a restriction on fresh poultry meat, eggs and other products originating from an LPNAI infected country is equally justified.

34. Having established that United States has not been able to present a prima facie claim under Article 2.2, India submits that its measure is based on scientific principles and sufficient scientific evidence on account of the following: a) India's measure conforms to or at based on international standards, which fulfils the requirement of scientific principles and sufficient scientific evidence; b) The fact that a number of other countries maintain similar import restrictions upon occurrence of NAI proves that the risk is well founded; c) existing scientific literature supports measures maintained by India.

35. With respect to the first requirement, India relies on its submission and arguments made under Article 3 which establishes that India's measures conforms to the OIE Code and therefore is consistent with Article 3 of the SPS Agreement and therefore is also based on scientific principles and sufficient scientific evidence as required under Article 2.2 of the SPS Agreement. With respect to the second requirement, India submits that many other countries such as Singapore, Philippines, Japan, Colombia, China etc. are maintaining similar import prohibition on occurrence of HPAI or LPAI virus. Thus the measures being followed by these countries reflect the risk associated from an occurrence of HPNAI or LPNAI virus.

36. Thirdly in light of available scientific evidence which suggests that the LPNAI virus can spread systemically within the bird, the basis for justifying a ban on fresh poultry meat, eggs and other poultry products from HPNAI countries is equally applicable to these products when they originate from LPNAI countries. This alone suffices for purposes of a finding that a temporary import suspension on fresh meat of poultry, eggs and other poultry products originating from a LPNAI country are based on sufficient scientific evidence.

37. Furthermore even assuming that LPNAI virus is only restricted to the respiratory and intestinal tracts, even so, fresh meat of poultry as it is traded still carries a risk of harboring the LPNAI virus. This is because during processing of raw meat of chicken for export, all the internal organs of the chicken are not removed (especially kidney, liver, heart and even pieces of lungs) and are part of the carcass imported as raw meat. Thus there is a very high possibility of contamination of the rest of the meat due to the presence of LPNAI virus in respiratory and intestinal tracts.

38. With respect to Article 5.1 and Article 5.2, the United States has argued that India's measure is not based on Article 5.1 as India has not conducted its own risk assessment. However if the Member conforms to or bases its measure on the international standard, there is no need to conduct a separate risk assessment. In this respect, it is India's position that since its measure conforms to or is based on the OIE Code there is no obligation on India to conduct a risk assessment.

39. Even otherwise the scientific evidence submitted by India to justify an import suspension on fresh meat of poultry and eggs from LPNAI countries clearly establishes the risk in trade from these commodities and fulfils the requirement of not maintaining its measure without sufficient scientific evidence under Article 2.2 and India is under no obligation to conduct a separate risk assessment in this instance.

E (V) & E (VI): THE UNITED STATES CLAIM UNDER ARTICLE 2.3 AND 5.5

40. The object of challenge under Article 2.3 claim of the United States FWS is NAP 2012. However SPS Agreement is only applicable to measures which may directly or indirectly affect international trade as required by Article 1 of the SPS Agreement. Though NAP 2012 can be considered to be an SPS measure as defined under Annex-A, it is not a measure to which the SPS Agreement applies because NAP 2012 or for that matter NAP 2006 does not directly or indirectly affect international trade.

41. Further as per United States, discrimination under first situation of Article 2.3 results due to the fact that India places a countrywide ban on imports from an exporting country that notifies either HPNAI or LPNAI. On the other hand, when faced with an HPNAI outbreak in its own territory, India applies control measures limited to 10 km surrounding the epicenter of the outbreak.

42. Firstly India considers that the OIE Code permits importing countries to demand country freedom from exporting countries and India believes that a suspension of imports for a minimal period of close to three months is necessary to ensure that infected poultry products do not enter India from a country which is experiencing an active outbreak.

43. Secondly, the situation of a country (such as India) when it experiences an outbreak of avian influenza within its territory and hence has to take control measures to prevent spread of the disease, is highly distinct from its situation as an importing country which has to ensure that infected products from countries experiencing active NAI outbreaks do not enter its territory. The risks that the two situations present are entirely different.

44. A country reporting an occurrence of NAI takes all possible measures to prevent to control and to contain the spread of virus as the epicenter of the virus is known. With imports on the other hand, in the absence of control measures, agents of disease transmission could enter a country and could be dispersed over a large area through internal commerce and trade. This amplifies manifold the risk of initiating several NAI outbreaks in different parts of an importing country through imports of potentially infected agents of NAI. Hence, the measures that a country takes in these two situations would quite naturally and logically be different.

45. As per the United States, discrimination under second situation of Article 2.3 results due to the fact that though it bans poultry products from LPNAI reporting countries it takes no control measures to detect and hence to prevent outbreaks of LPNAI. However this is incorrect. As stated above, India carries out various types of control and surveillance measures for NAI and the same has also resulted in the discovery of other strains of LPAI (strains other than H5 or H7). The OIE provides that countries may take trade related measures to prevent ingress of a disease which is exotic to it. Since India has never had an outbreak of LPNAI and the same is exotic to India, it never needed to take any domestic control measure. Thus mere application of differential control measures cannot *ipso facto* amount to discrimination especially when the risks presented by the two situations are entirely different.

46. The United States also alleges that India's measure constitute disguised restriction on trade, though the claim is quite ambiguous. Firstly as India had already clarified, its measures are neither unjustifiable nor discriminatory. Secondly an import prohibition by itself would not amount to disguised restriction in trade especially when India's measure is based on international standards which recommend the same.

47. With respect to the claim of the United States under Article 5.5, India submits that the United States claim does not establish a prima facie case as it has not established the basis of its allegation under each of the three element of Article 5.5 as required. The FWS by the United States simply makes a reference to what it believes are "different situations", which is only the first element of the three part test under Article 5.5. There is no explanation whatsoever on the other two elements. Even on the first element the submission simply notes that different situations exist but does not explain why those situations are comparable in the first place.

48. Thus the United States FWS is highly inadequate for its lack of any substantive arguments establishing in detail and with clarity the alleged violation of Article 5.5 through the three cumulative elements therein. However without prejudice to India's right to provide a rebuttal to further facts or legal submissions adduced by the United States with respect to its Article 5.5 claim, it is India's submission that for the same reasons as explained before in Article 2.3 with respect to the different situations, a violation of Article 5.5 is not made out by the United States.

E (VII): THE UNITED STATES CLAIM UNDER ARTICLE 5.6 AND 2.2

49. The claim of the United States under Article 5.6 appears to be limited to the prohibition on imports of fresh meat of poultry and eggs from countries notifying LPNAI as the United States has not adduced evidence with respect to other products or HPNAI. Further the United States claim under Article 5.6 incorrectly identifies India's ALOP through its domestic measures, i.e. the NAP. As

per Annex A (1) of the SPS Agreement, an ALOP is the level of protection which is sought to be achieved by the SPS measure at issue, which in this case is S.O.1663 (E). The identification of the wrong ALOP leads to a fatal error in the analysis and strikes at the very root of the United States allegation under Article 5.6.

50. Secondly the United States also does not clearly identify an alternative measure which would fulfill India's ALOP. The submission simply refers to the OIE Code as an alternative measure and perfunctorily states that the OIE Code is reasonably available without explaining which specific controls it is referring to. Thus it is clear from the United States submission that by suggesting India should permit unrestricted trade in eggs and meat from LPNAI countries or permit trade in these products from zones or compartments established in the exporting country, the United States is asking the Panel to compare the trade restrictiveness of S.O. 1663(E) with the ALOP it believes should apply, rather than the level of protection which is reflected in S.O. 1663(E).

51. Since LPNAI is exotic to India, S.O. 1663(E) ensures that poultry commodities from LPNAI reporting countries which present a risk of transmitting the infection are not traded during an active outbreak. Thus an alternative measure suggested by the United States would need to be such as would ensure the same level of protection as the import prohibition currently does which is not the case.

52. The United States makes an unsubstantiated claim that a breach of Article 5.6 results in a consequential breach of Article 2.2. However this is based on an incorrect reading of an AB judgment wherein the AB simply stated that there existed similarities between the requirements of the two articles. However it explicitly stated that such similarity cannot lead to the assumption that a violation of Article 5.6 will in all cases lead to a violation of Article 2.2. The United States incorrectly reads the Appellate Body's ruling as a positive statement that in all cases a violation of Article 5.6 will necessarily lead to a violation of Article 2.2.

E (VIII): THE UNITED STATES CLAIM UNDER ARTICLE 6

53. Article 6.1 states that guidelines developed by international organizations for recognition of pest/disease free areas or areas of low pest/disease prevalence shall be taken into account by Members for the purposes of recognition of such areas. However Article 6.3 places this burden upon the exporting country to initiate the proposal to recognize zoning or compartmentalization and to provide documentary evidence that the proposed pest/disease free areas or areas of low pest/disease prevalence exhibit adequate bio-security measures as may be necessary to achieve the importing country's ALOP and the same is also affirmed by the OIE Code. The United States view that Article 6 places a unilateral and *suo moto* obligation on the importing country to recognize and accept, pest/disease free areas without any evidence represents a flawed understanding of Article 6.

54. However the United States has neither made a formal request to India for information and for recognition of a specific pest/disease free area nor responded to India's suggestion with a counter proposal to take this process forward even though India has communicated its willingness to consider compartments.

55. Lastly the United States by making a claim that India is under an obligation to recognize pest/disease free areas or areas of low pest/disease prevalence, acknowledges that international trade in these products presents a valid risk of transmission of the disease, which justifies a country wide ban, but that under provisions of Article 6, those risks can be minimized by establishing zones or compartments which fulfill the bio-security concerns of the importing country.

E (IX): THE UNITED STATES CLAIM UNDER ARTICLE 7 AND ANNEX B OF THE SPS AGREEMENT

56. The United States claims that India violates its notification obligations under Annex B of the SPS Agreement. The argument of the United States is incorrect as the chapeau of paragraph 5 clearly states that the obligations under that paragraph only arise when there are no international standards or the content of the measure is not the same as the content of the standard. Since international guidelines exist and India's measure conforms to or is based upon such standards, the obligation under Annex B is not applicable to India.

ANNEX B-6

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF INDIA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

OPENING STATEMENT

1. India believes that the crux of this dispute is essentially two-fold: (i) whether India's measures on fresh meat of poultry and eggs conform with the OIE Code (ii) whether India has a unilateral obligation to recognize areas of no or low disease prevalence in the territory of the United States.

2. The United States mischaracterizes S.O. 1663 (E) by stating India imposes a permanent ban and that the ban is imposed even when a country reports LPAI in wild birds. Numerous SIPs submitted by India prove that the ban is not permanent and lasts until a country notifies freedom and that it is not imposed pursuant to notifications of LPAI in wild birds.

3. The United States claims that there is "no need" to prohibit eggs and fresh meat of poultry from countries reporting LPNAI. Hence it recognizes that OIE standards allow a country to demand NAI country freedom from exporting countries but insists that India should ignore these standards and should import eggs and fresh meat of poultry even when a country declares LPNAI.

The OIE Code and how it is to be read

4. The OIE Code definition for NAI includes both HPNAI and LPNAI. When a country declares an HPNAI outbreak it cannot be considered to be free from HPNAI or free from NAI. However when a country declares an outbreak of LPNAI, it may be free from HPNAI but because of the LPNAI outbreak it cannot be said to be free from NAI. Hence recommendations in the OIE Code which mention "NAI free country, zone or compartment" encompass a situation where a country is free from both LPNAI and HPNAI.

5. Since the OIE Code recognizes the prerogative of every Member to set its own level of protection, the issue then becomes what level of protection is implicit in the standards recommended by the OIE for trade in products from countries reporting notifiable avian influenza and does S.O. 1663(E) embody this level of protection.

6. As India has explained in its FWS, the recommendations for poultry products are structured in a manner wherein each recommendation contains a 'condition of entry' followed by international veterinary certification requirements which the consignment needs to meet and which is further attested to by the official veterinarian of the exporting country. To illustrate, Articles 10.4.13 and 10.4.14 contain recommendations for imports of eggs for human consumption. Article 10.4.13 states "*Recommendations for importation from an NAI free country, zone or compartment*". Article 10.4.14 states "*Recommendations for importation from an HPNAI free country, zone or compartment*". This is the condition of entry.

7. Once this is satisfied, the recommendation in both cases details the requirements that a veterinary authority must attest to in the international veterinary certificate. These are the health certificate requirements. Thus the health certificate requirements are relevant only once the condition of entry is fulfilled by the consignment. The health certificate requirements cannot override the condition of entry stated for the product. The United States presents an incorrect and flawed understanding of the Code when it requires that India, instead of seeking country freedom, should simply make do with attested health certificates.

Recognition of ALOP in the OIE Code

8. An importing country can condition entry of poultry products from a range of options such as NAI or HPNAI country, zone or compartment freedom. By giving these options, the OIE Code recognizes the right of an importing country to determine the level of freedom it deems appropriate before permitting imports. Article 10.4.1.10 states that an immediate ban should not

be imposed on poultry commodities due to notifications of HPAI or LPAI in wild birds. That is to say a country may prohibit a poultry product in response to a notification of NAI in poultry. Article 10.4.1.10 simply reasserts the condition of entry under the product specific measure which is taken in light of a country's ALOP.

9. Under the interpretation presented by the United States and EU, notifications of LPNAI would be irrelevant. So long as the notifying country is free from HPNAI, no importing country would be able to restrict imports of poultry products from such country on grounds of a notification of LPNAI. In effect it amounts to suggesting that the specific mention of LPNAI as being a notifiable disease is purely an academic exercise having no significance for the regulation of trade from such countries and all standards providing for NAI freedom are redundant and should be read out of the OIE Code.

India's measure is in conformity with the OIE Code

10. The import prohibition under S.O. 1663(E) with respect to eggs for human consumption, hatching eggs, egg products and fresh meat of poultry is in conformity with the 'condition of entry' requirement reflected in the relevant product specific recommendation and in Article 10.4.1.10 of the OIE Code. The relevant product specific standards allow for imports from a NAI free country. A natural corollary of implementing this level of protection is an import prohibition from a country which is not NAI free. Thus the level of protection is NAI freedom and the element implementing the NAI country freedom standard is the resulting prohibition. Thus the specific clauses for eggs, hatching eggs and fresh meat of poultry of S.O. 1663 (E) not only embody the level of protection, i.e. NAI country freedom which is explicitly provided in each of the relevant product specific recommendations but also embody the resulting element implementing the standard, namely the import prohibition from a country which is not free from NAI.

11. Hence Clauses 1(ii) (c), (d), (e), of S.O. 1663(E) pertaining to fresh meat of poultry, hatching eggs, eggs and egg products are in conformity with Article 10.4.19, Article 10.4.10, Article 10.4.13 and Article 10.4.15 respectively and also in conformity with Article 10.4.1.10 of the OIE Code and should be presumed to be consistent with the SPS Agreement and GATT 1994. For the same reason these clauses are also based on the OIE Code in accordance with Article 3.1 of the SPS Agreement.

India will now address the regionalization claim raised by the United States

12. The United States makes its claim purely on the basis of Article 6.1 and 6.2 of the SPS Agreement while ignoring the critical obligation imposed on exporting countries in this respect under Article 6.3 of the SPS Agreement and under the OIE Code. While Article 6.1 provides broad principles that need to be taken into consideration by a Member while formulating its SPS measure, Article 6.2 provides guidelines on the basis of which disease or pest free areas may be recognized. However the onus to prove that the area is infact disease or pest free and hence fulfils the importing country's ALOP is upon the exporting country under Article 6.3.

13. That the onus is firmly placed on the exporting country is also echoed by the recommendations provided by the OIE Code on zoning and compartmentalization. The OIE Code states, *[B]efore trade in animals or their products may occur, an importing country needs to be satisfied that its animal health status will be appropriately protected. In most cases, the import regulations developed will rely in part on judgments made about the effectiveness of sanitary procedures undertaken by the exporting country, both at its borders and within its territory"*. Further, *The Veterinary Services of an exporting country should be able to explain to the Veterinary Services of an importing country the basis for claiming a distinct animal health status for the given zone or compartment under consideration.*

14. Unless the United States establishes a disease free zone or compartment, makes public the existence of such zone or compartment, establishes through documentation that the control and surveillance measures fulfil India's ALOP, India is under no obligation to unilaterally recognize alleged zones within the United States as being pest or disease free. The United States has not initiated a bilateral mechanism, namely the presentation of a proposal to India for recognition of disease free zones or compartments. India fails to see merit in the United States claim of violation of Article 6. Articles 6.1 and 6.2 do not operate independently of Article 6.3 and do not impose any obligation upon the importing country in the absence of the triggering steps under Article 6.3.

India does not arbitrarily or unjustifiably discriminate between its own territory and that of other Members

15. The United States compares India's domestic control measures versus the NAI country freedom from imported products to suggest that India arbitrarily or unjustifiably discriminates between its own territory and that of an exporting Member. This scenario presented by the United States does not present identical or similar conditions such that it can be validly compared under Article 2.3. A country wide ban against Members reporting an active outbreak of NAI is not an identical or similar situation to a control measure applied within the municipal limits of a country during an outbreak of NAI.

16. In domestic outbreaks, the epicenter of the disease is known and identified and the risk is one of further spread beyond the originally infected area. With imports on the other hand, in the absence of control measures, agents of disease transmission could enter a country and could be dispersed over a large area through internal commerce and trade. Further as an importing country, it cannot exercise control over containment and disinfection methods applied by exporting countries and therefore has to necessarily apply border measures to ensure that agents of disease transmission do not enter its territory.

17. The United States also claims that India bans poultry products from LPNAI reporting countries but takes no control measures to detect and hence prevent outbreaks of LPNAI. This conjecturing is solely to divert the Panel's attention from what is fundamentally a distinction between the situation prevailing in the United States which has experienced several outbreaks of LPNAI and India which has only experienced outbreaks of HPNAI. The fact is LPNAI is exotic to India and India has to date neither detected, despite routine surveillance, nor experienced outbreaks of LPNAI.

18. Under Article 2.3 a mere formalistic distinction between measures does not suffice. It is only distinction that is either arbitrary or unjustifiable which leads to a violation of the Article. Any enquiry must accordingly focus on whether there is a legitimate cause or rationale for the alleged distinction. Panels have advised that measures applied must be examined in the *"specific context of the relevant risks"* posed by the two situations to determine if there is any justification for the distinction in sanitary measures. The United States projects a "one size fits all" approach which is clearly disproportionate to the risks presented in both scenarios.

19. United States' arguments on India's measure constituting a disguised restriction on international trade suffer from a severe lack of clarity. Panels have explained that "the key to understanding what is covered by "disguised restriction on international trade" is not so much the word "restriction", but the word "disguised". The United States has not adduced facts which establish that by prohibiting imports from LPNAI notifying countries, the measure was giving effect to an alleged protectionist aim of benefiting the domestic industry.

Claims under Article 5.5 should be rejected on grounds of serious ambiguity

20. The United States claims under Article 5.5 are vague and prejudice India's right of defense. All 6 factors need to be established by a complaining party through positive proof before a prima facie case under Article 5.5 can be made. Mere assertion of a claim does not amount to proof of having actually established a violation therein. The United States claim is identical to the summary provided in the panel request. There is no further analysis.

21. The United States also cannot rely on its arguments under Article 2.3 to establish a *prima facie* case under Article 5.5 without providing anything more. Panels have held, a violation of Article 5.5 may result in violation of first or second sentence of Article 2.3, but the reverse is not true.

The United States has not made out a case under Article 5.6

22. The United States claim under Article 5.6 is severely deficient on many levels. The United States suggests that India's ALOP can be fulfilled by standards provided for in the OIE Code. This is surprising because India does follow the OIE standards when it requires NAI country freedom from exporting countries before trade in eggs and fresh meat of poultry can take place.

23. Another fatal flaw in the United States claim concerns the discussion on the ALOP. Under Article 5.6 the complainant must establish that an alternative measure suggested by it fulfils the level of protection which is achieved by the measure at issue, which in this case is S.O. 1663(E), and not an ALOP it believes the importing country should apply. Instead the United States identifies the NAP 2012 and incorrectly discerns from it the ALOP it believes India seeks from imports. NAP 2012 has no application to imports and the ALOP India seeks from imports cannot be identified from an unrelated legislation. Due to the incorrect identification of the ALOP, the ensuring analysis is also seriously faulty and should be rejected.

24. The two alternative measures suggested by the United States are also unviable. The first option, 'unrestricted trade' requires India to ignore the 'condition of entry' provided in the OIE Code and suggests that India import poultry products from a country during an active outbreak purely on the strength of its veterinary certificates. The second option pertaining to zoning and compartmentalization would also not be a 'reasonably available alternative measure' until zones or compartments are first established by the United States and further shown to ensure the same level of protection as the import prohibition currently does.

CLOSING STATEMENT

25. The OIE Code has to be read as a whole and not in a piecemeal fashion. The United States adopts a reading which results in reading out entire provisions in the OIE Code pertaining to NAI country freedom. It is undisputed that every WTO Member has a right to determine its own appropriate level of protection. India has determined that its ALOP is fulfilled by NAI country freedom as reflected in the recommendations of the OIE Code. Hence a reading which restricts the right of India to seek NAI freedom in favour of only HPNAI freedom is untenable and undermines India's sovereign right to determine its ALOP.

26. The United States insists that SPS measures should always be supported by a risk assessment. As is clear, any measure that reflects the level of protection prescribed by an international standard *ipso facto* reflects the assessment of risk and scientific evidence of the standard setting body. To insist on a risk assessment even when a Member adopts international standards defeats the purpose and objective of harmonization contained in the SPS Agreement.

27. At the substantive meeting the United States did not dispute that there is no unilateral obligation on the importing country to recognize zones or compartments. The only question then is whether the United States as an exporting country fulfilled its burden by providing information on the basis of which India could have made an assessment that such zones meet India's requirements. To date United States has not provided this information and India is under no obligation to unilaterally recognize areas within the United States which it claims are pest or disease free.

Conclusion

28. Panel must note that the United States has raised objections to India's measure as it applies to eggs and fresh meat of poultry when a country reports LPNAI. It has not addressed other products or another disease, namely HPNAI. The Panel's enquiry must be limited to products and the disease specifically addressed. Further, claims under Article 5.5 and 5.6 are severely deficient and the Panel must hold that the United States has not fulfilled its burden of proof and established a prima facie case.

ANNEX B-7

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF INDIA

1. India's rebuttal submission will address the following themes in response to the issues raised by the United States (**US**) in its First Written Submission (**US FWS**), opening statement made at the meeting of the Panel with the Parties (**US Opening Statement**) and in its replies to questions posed by the Panel (**US Replies**):

I. SELECTIVE AND PIECEMEAL READING OF THE OIE CODE BY THE UNITED STATES

2. India pointed that the US does not object to the right of a country to require NAI country freedom from the exporting country before permitting trade in fresh meat of poultry and eggs. It nevertheless insists that India must accept eggs and fresh meat of poultry from the US when it is reporting an outbreak of LPNAI. The US points out that the OIE expressly provides that detections of HPAI and LPAI in birds other than poultry should not give rise to trade bans in the context of Article 10.4.1.10 of the OIE Code. The US did not cite this Article for the proposition that detections of LPNAI in poultry should not give rise to trade bans. It could not, because the OIE Code nowhere proscribes what is the natural outcome of NAI freedom, i.e. a prohibition on imports of poultry products from a country that declares LPNAI or HPNAI. Likewise the EU made it clear that it believes a ban imposed on countries on account of a notification of LPAI in wild birds is not in conformity with Article 10.4.1.10 and like the US, the EU does not take the position that bans following notifications of LPNAI in poultry are not in conformity with the OIE Code.

a. Does the OIE Code envisage a ban?

3. A review of US submissions and evidence reveals that it believes a ban is justified against countries which report HPNAI in poultry. As a matter of policy the US prohibits imports from countries declaring HPNAI (such as India) and the restriction is imposed on a permanent basis. The distinction that the US makes with respect to HPNAI and LPNAI is surprising because the OIE Code nowhere recommends imposing a ban on account of HPNAI either. Yet the US is of the opinion that the very same Code permits a ban on account of HPNAI but does not permit a ban on account of LPNAI.

4. An import prohibition is the natural implication of the 'condition of entry' not being met by an exporting country. When imports originate from countries having outbreaks of HPNAI or LPNAI such countries are not HPNAI or NAI free. Since the standards recommend that imports should take place from HPNAI or NAI free countries, by its very implication, the standard acknowledges that if a country is not free, the import need not take place. The natural outcome of importing countries enforcing NAI or HPNAI freedom from their trading partners is through an import ban.

b. Purpose behind notification of LPNAI

5. A related point raised by the US is that OIE requirements, as far as LPNAI are concerned, are limited to the notification obligation. This is not the case. Article 10.4.1.10 makes it abundantly clear that while countries may restrict imports from trading partners notifying LPNAI in poultry, they should not do so when a country notifies LPAI in wild birds. Likewise the OIE's User Guide states that the recommendations are designed to prevent 'diseases in question' from being introduced into an importing country. As far as the OIE Code is concerned, the 'diseases in question' are both HPNAI as well as LPNAI.

c. Origin of a product is a risk mitigation condition

6. India has submitted that recommendations which provide for 'importation from a NAI free country' cover a situation where a country is free from both LPNAI and HPNAI. Thus if a country is free from HPNAI but not from LPNAI, this condition would not be met. The US insists that eggs and fresh meat of poultry should nonetheless be imported from LPNAI positive countries as other control measures may be applied to mitigate the risk of LPNAI.

7. Firstly, this reading goes against the US' own position that bans are permissible when products originate from HPNAI countries and secondly it ignores the explicit wording of various recommendations for eggs and fresh meat of poultry which provide *'Recommendations for importation from a NAI free country/zone/compartment'*. The Panel must note that the recommendations in question do not recommend importing from a country which is not free. The OIE recommendations contain two risk mitigation conditions. The first recommendation to mitigation risk suggests that the product must originate in a free country. The second form of risk mitigation requires that the export consignment is additionally accompanied by a veterinary certificate certifying that the export consignment has been rendered risk free through the application of additional control measures. Both conditions ensure that trade in animal takes place with "an optimal level of animal health security." India's regime for the import of poultry products ensures that both risk mitigation conditions are applied as recommended by the OIE Code. India enforces the condition of entry with S.O. 1663(E) and the veterinary certificate through S.O. 655(E). This is not akin to the pick and choose approach advocated by the US.

d. Other recommendations in the OIE Code indicate that countries can ban imports on account of LPNAI

8. Article 10.4.5 which pertains to imports of 'live poultry (other than day old live poultry)' provide recommendation from NAI free country only. A log*ical reading of this recommendation suggests that if a country declares LP*NAI it would not be free from NAI and an importing country need not import from such country. It would be immaterial that such country is free from HPNAI and control measures such as showing no clinical signs of NAI and transportation in sanitized containers, are available to mitigate risk against LPNAI. Even the US agrees that Article 10.4.5 recommends that adult poultry should not be imported from a country not free from LPNAI. Thus the issue is not whether products can be safely traded from countries which have notified LPNAI but whether the OIE Code permits countries to import only from NAI free countries.

e. United States conflicting position on 'level of protection' and 'appropriate level of protection'

9. The US first claimed that standards by themselves did not reflect any level of protection but reflect simply the disease status of the exporting country. The US later admits that international standards do indeed reflect and are premised to achieve a certain level of protection. But only the WTO SPS Agreement recognizes this sovereign right of Member countries and not the OIE Code. This is incorrect as OIE's guidance note provides that concepts provided for in the SPS Agreement are recognised in the OIE Code including a member's right to adopt an appropriate level of protection.

10. The OIE Code recognizes that the animal health status of the exporting country must be taken into account. The OIE also recognizes that the standards are *designed to prevent the disease in question being introduced into the importing country*. HPNAI and LPNAI are both notifiable diseases, the assumption is that Chapter 10.4 recommendations are designed to prevent HPNAI and LPNAI being introduced into the importing country. The Code states that, "recommendations in the Codes focus on the animal health situation in the exporting country, and assume that the disease is not present in the importing country or, if present, that the disease is the subject of official control programmes. Importing countries should not impose sanitary measures for diseases or pathogens that occur in the importing country unless they are the subject of official controls and, in this case, the measures applied to imports should be no stricter than the official controls applied to similar animals/animal products in the country." The guidance makes it clear that while the animal health situation in the exporting country is a relevant factor, just as relevant is the disease and control situation in the importing country. The aim of India's AI regime is to eradicate AI from its territory. India is thus entitled to take sanitary measures that prevent both HPNAI as well as LPNAI from being introduced into India. India's ALOP would not be fulfilled by prohibiting imports from HPNAI countries alone. Thus India takes measures to prevent the ingress of both diseases of concern as recommended by the OIE Code.

f. Practice of other WTO/OIE Members

11. India has also provided extensive evidence in the form of laws maintained by other countries which impose a ban on exporting countries which notify LPNAI. The WTO notifications cite the OIE

Code as the relevant international guideline, standards or recommendation on which the ban is based and supported by.

II. CONFORMITY OF INDIA'S MEASURES WITH THE OIE CODE

a. The relevant standard

12. India has provided substantive arguments for its claim that clauses 1 (ii) (c), (d) and (e) of S.O 1663 (E) conform to the product specific recommendations in the OIE Code (i.e. Articles 10.4.19, 10.4.10, 10.4.13 and 10.4.15) and with Article 10.4.1.10. Articles 3.2 and 3.1 do not use the word relevant. However, Article 3.3 elucidates when a sanitary measure may be said to not be 'based' on an international standard. It clarifies that a measure which results in higher level of protection than measures *based on* the *relevant* international standard shall have to comply with Article 3.3. By implication the standards which are referred to in Article 3.1 and Article 3.2 are the very same standards under Article 3.3, i.e. 'relevant' international standards.

13. S.O. 1663 (E) pertains to the first risk mitigation condition in the product specific recommendations, and hence product specific measures applicable to eggs and fresh meat of poultry contained in S.O. 1663 (E) should be evaluated for their conformity with the relevant standard, i.e. the *"condition of entry"* which is contained in each standard. India asserts that the relevant standard is not only one which pertains to the specific products at issue but also one which pertains to the specific subject matter of the law under challenge. The law under challenge in this dispute is S.O 1663 (E) as it applies to eggs and fresh meat of poultry. The same law prohibits entry of these products from countries reporting NAI. The US has specifically challenged the "prohibition" under this notification. The subject matter of S.O. 1663 (E) does not extend to matters beyond the circumstances under which poultry products from avian influenza positive countries may be allowed entry.

b. Measures based on an international standard

14. The EU specifies that a measure *contrary* to OIE standards would not be considered to be "based on" these standards. According to the EU, a ban on poultry products on account of LPNAI in poultry would not be "*contrary to*" Article 10.4.1.10 as opposed to a ban on account of notifications of LPAI in wild birds. That which is not *contrary* to the Code is in fact supported by the OIE Code. As the OIE Code 'allows' a ban on account of LPNAI in poultry, it cannot by necessary implication be "contrary to" the OIE Code and is thus based on the Code. Thus, implementing recommendations which call for importing from an "NAI free country/zone/compartment" results in importing products from countries which are "free" from NAI. By its natural implication, a country which is 'not free' from NAI would not satisfy this condition. In practical terms this is achieved through an import prohibition, which ensures that products are not imported from countries that have declared HPNAI or LPNAI.

III. CONTINUING DEFICIENCIES IN THE UNITED STATES CLAIM UNDER ARTICLE 6

a. The United States does not maintain zones or compartments within its territory

15. It is clear that the US does not maintain either zones or compartments as required under Chapter 4.3 and 4.4 of the OIE Code and as required under Article 6.3 of the SPS Agreement. In order to describe its zoning measures, the US has instead alluded to measures it takes during an outbreak of HPNAI and LPNAI. The OIE Code recommends that the concept or zoning and compartmentalization pertain to measures taken "prior to outbreaks of diseases". It is evident that the US has not implemented any measures for purposes of "putting the recommendations of the Code in place".

b. United States shifting position on the obligation on an exporting country

16. The US agreed that any recognition by India of zones or compartments maintained by the US would be contingent upon the US making a request and providing supporting documentation. It also agrees that *"the question of whether a particular area presents characteristics of one type or another is a different issue – that question may only be able to be resolved based on information supplied by the exporting Member."* However, in the same vein the US insists regionalization requires the importing member to engage in an information gathering exercise on an exporting

member's diseases surveillance and control measures to ensure itself that imports do not pose a level of risk greater than the ALOP established.

c. The recognition of the "concept" of zones or compartments under Article 6.2 of the SPS Agreement

17. Article 6.2 does not concern itself with the existence or the subject matter of the importing country's legislation. It is immaterial under Article 6.2 whether there exists a law which recognizes the concepts of zones/compartments and the details provided in such law. The Article obligates an importing Member to recognize the concept and leaves the manner in which this may be accomplished to the Member in question. A combined reading of Article 6.3 and 6.2 makes it evident that once an exporting country provides relevant information, it is the obligation of the importing country to give due regard to this proposal and to evaluate it. The Article 6 Guidelines highlight that regardless of whether a law recognizing zones exits, an exporting Member can initiate the process and seek information on how its application may be processed. India has not received proposals for regionalization or received any enquiries on its laws and procedure that India might adopt to recognize an exporting country's zones or compartments.

18. The US claim of a breach of Article 6.1 is baseless. Relevant differences in sanitary characteristics of different areas of the exporting country cannot be established unilaterally by the importing country. Article 6.1 does not require an importing Member to go on an information gathering exercise. Such information would be available once submitted by exporting countries to importing countries.

d. Evidence does not establish that US provided a proposal for recognition of zones

19. The United States in all its correspondence has not identified areas for which it sought disease free status from India. The United States has failed to provide any technical literature/documentation to substantiate its claims. To the contrary the letters cited contain a comment on India's measure but provide no information on the US poultry industry or level of bio security maintained against avian influenza. Merely suggesting that India modify its veterinary certificate requirements does not equate with providing information on US zones or compartments sufficient for India to determine if such zones or compartments meet India's ALOP.

IV. UNITED STATES CLAIMS ON DISCRIMINATION AND DISGUISED RESTRICTION ON TRADE NOT MADE OUT

a. Claim concerning arbitrary and unjustifiable discrimination

20. To support its claim, the United States submitted a study which recorded the presence of antibodies to H7 in ducks. The US relies on this only evidence to suggest that India has LPNAI outbreaks which it is not controlling. India has substantiated that nothing in the study indicates that the antibodies to H7 were low pathogenic. According to the OIE Code, virus isolation tests are required to be conducted before an LPNAI or HPNAI infection can be said to have conclusively occurred. LPNAI is exotic to India and India is entitled to take measures to prevent introduction of a disease.

21. It also alleges that imposing country wide bans against imports but limiting trade to the affected zones internally results in discrimination. India has explained that as an importing country India is compelled to apply dissimilar control measures to its import and to domestic outbreaks because it cannot "exercise control over containment and disinfection methods applied by exporting countries and cannot certify the health and safety of imported products. The US insists that India must gather information on an exporting country's surveillance and control mechanisms to satisfy itself that such measures are strong enough to contain outbreaks in those countries. Article 10.4.30 and Article 10.4.31 which the US cites requires "*the exporting country to provide evidence that it maintains an effective surveillance program. This information can confirm that the territory is indeed the status it purports to be.*" This reinforces India's position that applying limited territorial bans on exporting countries during an outbreak is not a decision that an importing country can take unilaterally unless the efficacy of the exporting country's surveillance and control program is established by the exporting country.

b. Disguised restriction on international trade

22. The reasoning in *Australia-Salmon* reasoning on the "sudden change in position" is inapplicable to the facts of this case. For one, India has not shifted positions on whether a risk assessment is required of it. It was always India's understanding that having adopted an OIE recommendation, it was not required to further conduct a risk assessment. Further, in *EC-Asbestos*, the key to understanding what is covered by 'disguised restriction on international trade' is not so much the word 'restriction', but the word 'disguised' and none of the facts taken individually or collectively establish that India is disguising its true intent behind the measure.

V. UNITED STATES HAS NOT MADE OUT A PRIMA FACIE CASE UNDER ARTICLE 5.5

VI. CONTINUING DEFICIENCIES IN THE UNITED STATES CLAIM UNDER ARTICLE 5.6

23. The US had in its first written submission suggested that India follow the OIE Code as its reasonably available alternative measure. It has subsequently provided two alternative measures that it believes are reasonably available. Firstly, it proposes control measures or veterinary certificate requirements prescribed under Chapter 10.4 of the OIE Code. India submits that suggesting India apply veterinary certificate requirements does not meet India's ALOP. Rather the US has suggested an alternative ALOP which India ought to apply with respect to imports.

24. As a second alternative measure the US suggests that India need not accept imports carte blanche and can require exporting countries to provide evidence that they maintain effective surveillance programs required under Article 10.4.30 and 10.4.31.

25. The US' suggestion that India gather information on exporting countries' surveillance systems and determine if such systems are adequate, this alternative is not technically and economically feasible alternative given its current veterinary and scientific human resource and is rather significantly more trade restrictive than the measure currently applied.

VII. LIMITATION OF CLAIMS TO EGGS AND FRESH MEAT OF POULTRY

26. The US has provided arguments on apparent violations by India under the SPS Agreement vide Article 3.1, 3.3, 5.1, 5.2, 2.2 and 5.6 only with respect to eggs and meat and hence claims under these articles are limited to eggs and fresh meat of poultry.

VIII CONCLUSION

27. It is submitted that United States' in its challenge to India's avian influenza measure has limited the same to eggs and fresh meat of poultry. Further, India's measure conforms to the OIE Code and India is not required to undertake a risk assessment. Lastly, India maintains that the United States has not made out a violation by India under Article 6. India's law enables the Central Government to recognize zones or compartments but India cannot be expected to unilaterally recognize zones or compartments.

28. The claim of the United States under Article 5.5 should be rejected as the United States has not fulfilled its burden to establish a prima facie case of violation by India. United States has also failed to establish that India's measures arbitrarily or unjustifiably discriminate or are applied in a manner which would constitute a disguised restriction on international trade as required under Article 2.3. Finally the alternative measures proposed by the United States under the Article 5.6 claim neither fulfill India's ALOP and nor are they technically and economically feasible.

ANNEX B-8

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF INDIA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

OPENING STATEMENT

1. The United States first raised the issue of LPNAI being present in India as part of its claim under Article 2.3 of the SPS Agreement. The argument stated that India does not take domestic measures to control LPNAI which occurs in the country and hence its import measures against countries reporting LPNAI are discriminatory. Since India has not detected and hence not reported LPNAI to the OIE, the United States offered several hypotheses why LPNAI should be present in India. The first was that India's 85+ HPNAI outbreaks strongly suggest an underlying LPNAI infection in poultry. Both Prof. Brown and Prof. Honhold have unequivocally refuted such linkage between HPNAI and LPNAI. The second hypothesis was that India's large backyard poultry population significantly increases the chances of LPNAI introductions from wild birds into poultry. Dr. Brown has vehemently refuted this linkage between backyard poultry and LPNAI introductions while Dr. Honhold has noted that exhibits upon which US has relied on for this proposition are simply personal opinion of individual scientists, unsupported by any scientific basis. The third was the suggestion that H7 LPNAI viruses should have travelled from Pakistan to India where there was a H7 HPNAI infection in poultry. Again as Dr. Honhold explained, this is mere conjecture as presence in Pakistan does not imply presence in India. The fourth was a study by Pawar et al which the United States put forth as proof of presence of H7 LPNAI infection in poultry in India. Contrary to US suggestion on the results of the study, expert opinion instead establishes that the study on its own does not support a conclusion that antibodies found were H7 specific or that the results prove a LPNAI infection. Dr. Brown's written opinion had pointed out the possibility of cross reactions due to the testing method employed by Pawar et al, which he reiterated at the meeting and stated that the study did not beyond reasonable doubt show the presence of H7 antibodies. Dr. Guan also clarified that though India had not practiced vaccination, the role of illegal vaccination could not be ruled out. Importantly both Dr. Brown and Dr. Guan stressed that virus isolation and not serological testing as was done in Pawar et al, was the most solid evidence of presence of virus.

INTERPRETATIONS OF THE OIE CODE

2. The core issues in this dispute are now well known. India restricts entry of poultry products from countries which report either HPNAI or LPNAI in poultry until such time as the reporting country notifies freedom from the infection to the OIE. India is not alone in restricting imports from countries notifying LPNAI as several countries regularly apply similar measures. United States takes exception to India's measure on the ground that India's restriction on eggs and fresh meat of poultry from LPNAI notifying countries are unsupported by the OIE Code recommendations. To the United States it is a significant fact that Chapter 10.4 does not recommend that a "ban" may be imposed. It should be noted that the United States equates "to recommend" with "explicitly stated" an argument that the European Union has also proposed.

3. This argument is misleading for two reasons. One, Chapter 10.4 does not "recommend" imposing bans on poultry products from countries notifying HPNAI either. Yet, the United States (and EU) read the recommendations to mean exactly that and go ahead and ban imports from countries notifying HPNAI. With HPNAI, they read OIE recommendations which state 'Recommendations for importation from a HPNAI free country/zone/compartment' as suggesting that if the country from which the product is sought to be imported is not free from HPNAI, such product need not be imported. Yet a similar interpretation is denied to recommendations which state 'Recommendations for importation from a NAI free country/zone/compartment.'

4. Second, the United States has entered into several arrangements with its trading partners all of whom are OIE Members, which restrict poultry exports from the US when it declares LPNAI. The interpretation it is seeking of the OIE Code is difficult to reconcile with its own trading regime unless of course one recognizes that the US would not acquiesce to restricting its own imports in

the absence of sound science and without the framework of international standards which support such restrictions.

5. The selective reading of the OIE Code leads to this absurd result; a ban on poultry products from HPNAI reporting countries conforms to the OIE Code (even in the absence of an explicit recommendation for a ban) since there are recommendations which state 'Recommendations for importation from a HPNAI free country/zone/compartment' but, a ban on poultry products from LPNAI reporting countries is unsupported by the OIE Code since the recommendations state 'Recommendations for importation from a NAI free country/zone/compartment' and an explicit language recommending a ban is absent

LEGITIMACY OF TRADE RESTRICTIONS

6. Before I go into when trade restrictions may be legitimate under the OIE Code, it will be helpful to understand if the OIE agrees that if a country is not free of a disease, its products may not be imported by other countries? The answer is yes. In its introduction OIE states that "where fresh meat is not recommended to be traded from countries, zones or compartments, it may be possible to establish measures for trade in meat products". Likewise in its discussion of Article 10.4.19 it states "If the requirements of Article 10.4.19 cannot be satisfied, because the exporting country is not free from HPNAI, it is still possible to export processed poultry meat". Likewise when commenting on maintaining disease free status it states that not being disease free can lead to potential loss of commercial trading opportunities. This is a clear admission that disease notification and hence disease status has ramifications for market access.

7. More importantly, the issue is (i) do the OIE recommendations provide that products should originate in NAI free countries and if so, (ii) can countries take measures to restrict imports if a country is not free from NAI. The answer concerning the first question is evident in Chapter 10.4 itself. That Chapter provides recommendations for importation from NAI and HPNAI free countries hence it is clear that the OIE has recommended that trade should take place from a NAI or HPNAI free country. The natural conclusion being that trade need not take place if a product is not originating from a NAI or HPNAI free country. However whether a country is "justified" in restricting imports from countries that are not NAI or HPNAI free is an issue for which the necessary guidance is provided under Chapter 5.1 of the OIE Code.

8. Article 5.1.2 makes it clear that Members may take import measures to fulfill their ALOP. In taking such measures the animal health situation of the exporting as well as importing country are relevant factors. It advises Members not to take import measures against countries which have reported a disease which is not an OIE listed disease and finally it cautions Members not to take import measures against diseases which are present in the Member's own territory and for which no control measures are applied.

OTHER INCONSISTENCIES IN OIE'S RESPONSE

9. The OIE was asked to specifically clarify the purpose of reporting LPNAI in poultry. The response provided by the OIE is as good as not providing a response. The OIE does not explicitly state that notification of LPNAI is limited for the purpose of surveillance. It could not have stated that, since only notifications of HPNAI in wild birds are for the limited purpose of surveillance and no language in the OIE Code suggests that notifications of LPNAI likewise have a limited purpose. The question remains unanswered.

10. Likewise when asked to clarify what the TAHSC meant when it referred to reporting of HPNAI and LPNAI in the same vein as being for 'trade purposes', the OIE instead clarifies that reporting of HPNAI in wild birds was for surveillance. There is no relevance of the answer to the question posed and instead undoubtedly establishes that the OIE has gone out of its way to be evasive in its responses.

11. Similarly, when the Panel asked what measures an importing country must take when an exporting country is reporting LPNAI and wants to export live poultry other than day old poultry, (Article 10.4.5) the OIE instead says that countries wishing to import from HPNAI free countries should do a risk assessment. This is another example of OIE's brazen attempt to divert attention from the main issue, which is that if an exporting country notifies LPNAI, it may not be permitted to export live poultry (other than day old poultry) to its trading partners. If Article 10.4.5 is read

to mean that an importing country may not import live poultry (other than day old poultry) from countries reporting LPNAI, there is no reason the same meaning cannot be attributed to other recommendations which provide for "Recommendations for importation from a NAI free country/zone/compartment".

12. In question 17, the Panel sought a very clear answer from the OIE whether products specific recommendations may be applied as alternatives depending on an importing country's ALOP or were they to be applied strictly based on the disease status of the exporting country. This question goes to the root of the issue because India claims that it can apply LPNAI based restrictions since they fulfill India's ALOP and further that the OIE Code recommendations are worded such that flexibility is provided to countries to import poultry products based on the level of protection deemed appropriate by each importing country. The United States on the other hand has claimed that the only relevant consideration is an exporting country's status so that even if a country is not free from LPNAI but is free from HPNAI, it should be allowed to export poultry products.

13. Surprisingly the OIE agrees with the US reference to avian chlamydiosis to suggest that any restrictions recommended are explicitly provided in the Code. The United States has used this reference to avian chlamydiosis presumably to suggest that the OIE Code has not 'recommended' or 'explicitly' provided for a ban on account of LPNAI and hence these are unsupported by the OIE Code. But equally by this logic the OIE Code has not 'explicitly' provided for bans on account of HPNAI either. Yet the United States believes such bans are supported by or based on the OIE Code. Importantly, the reference to the chapter on avian chlamydiosis supports India's position that if a country is free from a disease it may restrict entry of products from countries not free of that disease. The relevant recommendation states as follows:

> "Article 10.1.2: Trade in commodities
>
> Veterinary Authorities <u>of countries free from avian chlamydiosis may prohibit</u> importation or transit through their territory, from countries considered infected with avian chlamydiosis, of birds of the Psittacidae family."

14. If anything, the reference to Article 10.1.2 on avian chlamydiosis supports India's claim that the disease health situation in the importing country is relevant and must be taken into account when imposing measures and further that a country is justified in taking measures against diseases which are not present in its territory.

CLAIM UNDER ARTICLE 5.6 NOT MADE OUT

15. In its First Written Submission and its Opening Statement at the First Substantive Meeting India had highlighted that the claim under Article 5.6 suffered from a fatal legal flaw. The complaining party bears the burden of establishing that an alternative measure suggested by it fulfills the level of protection which is <u>achieved by the measure at issue</u>, i.e. S.O. 1663 (E). The United States instead sought to discern the ALOP from the National Action Plan, (NAP) which is a domestic measure and in any event is not the measure at issue in this dispute. The United States continues this line of argument and suggests that since India has not defined its ALOP, it is constrained to infer it from record evidence and has again gone on to infer the ALOP from the NAP.

16. India finds the US argument unconvincing because even if the United States had to engage in the exercise of inferring an ALOP, it still had to restrict itself to the measure at issue, i.e. S.O. 1663 (E). On the excuse of inferring an ALOP, the United States cannot impugn an unrelated measure and further still infer an ALOP from it. The identification of an ALOP from a measure which is not at issue leads to a fatal legal error and strikes at the very root of the United States allegation under Article 5.6

17. For the same reason its claim under Article 2.2 also fails. India however reiterates that even in the absence of the legal error in the Article 5.6 claim, the claim under Article 2.2 as a consequential breach of Article 5.6 fails, as the United States has failed to provide a cogent reason for linking and reading together two articles which have made no references to one another.

CLAIM UNDER ARTICLE 5.5 NOT MADE OUT

18. India maintains that the United States claim under Article 5.5 continues to remain ambiguous and should be rejected on this ground alone. The United States Second Written Submission contains broad generalizations on the Article 5.5 claim but nothing in that discussion addresses in any detail or with clarity the separate elements of the claim which are required to be fulfilled cumulatively for a valid claim under Article 5.5.

19. The United States presents no facts to explain why situations being compared are different but comparable. As the Panel in *Australia- Salmon* has stated, situations under Article 5.5 can be compared "if these situations involved either a risk of "entry, establishment or spread" of the same or a similar disease or of the same or similar "associated, biological and economic consequences". To this requirement the United States notes, "… the comparability of the different situations at issue in the US claim under Article 5.5 needed no elaboration. They involve trade in the *same* products and control of the *same* diseases. The Appellate Body has explained that for purposes of a claim under Article 5.5, comparable situations are "situations involving the same substance or the same adverse health effect". There is no doubt that the situations at issue here are comparable." Overall the claim under Article 5.5 remains highly deficient and should be rejected outright.

CLOSING STATEMENT

1. At the outset India will place on record the comments it had to the United States Opening Statement. In paragraph 15 the US refers to an SPS meeting of 2008 and the statement made by India at such meeting to suggest that India applies bans on poultry due to reports of avian influenza in wild birds. As India clarified it is clear from the text of the minutes that the ban was imposed on poultry products in response to notifications of NAI. Its stated concern for avian influenza in wild birds should not be taken to mean its application of bans on this account. India refers to a subsequent SPS Committee meeting in 2010, where India clarified in no uncertain manner that its bans are imposed in response to notifications of NAI in poultry only and not in response to information of avian influenza in wild birds.

2. Second, in response to US suggestion in paragraph 30 of its Opening Statement that India requires attestation that an exporting country is free of LPAI, India reiterates that is not the case. India refers to its response to Panel question 25 where it clarified that though veterinary certificates refer to HPAI and LPAI, they are implemented as meaning HPNAI and LPNAI. That answer also makes reference to import permits issued by India permitting imports from countries which had experienced LPAI in wild birds in the same period when import permits were issued. This clearly proves that India does not in fact restrict imports from countries which report LPAI or HPAI in wild birds.

3. Third, India refers to paragraph 17 of the US Opening Statement where it suggests that certain products such as fresh meat of poultry can be traded regardless of the status of the exporting country. India notes that if the status of the exporting country for fresh meat of poultry were indeed irrelevant the standard, i.e. 10.4.19 would have been worded very differently. There are several product recommendations such as Article 10.4.23 concerning feathers and down of birds other than poultry where the exporting country's status is irrelevant and are worded to convey this meaning clearly. Article 10.4.19 on the other hand is worded such that it makes a clear recommendation to import from a NAI or HPNAI free country/zone/compartment.

4. India reiterates that Panel's questions to experts erroneously shifted the burden of proof onto India. It was the United States which doubted India's notifications to the OIE and insisted that LPNAI had to, as a matter of fact be present in India and it was implausible that India did not have LPNAI in its poultry. India notes that the OIE does not verify disease notification, disease freedom or surveillance for avian influenza. These matters are left to the individual OIE Members and the OIE does not have the mandate to undertake these activities. Such as the US claim that HPNAI is not present in its territory is not subject to verification by the OIE, so is India's claim that LPNAI is not present in India. Thus if the US is doubting India's disease status, the burden is on the US to prove through evidence that its claim is made out. Hence the role of experts should have been to evaluate this claim based on the exhibits submitted by the US and not as has happened to shift the burden onto India to disprove the negative.

5. India also reiterates that S.O. 1663 (E) contains several product specific measures. Thus conformity of individual product specific measures must be evaluated with the relevant international standard to determine if the measure pertaining to that product is conforming to or is based on the OIE Code. Similarly it should also be noted that the US challenges the "prohibition" and hence the relevant standards under the OIE against which the prohibition is to be evaluated is the "condition of entry" that each product specific recommendation provides and not against the veterinary certificate requirements under each product specific recommendation.

6. Further India has explained in detail the deficiencies in the opinion provided by the OIE. As India has stated the Panel has an obligation to objectively evaluate the matter before it and towards that end it must evaluate the OIE Code in light of rules of treaty interpretation in the VCLT. The US states that the OIE Code is not a treaty and VCLT does not apply. Attention is drawn to Article 2 (a) of the VCLT under the definition of which the OIE Code clearly qualifies as a treaty to which its rules of interpretation apply. Further the OIE Code is also referred to in Annex A paragraph 3 (b) of the SPS Agreement as the relevant international standard for animal health and zoonoses. Since the SPS Agreement is undoubtedly a treaty and the OIE Code is an integral part of that Agreement, it too must be interpreted in light of customary rules of treaty interpretation.

7. India also refers to the discussion at the meeting today concerning the US regionalization claim. As was evident, apart from requiring India to change its veterinary certificate requirements there is nothing in the US Exhibits about specific zones or compartments that the US requested India to recognize. It is also telling as the US explained in its response to a Panel question that it initiated no constructive engagement with India post 2010. As India has explained, every time US asked India to change its sanitary requirement it said these conditions could not be changed as they applied to all countries. The US has always been well aware of the 'Guidelines to further the practical implementation of Article 6 of the SPS Agreement' and should have initiated good faith negotiations with India on this issue. If India is faulted for not making abundantly clear to the US that it will recognize zones or compartments if the US so furnishes a proposal, the US is equally responsible for not being unequivocal about its request. As the country requiring an exception in India's trading regime it should have made a clear, explicit and unequivocal request to this effect to India.

8. Finally India notes that India had made a second preliminary ruling request that the US claim under Article 2.3 is not maintainable as the NAP was not identified as a specific measure at issue in the US panel request. To this the US claimed that the NAP was not the measure at issue and that the US had not impugned it. However the deliberations and the scrutiny that the NAP has been subjected to are in fact tantamount to examining NAP as the measure at issue. India requests the Panel to examine the maintainability of the US Article 2.3 claim in light of India's second preliminary ruling request.

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ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA[*]

1. Argentina will refer exclusively to certain issues raised in this case. Specifically, it will comment on the obligation for Members to base their sanitary and phytosanitary measures on scientific principles, that sanitary or phytosanitary measures should not be maintained over time without sufficient scientific evidence, and that they should be based on a risk assessment. It will also underscore the importance of satisfying the principles of Harmonization and Regionalization, respectively set forth in Articles 3 and 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).

2. It is important to recall that the objective of the SPS Agreement is to prevent sanitary or phytosanitary measures from being used as disguised restrictions on trade.

3. WTO jurisprudence has identified three separate requirements arising from the text of Article 2.2: "It is apparent from the text of Article 2.2 that this provision contains three separate requirements: (i) the requirement that SPS measures be applied only to the extent necessary to protect human, animal or plant life or health; (ii) the requirement that SPS measures be based on scientific principles; and (iii) the requirement that SPS measures not be maintained without sufficient scientific evidence".[1]

4. The linkage between the sanitary or phytosanitary measure and the corresponding scientific evidence must be well-founded and meet objectiveness criteria. In this connection, it will be recalled that in "Japan – Agricultural Products II" and in respect of the requirements in Article 2.2 of the SPS Agreement, namely that there should be a rational and objective relationship between the sanitary or phytosanitary measure, on the one hand, and the scientific evidence, on the other, the Appellate Body stated that it was a relationship to be determined on a case-by-case basis.[2]

5. Argentina wishes to reaffirm the interpretation according to which all SPS measures are to be based on scientific principles, not only when the measure is adopted but also throughout the period during which it is in effect. It is important to ensure compliance with the requirement that an SPS measure should not be maintained without sufficient scientific evidence; otherwise, the spirit of the Agreement would be undermined by allowing the continued existence of SPS measures that prove to be inconsistent with Article 2.2 of the SPS Agreement.

6. Argentina further emphasizes that although they are entitled to set their own levels of protection, Members may not disregard their obligation under Article 5.1 to provide scientific justification for their measures by carrying out a risk assessment.

7. Argentina underscores the importance of complying with the "Harmonization" criteria. Article 3 of the SPS Agreement encourages Members to harmonize their sanitary and phytosanitary measures with the existing international standards, guidelines and recommendations. The requirement in Article 3.1 that SPS measures be "based on" points to the need for such measures to rely on the relevant international standards.

[*] This text was originally submitted in Spanish by Argentina.

[1] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Report of the Panel, WT/DS291/R, WT/DS292/R, WT/DS293/R, paragraph 7.1424.

[2] *Japan - Measures Affecting Agricultural Products* ("Japan – Agricultural Products II"), Report of the Appellate Body, WT/DS76/AB/R, paragraph 84.

8. Argentina considers it essential to take into account the standards, guidelines and recommendations of the OIE to the extent that they enable trade, so as to avoid absolute prohibitions on imports. It emphasizes that the international standards are designed to facilitate - not to restrict - the development of international trade. SPS prohibition measures in relation to international trade have the most restrictive impact. In Argentina's view, a Member which has imposed measures that deviate from the international standards is required to ensure, among other things, that such measures are based on a risk assessment. Argentina also believes that sanitary and phytosanitary measures should be based on a risk assessment which confers scientific legitimacy on the measures in question.

9. It should be recognized that an SPS measure may be regarded as not being "based on" international standards when it manifestly runs counter to the standards issued by the competent international organizations, such as the World Organisation for Animal Health (OIE) in the case of this dispute.

10. Article 5 of the SPS Agreement requires Members to carry out a risk assessment. The need for an SPS measure to be "based on" a risk assessment pursuant to Article 5.1 and 5.2 means, in specific terms, that there must be a rational and objective relationship between the SPS measure and the results of a risk assessment.[3] At the same time, Article 5.6 lays down the obligation to ensure that an SPS measure is not more trade-restrictive than required. WTO jurisprudence takes the same line in that there would be a violation of this provision where there are alternative measures available to achieve the adequate level of protection that the Member has duly determined to be acceptable, which would be less restrictive on international trade than the SPS measure at issue.[4]

11. Argentina accordingly concurs with the position reflected in WTO jurisprudence that the application of mitigating measures will always be less restrictive than outright prohibition[5], which imposes the highest possible level of restriction, that is, total interruption of international trade flows. In particular, Argentina agrees with the United States' view that the alternative which satisfies the Article 5.6 requirements is the adoption of the OIE standards.

12. Another principle that Argentina regards as essential is regionalization. It emphasizes that the obligation to adapt SPS measures to the sanitary characteristics of the areas of origin and destination of the products, taking into particular account the level of prevalence of diseases or pests, is critical to guaranteeing the uninterrupted flow of international trade, while ensuring that Members can exercise their right to protect their territory from the risk of entry, establishment and spread of diseases and pests.

13. The paragraphs of Article 6 of the SPS Agreement taken in conjunction clearly show that the process of determining the areas or regions concerned must be based on a series of objective criteria that will ultimately guarantee non-discrimination, taking into account international standards such as those established by the OIE. Insofar as the interested Member provides the importing Member with the documentation necessary to define a region, non-recognition thereof will be a sign that the SPS measures are not based on those international standards. At the same time, it will point to non-compliance with the provisions of Article 6 of the SPS Agreement.

[3] Report of the Appellate Body, *EC - Hormones*.
[4] Report of the Appellate Body, *Australia – Salmon,* paragraph 194.
[5] See, for example, Report of the Panel, *Australia – Salmon,* paragraph 7.111.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

A. THE ORDER OF CONSIDERATION OF CLAIMS UNDER ARTICLE 3 AND UNDER ARTICLES 2.2, 5.1 AND 5.2

1. Australia considers that it is open to the panel to commence its analysis with the claims under Article 3, followed by consideration, if necessary, of the claims under Article 2.2, 5.1 and 5.2. In this regard, Australia notes that only measures which *conform to* international standards enjoy the presumption of consistency with the SPS Agreement.[1] Australia also notes that this presumption is rebuttable.[2]

B. ALOP UNDER THE OIE CODE

2. Australia respectfully suggests that, in order for a Member to claim that their measures *conform to or are based on* an international standard, that Member's ALOP must not render that standard nugatory. As highlighted by the panel in *Australia-Apples*[3] and by the Appellate Body in *Australia-Salmon*[4] a Member is not permitted to adopt measures to achieve an ALOP which contradict its obligations under the SPS Agreement. Australia respectfully suggests that, in a similar way, the panel could choose to consider the question of whether India's ALOP renders the standards embodied in the OIE Code nugatory.

3. In this context, Australia agrees with the argument made by the European Union in its Third Party Submission that regionalisation should not automatically be equated with a low ALOP, and could in fact be compatible with a high ALOP.[5] Australia also notes the European Union's argument that the regionalisation requirements in Article 6 of the SPS Agreement should be understood in light of the "significantly less trade restrictive alternative" requirement in Article 5.6 of the SPS Agreement,[6] and shares that view.

C. AUSTRALIAN RISK ASSESSMENT

4. India states in paragraph 9 of its First Written Submission:

> *The Australian Risk Assessment categorically concludes that fresh meat of poultry from countries such as USA which notified LPNAI should not be imported.*

India further states in paragraph 178 of its First Written Submission:

> Australia…has prohibited import of unprocessed meat and meat products from regions reporting occurrence LPAI in poultry [sic].

5. These assertions are apparently drawn from the *General Import Risk Analysis Report for Chicken Meat: Final Report* by Biosecurity Australia, a risk assessment conducted by Australia in 2008. However the conclusions drawn by India from the Australian risk assessment are a misreading of the document. As a result of Australia's risk analysis, quarantine measures were

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[1] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 170.

[2] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 165.

[3] Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report, WT/DS367/AB/R, paragraph 7.1134.

[4] Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, paragraph 206.

[5] European Union, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – Third Party Submission* (26 June 2013) paragraph 109.

[6] European Union, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – Third Party Submission* (26 June 2013) paragraph 113.

implemented by Australia which conform to the OIE code, by allowing the importation of chicken meat either from a country or zone which is HPNAI/LPNAI free, or that has been processed to ensure the destruction of the AI virus. It is incorrect to assert that the Australian risk assessment supports a blanket ban on the importation of chicken meat from countries which have notified LPNAI as is asserted by India at paragraphs 9 and 178 of its First Written Submission.

D. INTERNATIONAL RISK ASSESSMENT TECHNIQUES

6. Australia notes that Article 5.1 of the SPS Agreement states that Members shall ensure that their SPS measures are based on a risk assessment, "taking into account risk assessment techniques developed by the relevant international organisation." The United States notes in its First Written Submission that the OIE has developed standards for risk assessment, including Chapter 2.1 of the OIE Code and the Handbook.[7] Australia shares Japan's view that the requirement to take into account risk assessment techniques developed by international organisations does not equate to a requirement to conform to such international standards.[8] In this regard Australia notes the Appellate Body's guidance in *EC-Hormones* regarding the distinction between "based on" and "take into account."[9]

E. STANDARD OF REVIEW

7. Australia considers that the SPS Agreement balances the right to take measures to protect human, animal, or plant life or health against the trade liberalization goals of the WTO. This balance cannot be maintained if Panels fail to apply appropriate standards of review.

   Australia reiterates its submission in *US – Continued Suspension* that the appropriate standard of review to be applied in a given dispute should be informed by both Article 11 of the DSU and the particular covered agreements and obligations at issue. Australia maintains that the standard of review to be applied by Panels may vary between different obligations under the SPS Agreement and must reflect the balance between regulatory autonomy and international scrutiny that is reflected in that Agreement.

8. In Australia's view, the most significant limitation imposed by the text of the SPS Agreement on a panel's fact-finding jurisdiction is provided in Article 5.1. Article 5.1 imposes a positive obligation on Members to obtain and rely upon a risk assessment that is appropriate to the circumstances. A panel may not usurp the role of a risk assessor by conducting the risk assessment itself, because doing so would nullify the competence retained by Members under Article 5.1 of the SPS Agreement, and would amount to a *de novo* review. Such a review would be inconsistent with Article 11 of the DSU. Considerable, but not total, deference to a Member's risk assessment should therefore be accorded by the panel where the Member has performed a comprehensive and transparent risk assessment.[10]

9. It will be for the panel to determine whether India has performed a risk assessment, and if so whether that risk assessment is comprehensive and transparent. Australia considers that a panel must not interfere with a Member's risk assessment solely because it might have drawn different conclusions on the basis of the available evidence. A panel must limit the scope of its review to determining whether the risk assessor's decision is objective and credible.

F. ARTICLE 2.3 CLAIM

10. In relation to the Article 2.3 claim in this dispute, Australia suggests that there would be merit in the conclusion that the allegedly more stringent international measure, rather than the allegedly more lenient domestic measure, is the proper focus of an Article 2.3 claim of discrimination between a Member's own territory and that of other Members. The measures

[7] United States of America, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – First Written Submission* (10 April 2013) paragraph 117.

[8] Japan, *India – Measures Concerning the Importation of Certain Agricultural Products (WT/DS430) – Third Party Submission* (26 June 2013) paragraph 21.

[9] Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 189.

[10] See also Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute,* WT/DS321/AB/R, adopted 16 October 2008, paragraphs 227 – 231.

challenged by the United States in this dispute are not India's domestic measures, but rather India's international measures, such as those enacted under SO1663(E). In our opinion it appears that NAP12 is being used as a comparison for the purposes of allegedly demonstrating the elements of Article 2.3, rather than as the object of the claim.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil hereby presents its integrated executive summary, where it provides a brief description of the main points presented in its Third Party Submission and Oral Statement.

(a) The presumption established by Article 3.2, and reinforced by Article 5.6, of the SCM Agreement, is rebuttable

2. In Brazil's view, the SPS Agreement offers appropriate policy space for Members to determine the necessary sanitary and phytosanitary protection for the protection of human, animal or plant life or health, according to legitimate regulatory concerns. Nonetheless, such discretionary power has to be consistent with the provisions of the Agreement, as stated in Article 2. While article 2.1 and the preamble of the SPS Agreement are the basis for the right of States to establish SPS measures, Articles 2.2 and 2.3 provide a balance between this right and international trade.

3. Following this rationale, and as put forth by Article 3.2, all measures taken in conformity with these standards are "deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994".

4. In this sense, the presumption of Article 3.2 gives, one may say, an easier approach when establishing and maintaining SPS measures.1 Furthermore, Article 5.6 explicitly rules out SPS measures conforming with international standards from the requirement of not being "more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility. It, however, does not mean an absolute presumption. Brazil would like to recall that, when article 3.2 establishes said presumption, it does not express that such presumption is not subject to questioning, as put forward by the Appellate Body, in *EC – Hormones*.

(b) According to Articles 3.1 and 3.3 of the SPS Agreement, a SPS measure that does not conform to an international standard, guideline or recommendation must be based on the assessment of the risk to life or health of humans, animals or plants.

5. As previously mentioned, only SPS measures that comply with international standards have the benefit of the presumption of conformity to the SPS Agreement and GATT 1994. Conversely, SPS measures diverging from international standards should be based on a risk assessment, as detailed by Article 5 of the SPS Agreement, in order to be consistent with the provisions of this Agreement.

6. In Brazil's view, Members have the right to define the appropriate level of protection required in their territory and, as a consequence, establish and maintain SPS measures with higher level of protection than international standards. For that, it is necessary that the SPS measure have (i) a "scientific justification" as defined by footnote 2 of the SPS Agreement or to be established taking into account (ii) "the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.

(c) The principle of regionalization recognized by an international organization should not unjustifiably encumber the exporting Member.

7. Brazil believes regionalization ensures fairness of treatment among Members and guarantees that SPS measures are not applied in an arbitrary manner. It also strengthens the principle embodied in Article 5.6 of the SPS Agreement, as the specificity of measures to areas or regions with different risks to human, animal and plant life or health also guarantees that such a measure is no more trade-restrictive than necessary.

1 *EC – Hormones* (Appellate Body Report, para. 102)

8. These considerations have special importance in the present case. The World Organization for Animal Health (OIE), more than establishing notification requirements for Avian Influenza, lays down elements that may qualify a country, zone or compartment as pest-free or disease-free area, under the Terrestrial Animal Health Code, Articles 10.4.3 and 10.4.4. Although not mandatory, the provisions should be taken into account by Members so as to ensure that the SPS measures are adapted to the levels of prevalence of Avian Influenza in a specific area, in light of Article 6.1 of the SPS Agreement.

9. Scientific principles guide Members' adoption of SPS measures. It is a cornerstone of the SPS Agreement for measures to be "adapted to the sanitary or phytosanitary characteristics of the area"[2] and that disease-free areas should be characterized according to "factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls."[3]

10. Regionalization helps SPS Measures to be more effective and less trade restrictive and, for that end, international standards can constitute a useful tool. As the Panel in *EC – Hormones*[4] recognized, it is the exporting Member that needs to comply with Article 6.3 as the burden of proof is explicitly conferred on them. However, once it has complied with its obligations or made a good faith effort to grant reasonable access for inspection and other procedures, it is on the importing Member to justify, with the adequate risk assessment, the divergence from the internationally recognized pest-free area. As in *EC Hormones*[5]: "Once such a prima facie case is made, however, we consider that, at least with respect to the obligations imposed by the SPS Agreement that are relevant to this case, the burden of proof shifts to the responding party."

[2] SPS Agreement, Article 6.
[3] SPS Agreement, Article 6.2.
[4] *EC – Hormones* (Panel Report., fn 250)
[5] *EC – Hormones* (Panel Report,.para. 8.51)

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THE PRELIMINARY RULING REQUESTS

1. The European Union recalls that third parties have the right to comment on a request for a preliminary ruling, as their right stems directly from Article 10 of the DSU as a due process requirement.

2. The European Union considers that the references to 'implementing measures' and 'related measures' 'identify the specific measures at issue'. Unlike in the cases of *EC – Selected Customs Matters* and *China – Raw Materials*, where the challenges concerned a broad spectrum of possible measures, the scope of this case is precisely circumscribed only to those NAI measures. In addition, India failed to answer the US request under Article 5.8 of the SPS Agreement and this should be considered an attendant circumstance.

3. The requirement to 'provide a brief summary of the legal basis sufficient to present the problem clearly' should be assessed on a case by case basis. The simple listing of articles may be enough, as found by the Appellate Body in *EC - Bananas III*. The Articles 2.3, 5.5 and 5.6 claims refer to both HPNAI and LPNAI. The sufficiency requirement is met by the Article 2.3 claim because it not only reproduces the text of the provision, but there is an indication of the country and the measures. The use of the words 'for example' does not render the Article 5.5 claim imprecise. Finally, there is no risk of confusion from the formulation of the Articles 2.3 and 5.5 claims.

4. In light of the above, the European Union considers that the standard in Article 6.2 of the DSU is met by the US panel request.

5. With regard to India's second preliminary ruling request, the European Union agrees that the US panel request makes reference to 'similar avian influenza related controls with respect to like domestic products and their internal movement within India'. The measure at issue should not be the import ban or the National Action Plan regarded separately, but rather the difference between the two. The European Union also considers that the health certificate requirements are 'implementing and related measures', given the particular circumstances of this case.[1]

II. PROCEDURAL ASPECTS

6. The European Union considers that the SPS Agreement is applicable in the present case. Some flexibility in approaching issues of burden of proof may be appropriate, given the judgement inherent in weighing evidence.[2] As a preliminary issue, the European Union recalls that the Appellate Body has stated, in the context of Article 5.1 of the SPS Agreement, that the standard of review in SPS cases is rather deferential to WTO Members' assessments.[3]

7. The starting point for a panel in assessing the utility of expert advice should be the possible contribution towards an 'objective assessment of the matter before it'. Four main contentious points are identified by the European Union in the present case.

8. First, expert advice is not needed for the interpretation of the OIE standards, as they are reasonably clear. This point of the dispute seems to be not about science, but about an interpretative exercise. Second, India's Summary Document cannot be characterized as a valid risk assessment as long as India itself dismisses that. In addition, an OIE expert

[1] Appellate Body Report, *EC – Bananas III*, para. 140.
[2] Appellate Body Report, *Australia - Apples*, paras 360-66.
[3] Appellate Body Report, *US - Continued Suspension*, para. 590.

already examined the document and has concluded to the contrary.[4] Third, India's claim that LPNAI is exotic to its territory cannot be elucidated by simple analysis of the existing data. However, there is strong evidence suggesting that LPAI virus (LPAIV) of the H7 serotype might be occurring in India.[5] Finally, while considering the fourth issue, namely the occurrence of LPNAI in internal organs, other than respiratory or digestive systems, one should keep in mind that the studies by Post et al. and Swayne and Beck do not examine the same tissues. In case of any doubts as regards the presence of viable virus in fresh meat, the OIE Scientific Commission would be the best placed to review the matter.

9. In light of the above, while fully acknowledging the utility of expert advice in SPS disputes in general, the European Union is of the view that it is not necessarily needed in the present dispute and it may rather unduly delay the proceedings.

10. With regard to the order of analysis, for effectiveness-related reasons the European Union considers that the Panel should start its analysis with the harmonization claims and then proceed with the claims related to risk assessment. The European Union submits that the Panel should analyse the US risk assessment claims under the more specific provision first, namely Article 5.1 and only afterwards under the more general principle embodied in Article 2.2 of the SPS Agreement.[6]

III. SUBSTANTIVE ISSUES

A. Claims related to harmonization

11. Article 3 encourages Members to harmonize their SPS measures, distinguishing between three different situations: when the measures are 'based on' international standards, when the measures 'conform to' the said standards and when the measures are more stringent than the international standards. The Appellate Body clarified that 'a measure that conforms to an international standard would embody the standard completely and, for practical purposes, converts it into a municipal standard'.[7] The 'base on' requirement is different from 'conform to' and it means that the measures are 'supported' by the international standards.[8]

12. The European Union submits that there is no obligation of Member Countries concerning notification of LPAI in wild birds in the OIE Code.[9] Information voluntarily submitted concerning LPAI virus infections in wild birds should not serve, in any case, as a justification for the imposition of trade bans in poultry commodities by other countries.

13. Comparing product-by-product the Indian measures and the OIE standards, the European Union notices that while the OIE Code contains no recommendation concerning trade in live pigs, S.O. 1663(E) imposes a ban on this product. Several OIE recommendations for unprocessed poultry products provide different alternatives, depending on the NAI or HPNAI free status of a country/region/compartment. The European Union considers that these alternatives depend on objective factors and do not give countries an unfettered discretion to choose the one they prefer. Thus, to that extent, there is a discrepancy between the OIE standards, which distinguish between HPNAI and LPNAI, and India's measures, which treat both situations in the same way.

14. The European Union is of the view that Article 10.4.1.10 is a general provision which should be interpreted in the light of the product-specific provisions. It cannot be interpreted as allowing an immediate ban following HPNAI or LPNAI notifications. Thus, the European Union submits that India's bans on live pigs and unprocessed poultry products do not 'conform to' and are not 'based on' the relevant OIE standards.

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[4] US Exhibit 108.

[5] S. Pawar et al., "Avian influenza surveillance reveals presence of low pathogenic avian influenza viruses in poultry during 2009-2011 in the West Bengal State, India", *Virology Journal*, 2012, 9:151.

[6] Panel Report, *Australia-Salmon*, para. 8.48.

[7] Appellate Body Report, *EC – Hormones*, para. 170.

[8] Appellate Body Report, *EC – Hormones*, para. 163.

[9] Article 1.1.3.1., making reference to Article 10.4.1.1 and Article 10.4.1.2 of the OIE Code, read in conjunction with Article 10.4.1.10 of the OIE Code.

B. Claims related to risk assessment

15. To the extent that India's measures do not 'conform to' and are not 'based on' the OIE recommendations, it is necessary to establish whether there is a solid scientific basis for their imposition. The definition of risk assessment is provided in paragraph 4 of Annex A of the SPS Agreement. As a previous panel notes, there are two types of risk assessment, namely a pests risk assessment and a food safety risk assessment.[10] Article 5.1 does not require Members to carry out their own risk assessment, as an 'SPS measure might well find its objective justification in a risk assessment carried out by another Member, or an international organization'.[11]

16. The Summary Document, presented by India at the October 2010 meeting of the SPS Committee, cannot be considered as a valid risk assessment and does not meet the requirements of Article 5.2 of the SPS Agreement. India itself maintains that the Summary Document is not its risk assessment and that it only summarizes what India believed to be the basis of the OIE recommendation. Furthermore, the European Union recalls that an OIE expert already examined the document and that he concluded that it cannot be considered a valid risk assessment within the meaning of the SPS Agreement or of the OIE Code.

17. Article 2.2 contains the general principles of the SPS Agreement related to necessity and scientific disciplines for the use and maintenance of SPS measures. The necessity requirement has not been clarified in the context of this provision but one may find useful guidance in the interpretations provided in the framework of Article XX(b) of the GATT 1994 or of Article 2.2 of the TBT Agreement.

18. The second element of Article 2.2 is the general requirement to base measures on scientific principles and not maintain them without sufficient scientific evidence. Article 5.1 is a more specific provision related to these principles, requiring WTO Members to undertake a risk assessment. A violation of the more specific provision in Article 5.1 constitutes also a violation of the more general requirements in Article 2.2.[12] However, given the more general wording of Article 2.2, the reverse is not necessarily true.[13]

C. Claims related to risk management

19. The SPS Agreement and the corresponding case law recognize that each WTO Member may establish the level of protection it deems appropriate.[14] This includes a 'zero-risk' policy and may cover any ascertainable risk, including small or 'negligible' risks.[15] However, the risk management choices of Members should be reflected in measures applied in a non-discriminatory and reasonable manner, as prescribed by Articles 5.5 and 5.6 of the SPS Agreement.

20. A SPS measure is more trade-restrictive than required if there is an alternative SPS measure meeting the conditions of footnote 3 to Article 5.6.[16] In the present case India has not expressly stated its appropriate level of protection (ALOP). No answer has been provided by India to the US Art 5.8 request.[17] Accordingly, if the level of protection is not specified in writing, a panel should infer it from the SPS measures applied in practice. Assuming that India has a high ALOP, the European Union submits that *regionalization* meets the three cumulative conditions of Article 5.6: it is reasonably available, achieves the Member's ALOP and is significantly less trade restrictive that a country-wide ban.

[10] Panel Report, *Australia-Salmon*, para. 8.68.
[11] Appellate Body Report, *EC - Hormones*, para. 190.
[12] Appellate Body Report, *Australia-Salmon*, paras 137-38.
[13] Appellate Body Report, *Australia-Salmon*, para. 137.
[14] Appellate Body Report, *EC – Hormones*, para. 124.
[15]Appellate Body Report, *Australia-Salmon*, para. 125.
[16] Appellate Body Report, *Australia – Salmon*, para. 194.
[17] Exhibit US-4.

D. National Treatment claims

21. According to a previous panel there are three cumulative requirements to be met before a violation of the first sentence of Article 2.3 can be established[18]. Without taking position at this stage on the prevalence of similar conditions, the European Union reiterates that it sees no contradiction in having a high level of protection and allowing trade according to the regionalization principles. We also see no contradiction in having a high level of protection and taking domestic measures circumscribed to a certain area.

22. The obligation embodied in Article 5.5 of the SPS Agreement is the principle of non-discrimination in risk management. Three cumulative conditions have to be met in order to establish a violation of Article 5.5.[19]

23. The European Union agrees that while not explicitly stated, India's ALOP can be inferred from the SPS measures applied. WTO Members are free to set their ALOP but they are *not* free to adopt different ALOPs in 'different situations'. It has been previously decided that the type of situations envisaged by Article 5.5 are *comparable* situations, such as 'situations involving the same substance or the same adverse health effect'.[20]

24. As to the relationship between Articles 5.5 and 2.3 of the SPS Agreement, the Appellate Body has stated that a violation of Article 5.5 would automatically trigger a violation of Article 2.3, while the reverse is not necessarily true. [21]

E. Claims related to regionalization

25. The European Union recalls that regionalization is an important principle aiming at allowing trade while maintaining a high health status. In the case of Members with large territories an outbreak of NAI in one part of the territory often means no risks in other parts of the country. The European Union considers that Article 6 of the SPS Agreement imposes an obligation to recognize regionalization as a matter of principle.[22] This formal recognition should be followed by the agreement of the Members on the necessary measures *prior* to outbreaks of the disease. Finally, once these arrangements are in place, the authorities of the importing country will be able to take decisions on individual cases.[23]

26. Furthermore, a cumulative reading of Articles 6.2 and 6.3 reveals that the process of determining the areas is not at the absolute discretion of the importing Member. There are a set of *objective* criteria which shall be taken into account, such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls. In addition, it is the view of the European Union that Members are under an obligation to enter with good faith into a proper dialogue. Otherwise there is a breach *per se* of Article 6.[24]

27. The SPS Committee has developed specific guidelines on Article 6. Even if these guidelines cannot be considered a 'subsequent agreement' among the Parties within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT) because of explicit text to the contrary, [25] they may nevertheless provide 'useful guidance' on how the mechanism of Article 6 may articulate.[26]

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[18] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111.
[19] Appellate Body Report, *EC - Hormones*, para. 214.
[20] Appellate Body Report, *EC - Hormones*, paras 216-17.
[21] Appellate Body Report, *Australia-Salmon*, para. 252.
[22] Article 6.1 of the SPS Agreement provides that 'Members shall recognize the concepts'.
[23] Chapter 4.3. of the OIE Code.
[24] In a different context, the Appellate Body has already sanctioned the lack of engagement in 'serious, across-the-board negotiations'. Appellate Body Report, *US – Shrimp*, para. 166.
[25] G/SPS/48, para. 2.
[26] Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 14-5.

F. Transparency claims

28. Members shall allow a reasonable interval between the publication and the entry into force of an SPS measure under Paragraph 2 of Annex B.

29. The European Union considers that the Indian measures do not 'conform to' and are not 'based on' the OIE standards. Accordingly, the content of India's measures is not 'substantially the same' as the content of the relevant international standard. To the extent the regulation has a 'significant effect on trade' of other Members, which a trade ban may very well have,[27] India's measures are in breach of Paragraph 5 of Annex B and Article 7 of the SPS Agreement.

G. Article XI of the GATT 1994

30. The European Union shares the view that a violation of the SPS Agreement may result in a violation of the GATT 1994.

[27] Panel Report, *EC — Hormones (Canada)*, para. 8.26.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF GUATEMALA[*]

1. Guatemala would like to take this opportunity to comment on three issues:

1.1. First, on the legal interpretation of Article 5.8 of the SPS Agreement;

1.2. Second, on the suggested order of analysis of this dispute; and,

1.3. Third, on the second request for preliminary ruling under Article 6.2 of the DSU.

A. LEGAL INTERPRETATION OF ARTICLE 5.8 OF THE SPS AGREEMENT

2. On the legal interpretation of Article 5.8 of the SPS Agreement, Guatemala observes that there is no particular claim under this provision. The concern of India seems to be related to potential adverse inferences that could be drawn from the facts of the case and the legal interpretation of this provision.

3. Guatemala observes that India appears to suggest that Article 5.8 of the SPS Agreement does not deal with a dispute settlement situation and has no role to play once dispute proceedings are initiated, because it has been characterized by the Appellate Body as providing for a pre-dispute procedure.

4. If Guatemala understands correctly, India is apparently claiming that the obligations under Article 5.8 cease to exist once dispute settlement procedures are initiated. Guatemala disagrees with this interpretation.

5. In the view of Guatemala, the Appellate Body characterized Article 5.8 of the SPS Agreement as a pre-dispute proceeding in the context of a discussion on burden of proof. Nothing in the Appellate Body's conclusions appear to suggest that, once a dispute settlement procedure has initiated, the obligations under this provision are terminated.

6. Furthermore, Guatemala observes that the Appellate Body carefully indicated that a Member seeking to exercise its right to receive information under Article 5.8 "would, most likely, be in a pre-dispute situation". This is probably because, Members resorting to dispute settlement procedures may not need an explanation of the measures at issue but are seeking redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements.

7. Guatemala agrees with India that Article 5.8 of the SPS Agreement provides no time limit to provide the answers required. However, the lack of a time limit in this provision cannot support the legal interpretation that there is no continued duty of performance. Guatemala believes that the only way to comply with the obligation contained in Article 5.8 is, precisely, the provision of "an explanation of the reasons" for a sanitary or phytosanitary measure. Guatemala does not find in any part of Article 5.8, or elsewhere, that initiation of dispute settlement procedures would render the obligations contained in this provision meaningless.

B. ORDER OF ANALYSIS

8. With respect to the order of analysis proposed by the parties, the Appellate Body determined that "as a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member. Furthermore, panels may choose to use assumptions in order to facilitate resolution of a particular issue or to enable themselves to make additional and

[*] Guatemala requested that its oral statement serve as the integrated executive summary.

alternative factual findings and thereby assist in the resolution of a dispute should it proceed to the appellate level".[1]

9. In the present case, it is clear that the parties characterize differently the matters at issue. Although the United States did not appear to suggest a particular order of analysis, initiated the presentation of its legal claims with those under Article 5 of the SPS Agreement. India, on the other hand, suggests that the Panel begins with the analysis of the claims under Article 3.

10. Guatemala agrees with India that it might be appropriate to initiate the analysis of the claims under Article 3 of the SPS Agreement, in view of the existence of an international standard and the claim that the measures at issue "conform" or are "based on" such an international standard.

11. However, should the Panel find that India's measures are consistent with Article 3, Guatemala considers that it might be appropriate to make additional and alternative factual findings on the rest of the provisions in order to assist in the resolution of this dispute, should it proceed to the appellate level.

12. Conversely, should the Panel find that India's measures are inconsistent with Article 3, Guatemala does not share the view that the Panel then needs to start the analysis of the claims under the more general provisions of the SPS Agreement rather than under the more specific and detailed provisions of the SPS Agreement.

13. In the view of Guatemala, there is a well-established practice whereby the Panels and the Appellate Body start their analyses under the provisions that specifically addresses in detail the alleged inconsistencies.[2] Guatemala does not see, and India does not explain, why this Panel should depart from this practice. Therefore, Guatemala respectfully suggest the Panel to initiate its analysis under the more specific and detailed provisions. In this case, the claims under Article 5 of the SPS Agreement.

C. SECOND REQUEST FOR PRELIMINARY RULING UNDER ARTICLE 6.2 OF THE DSU

14. Regarding the second request for preliminary ruling under Article 6.2 of the DSU, India claims that two types of measures are outside the terms of reference of this Panel: a) India's National Action Plan; and b) the health certificate requirements for products listed in subparagraphs a) to j) of paragraph 1) (ii) of S.O. 1663(E).

15. As a matter of fact, none of these measures are identified in the Panel request by name.

16. On the National Action Plan, India is of the view that the United States is challenging this Plan. In response, the United States clarified that it has not sought a finding that India's National Action Plan is inconsistent with the SPS Agreement. The United States considers the National Action Plan of India as evidence to make the legal claim of discrimination.

17. Additionally, India appears to suggest that the United States, by making a claim under Article 2.3 of the SPS Agreement, "has to necessarily adduce and impugn such of India's measures which it believes are the cause of this arbitrary or unjustifiable discrimination".[3] In this case, India makes reference to its National Action Plan.

18. Guatemala does not find in Article 2.3 of the SPS Agreement nor in the jurisprudence any basis to oblige the complaining Member to challenge domestic measures that may serve as the basis to demonstrate the existence of a discrimination.

19. The Panel in Australia — Salmon (Article 21.5) identified three elements, "cumulative in nature", necessary to find a violation of the first sentence of Article 2.3:

[1] Appellate Body Report, Canada - Wheat Exports and Grain Imports, para. 126).

[2] For instance, Panel Report, EC – Asbestos, paras. 8.16–8.17; Appellate Body Report, EC - Bananas, para. 204; Panel Report, EC - Hormones, para. 8.45.

[3] FWS of India, paragraph 73.

19.1. (1) the measure discriminates between 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;

19.2. (2) the discrimination is arbitrary or unjustifiable; and

19.3. (3) identical or similar conditions prevail in the territory of the Members compared."[4]

20. The first element requires the demonstration of the existence of the claimed discrimination; and, clearly, the initial burden of proof rests on the complaining party. Generally speaking, if the complaining party asserts an affirmative claim of discrimination, it has to demonstrate that the domestic products are being treated more favorably than the imported products. In so doing, the complaining party is free to choose the means to raise a presumption that what is claimed is true.[5] This may include the analysis of pieces of legislation other than the challenged measures.

21. Guatemala considers that Article 2.3 of the SPS Agreement does not address the measures that need to be challenged. Thus, Guatemala finds no basis to support the proposition of India that it was necessary to challenge, in this case, the National Action Plan to demonstrate the alleged discrimination.

22. For these reasons, Guatemala agrees with the United States that India apparently mistakes evidence that can be used to establish an element of a claim with the measure that is the object of the challenge.

23. Finally, regarding the health certificate requirements, Guatemala sees no relevance on the legal source for their issuance. Given the facts of these case, as explained by the Parties, it seems that the health certificate requirements are "implementing and related measures". If Guatemala understands correctly, the health certificate requirements are necessary to implement the avian influenza-based import prohibitions. As acknowledged by India, its veterinary certificates "are required to accompany every export consignment of certain livestock products".[6] Therefore, Guatemala considers that these health certificate requirements are within the terms of reference of this Panel.

24. Guatemala thanks the Panel for this opportunity and would be happy to respond to any follow-up questions you might have.

[4] Panel Report, Australia — Salmon (Article 21.5 — Canada), para. 7.111.

[5] Appellate Body Report on United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India ("US - Wool Shirts and Blouses"), p. 14.

[6] FWS of India, paragraph 96.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Introduction

1. As a third party, Japan has a systemic interest in the interpretation and application of the SPS Agreement, and therefore, would like to provide its views on several important legal issues raised in this proceeding.

II. Necessity of Seeking Opinions from Independent Experts

A. The Role of Experts in a Panel Proceeding

2. As noted by the United States, a WTO panel is charged with making "an objective assessment of the matter before it."[1] To that end, the panel is authorized to utilize resources such as experts in order to further inform its opinion. Specifically, Article 13.1 of the DSU grants panels "the right to seek information and technical advice from any individual or body which it deems appropriate." Article 13.2 further permits panels to "seek information from any relevant source," and to "consult experts to obtain their opinion on certain aspects of the matter." Indeed, it is well-established that panels have the "right" to seek information – including expert opinions – where the panel deems it appropriate.[2]

3. Expert opinions and analyses are even more important in disputes under specialized agreements such as the SPS Agreement, which involve facts of a highly scientific and technical nature. This understanding is reflected in Article 11.2 of the SPS Agreement, which states that "{i}n a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel." The increased importance of scientific and technical advice in the context of the SPS Agreement is demonstrated by the use of the word "should" in Article 11.2, whereas the DSU provides that a panel "may" seek advice in Article 13.2. The SPS Agreement therefore not only permits, but encourages panels to seek the opinion of experts with regard to the scientific or technical issues of a case.

4. Nonetheless, the United States in its First Written Submission claims that the adoption of an expert procedure in these proceedings would not result in any appreciable assistance to this Panel.[3] The United States claims that because there is no risk assessment, there is no scientific evidence that needs scrutiny with the assistance of experts. In Japan's view, this is an incorrect characterization of the role of expert assistance in SPS-related dispute settlement. To the extent that the U.S. claims that the role of experts is contingent upon the respondent setting forth a risk assessment, nothing in the plain text of the SPS Agreement applies such limits to the role of experts. Article 11.2 of the SPS Agreement provides that in a "dispute under this Agreement involving scientific or technical issues," expert opinions may and should be sought. This language does not limit the use of experts to a particular type of review – risk assessments – as long as the dispute involves "scientific or technical issues".

5. Interestingly, the United States relies only on a discussion in *Australia – Apples* about the panel's use of expert testimony to explain risk assessment procedures.[4] However, other WTO decisions do not limit the use of expert panels in such a way. Moreover, the Appellate Body went on to note that "{t}he experts may also be consulted on the relationship between the risk assessment and the SPS measure."[5] Indeed, the Appellate Body in *Japan – Apples* also confirmed that the panel was entitled to take into account views of experts in assessing whether the complaining party had established a *prima facie* case.[6] Similarly, the panel in *EC – Biotech* found

[1] United States' First Written Submission (10 April 2013) ("US FWS"), para. 170 (p. 55).
[2] *US – Continued Suspension* (AB), at para. 439; *US – Shrimp* (AB), at para. 104.
[3] US FWS, at para. 170 (p. 54).
[4] *Id*. (*citing Australia – Apples* (AB), at para. 215.)
[5] *US – Continued Suspension (AB)*, at para. 592.
[6] *Japan – Apples* (AB), at para. 166.

it proper to seek the advice of experts merely when the submissions raised technical and scientific issues. The panel noted that the experts had assisted the panel in "understanding the issues raised by the Parties," again showing that the panel's reliance on experts was not limited to an evaluation of a risk assessment.[7]

B. Validity of a Risk Assessment

6. Even if the Panel were to accept that expert opinions are only useful when evaluating risk assessments, there remain sufficient issues of scientific and technical nature in this dispute that would require the aid of independent experts in determining whether a valid risk assessment has been conducted. For instance, according to the United States, India has reached a different conclusion with respect to adopting import bans on poultry meat different from the import risk analysis conducted by New Zealand (MAF Regulatory Authority 1999) that concluded, subject to the application of appropriate sanitary measures, chicken meat could be imported safely from countries considered infected with HPAI.[8] The panel may wish to review the underling scientific basis of India's measure with the aid of independent experts.

7. Furthermore, while India claims that the Summary Document is not India's risk assessment, the Panel may still seek to examine whether the Summary Document would nonetheless be considered a *de facto* risk assessment, in which case some additional issues of scientific fact may be disputed. For instance, the United States and India present starkly opposing views on the sources used to develop the Summary Document. The Panel may also seek to obtain expert opinions regarding the accuracy of India's understanding that the sources behind the Summary Document formed the basis of the OIE recommendations.[9] Moreover, India claims that it was not required to conduct a risk assessment because its SPS measure was based on the OIE standard (according to India, a Member is not required to conduct a risk assessment under Article 5 if the SPS measure is based on an international standard, as the standard itself fulfills the requirements of Article 2.2, and circumstantially, Article 5.1).[10] This would seem to suggest that the assessment of risk performed by the OIE is what forms the scientific basis for India's SPS measure, and if so, that the Panel's examination of OIE assessment may benefit from review by independent experts as well.

8. In the present dispute, therefore, whether the OIE standard constitutes the elements necessary to satisfy the SPS Agreement's requirement for a risk assessment, and whether the science cited in the Summary Document is relevant today and pertinent to the circumstances of India, these are issues that may and should be determined with the help of independent experts.

C. The Use of OIE Experts

9. The parties to this dispute disagree with the interpretation of the OIE standard. India claims that Members can impose an immediate ban on trade in poultry commodities from a country reporting LPAI under Article 10.4.1.10 of the OIE Code.[11] However by the very same provision, the United States states that notification of HPAI and LPAI in birds other than poultry should not be a basis to impose ban on poultry commodities.[12] A point that the Panel may wish to clarify is whether LPAI is an exotic disease to India. The disease status in regard to LPAI in India is a fundamental factual question for the Panel to consider in light of the legal claims India has put forward. Japan is of the view that OIE experts are in a good position to provide technical knowledge in order for the Panel to determine these contentious issues, especially with respect to the conformity of India's measures on the relevant OIE Codes.

10. In regard to the use of expert, while India does not categorically reject the necessity of experts in this proceeding, India opposes the use of OIE experts to assist the Panel in this proceeding. According to India, the OIE should not be called upon to provide expert opinion

[7] *EC – Biotech* (Panel), at paras. 7.18, 7.30 .
[8] US FWS, at para. 83.
[9] India's First Written Submission (31 May 2013) ("India FWS"), at paras. 7, 9.
[10] *Id.* at paras. 7, 146, 163-64, and 183-84.
[11] India FWS, at para. 123.
[12] US FWS, at para. 51.

because prior OIE "interjection[s] at the SPS Committee meeting cast[ ] serious doubts over the OIE's ability to provide guidance to the Panel…"[13]

11. Experts are subject to Section II (Governing Principle) of the *Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("Rules of Conduct"),[14] which provides that all covered persons, such as panelists and expert advising panels,[15] "shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings of bodies pursuant to the dispute settlement mechanism, so that through the observance of such standards of conduct the integrity and impartiality of that mechanism are preserved." Integrity and impartiality are further required by Section VI.2 of the Rules of Conduct, which provides that experts "disclose any information ... which is likely to affect or give rise to justifiable doubts as to their independence or impartiality."

12. When selecting experts, panels must consider "whether there is an objective basis to conclude that an expert's independence or impartiality is likely to be affected or there are justifiable doubts about that expert's independence or impartiality."[16] This standard ensures the fairness and impartiality of the experts in conformity with due process. And while a party may object to the selection of a particular expert, such objection should be accompanied by an explanation of why the expert's independence or impartiality has been compromised.[17] Certain affiliations with international organizations may provide a basis to exclude such an expert; for instance, in *EC – Hormones*, the Appellate Body found that – in a case of two competing standards – it was improper for the panel to call on an expert who was involved in developing the standard upon which one of the parties relied in its risk assessment, as the expert would be inclined to defend its standard over the other, rather than conduct an objective assessment.[18]

13. As such, it is not clear to Japan that an OIE expert's independence or impartiality, if selected, would be compromised. Rather, such an expert may even be in the best position to provide guidance to the Panel in this dispute, in particular verifying India's reading of its Summary Document, which India argues formed based on the OIE recommendations and the justification for India's measure.[19] As such, it is Japan's view that the Panel should not preclude the consideration of OIE experts to aid the Panel in understanding the claims raised by the Parties in this dispute as long as their independence and impartiality can be ensured.

III. Appropriate Standards for Determining the Existence of a Risk Assessment Under SPS Articles 5.1 and 5.2

14. If the Panel were to determine that the assessment of risks was conducted either through the Summary Document, or through the adoption of the OIE standard, Japan offers the following observations for the Panel's consideration in determining whether India has complied with its obligations under Articles 5.1 and 5.2 of the SPS Agreement.

A. The Meaning of "Take Into Account" is Different from "Based on" or "Comply with"

15. Article 5.1 stipulates that Members shall ensure their SPS measures are based on a risk assessment, "taking into account risk assessment techniques developed by the relevant international organization." The United States specifically notes that the Summary Document "does not even reference the OIE's standards for a risk assessment such as Chapter 2.1 of the OIE Code or the Handbook."[20] Thus, while the United States concludes that India has failed to "at least take into account" the risk assessment techniques of relevant international organizations, it also raises the question to what extent India should have discussed and deferred to the OIE Code or

[13] India FWS, at para. 10.
[14] Rules of Conduct for the Understanding on the Rules and Procedures Governing the Settlement of Disputes, WT/DS/RC/1 (adopted 3 December 1996) ("Rules of Conduct").
[15] Rules of Conduct, at Section IV.1.
[16] *US – Continued Suspension (AB)*, at para. 454.
[17] *Australia – Apples (Panel)*, at paras. 7.31-7.32.
[18] *US – Continued Suspension (AB)*, at para. 469.
[19] India FWS, at para. 7.
[20] US FWS, at para. 117.

Handbook in order to fulfill its requirements under Article 5.1, even if it were to ultimately decide to reject the risk assessment techniques contained in those international standards.

16. At the very least, it is clear that the requirement to take into account risk assessment techniques developed by international organizations does not equate to a requirement to *conform* to such international standards. As the United States correctly notes, a Member whose standards conform to the international standards enjoys a presumption of consistency under the SPS Agreement. It is also true, however, that conformity with international standards is neither required, nor does a presumption of consistency mean that Members who decide not to conform their measures to international standards are subject to "a special or generalized burden of proof upon that Member, which may, more often than not, amount to a *penalty*."[21]

17. The requirement to take into account certain risk assessment techniques under the second half of Article 5.1 should also be distinguished from the obligation of a Member to base its risk assessment on scientific evidence under the first half of Article 5.1. The Appellate Body in *EC – Hormones* made clear that the obligations implicated by the two terms are distinctly different. Therefore, the requirement for a Member to "base" its risk assessment on scientific evidence refers to an objective situation. The Appellate Body has established the requisite relationship between the scientific evidence and risk assessment to be one of a "rational relationship." As demonstrated through the Appellate Body's guidance in *EC – Hormones*, the requirement to "take into account" certain factors, on the other hand, leaves the Member a degree of discretion to reject the particular factors considered.[22] The discretion of a Member to reject the risk assessment techniques developed by an international organization is especially clear when a Member has decided not to adopt the level of protection set forth by the international organization. This is because the particular techniques developed by an entity will be tailored to the particular level of protection espoused by that entity.

18. Thus, the above analysis demonstrates that the requirement that a Member take into account risk assessment techniques developed by international organizations is clearly differentiated from an obligation to conform to, or base its risk assessment on, the standards set forth by an international organization. The Appellate Body further indicated that should a WTO Member choose a higher level of protection, that Member may adopt "the scope and method" of its risk assessment different from those of risk assessment performed by the international body that underlies the international standard.[23]

19. India does have the prerogative to adopt a level of protection higher than that espoused under the international standard. In this case, while India would not be required to employ the risk assessment methods set forth in the OIE Code, Article 5.1 still would not exempt India from taking into account the risk assessment techniques developed by international organizations. However, a Member has a degree of discretion in taking into account risk assessment techniques developed by international organizations, and when the Member decided to adopt a higher level of protection than that espoused under the international standard that Member may subsequently decline to adopt such techniques.

B. Guidance on Requirements to Express International Standards that have been Taken Into Account

20. In addition to Article 5.1, Article 5.2 of the SPS Agreement uses similar language requiring an implementing Member to "take into account" seven specific factors in conducting its risk assessment. And similar to its assertion that a failure to "reference" the OIE Code suggests a violation of Article 5.1, the United States argues that India failed to comply with Article 5.2, because "{t}he most recent scientific authority cited is over 14 years old," and "there is not even a cursory reference to available scientific evidence explaining that LPAI does not replicate systematically and the corresponding implications for the safety of poultry meat and eggs."[24] In other words, it appears that the United States assumes that India did not take into account the requisite factors expressed in Articles 5.1 and 5.2 of the SPS Agreement because the Summary Document does not "reference" those specific factors. However, it is not clear that a Member's

[21] *EC – Hormones (AB),* at para. 102. Italic Original.
[22] *Id*. at paras. 189, 193-94.
[23] *US – Continued Suspension (AB),* at para. 685.
[24] US FWS, at 118.

failure to expressly reference each factor provided in Articles 5.1 and 5.2 automatically leads to the conclusion that the Member failed to take those factors into account, especially with regard to information that the Member has ultimately decided to reject in its risk assessment after examining factors to be taken into account.

21. As discussed above, a requirement to "base" an SPS measure on scientific evidence is distinguished from a requirement to "take into account" certain factors. The panel in *EC – Biotech* clarified that when a Member has decided to "base" its risk assessment on divergent opinion, the Member is required to express the information that its risk assessment is based on.[25]

22. With regards to factors that should be "taken into account," however, the Appellate Body in *Australia – Apples* only acknowledged that reference by the risk assessor of the risk assessment technique employed "is useful both to the risk assessor, should a dispute arise in relation to the risk assessment, and to the Panel that is called upon to review the consistency of that risk assessment with the provisions of the SPS Agreement."[26] Thus, while the Appellate Body has found it "useful" for a risk assessment to describe the methods employed, it does not appear to go beyond that to suggest that such description is mandatory. This would suggest that express reference to each factor listed in Article 5.2 may not be necessary, especially for these declined; instead whether a particular factor be taken into account by a Member can be discerned from the examination of the risk assessment as a whole.

IV. CONCLUSION

23. The Government of Japan thanks the Panel for this opportunity to comment on important issues in this proceeding, and asks that the Panel consider the observations of Japan in reaching its determinations.

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[25] *EC – Biotech (Panel),* at para. 7.3060; *see also EC – Hormones (AB),* at paras. 193–194.
[26] *Australia – Apples (AB)*, at para. 246.