PUBLIC VERSION

WTO Confidential Information Redacted From Pages 63-64

INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN AGRICULTURAL PRODUCTS FROM THE UNITED STATES

(AB–2015-2 / DS430)

APPELLEE SUBMISSION OF

THE UNITED STATES OF AMERICA

February 13, 2015

SERVICE LIST

Participant

H.E. Ms. Anjali Prasad, Permanent Mission of India

Third Parties

H.E. Mr. Alberto Pedro D'Alotto, Permanent Mission of Argentina

H.E. Mr. Hamish McCormick, Permanent Mission of Australia

H.E. Mr. Marcos Galvão, Permanent Mission of Brazil

H.E. Mr. Yu Jianhua, Permanent Mission of the People's Republic of China

H.E. Mr. Gabriel Duque, Permanent Mission of Colombia

H.E. Mr. Humberto Jimenez Torres, Permanent Mission of the Republic of Ecuador

H.E. Mr. Angelos Pangratis, Permanent Mission of the European Union

H.E. Mr. Eduardo Ernesto Sperisen-Yurt, Permanent Mission of Guatemala

H.E. Mr. Yoichi Otabe, Permanent Mission of Japan

H.E. Mr. Nguyen Trung Thanh, Permanent Mission of the Socialist Republic of Viet Nam

TABLE OF CONTENTS

TABLE OF REPORTS

Short Form	Full Citation
Panel Report	Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products from the United States*, WT/DS430/R, circulated 14 October 2014
Australia – Apples (AB)	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
China – Rare Earths (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011.
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
India – Quantitative Restrictions (AB)	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999

Short Form	**Full Citation**
Japan – Apples (AB)	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003
US – Continued Suspension (AB)	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008
US – Countervailing Measures on Certain EC Products (AB)	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – Large Civil Aircraft (2nd complaint) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Shrimp (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998
US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006

I. INTRODUCTION AND EXECUTIVE SUMMARY

A. Introduction

1. Avian influenza is a disease that affects birds. Some types of avian influenza are endemic to certain bird species and asymptomatic. Other types, however, can devastate poultry stocks. The United States supports and leads international efforts to control for this disease. The question in this dispute is whether India has used concerns with avian influenza as an excuse for adopting unwarranted trade barriers.

2. The Panel that heard this dispute found so, and it did not do so lightly. The Panel conducted a thorough and unbiased examination of the Parties' arguments and evidence. At every stage of the proceedings, it ensured the Parties had a full opportunity to present their views and provided multiple opportunities for the Parties to clarify their positions. Moreover, to obtain assistance in evaluating the Parties' evidence, the Panel appropriately consulted with internationally renowned experts on avian influenza as well as the relevant international organization that coordinates efforts to ensure safe trade with respect to avian influenza. Through this rigorous examination, the Panel properly found that India's measures are inconsistent with its obligations under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Among the findings made by the Panel in this dispute were the following:

- The OIE has adopted international scientifically-based recommendations for avian influenza control measures that treat different types of avian influenza differently in order to facilitate a consistently safe level of trade that will avoid the introduction of avian influenza into an importing country;

- That India's avian influenza measures treat detections of both types of notifiable avian influenza in an exporting Member the same – namely, by imposing a country-wide ban on importation of a range of agricultural products, including those products that international standards recognize can be safely traded following detections of notifiable avian influenza;

- That India maintains these import prohibitions without basing them on a risk assessment; and

- That India, while imposing these restrictions on imports, treated its own domestic industry far more leniently, including by only imposing very limited geographic restrictions on the movement of products whenever a domestic avian influenza outbreak took place.

3. In short, the Panel undertook a thorough analysis of the legal standards and record evidence, and correctly concluded that India has no scientific basis to maintain its measures. As the United States will explain in this submission, India's in its appeal has not shown that the Panel made any errors of law or that the panel in any way departed from its obligation to make an objective assessment of the matter before it.

B. Executive Summary

4. The United States argued, the evidence established, and the Panel fairly concluded that India is in breach of its obligations under the SPS Agreement. Thus, each and every issue raised by India in its appeal is without merit.

5. India fails to establish that the Panel erred in its findings on Articles 2.2, 5.1, and 5.2 of the SPS Agreement. The Panel found that India did not base its measures on a risk assessment within the meaning of SPS Annex A(4). In the absence of a risk assessment, the Panel found India's AI measures to be inconsistent with SPS Article 5.1 because they are not based on a risk assessment and SPS Article 5.2 because there is no risk assessment that takes into account the factors set forth in that provision. The Panel further found that because India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement, India's AI measures were also inconsistent with SPS Article 2.2 because they are not based on scientific principles and are maintained without sufficient scientific evidence.

6. India challenges the Panel's finding on four grounds, none of which have merit. India argues that a Member "can either bases its sanitary measure" through SPS Article 2.2 "by directly establishing a link between the SPS measure and the scientific principle and sufficient scientific evidence or alternatively the respondent country can follow the systemic process underlined in" in SPS Article 5.1 "by conducting the risk assessment and thus also comply with the requirements in" SPS Article 2.2. India's argument rejects the plain meaning of these provisions and prior Appellate Body reports concerning them. The Panel correctly interpreted the relationship between Articles 2.2, 5.1, and 5.2.

7. India's other three challenges are brought under DSU Article 11. India argues that: the Panel failed to make an objective assessment by disregarding India's arguments and evidence that were presented to establish that its measures are based on scientific principles and sufficient scientific evidence per SPS Article 2.2; that the Panel failed to find that U.S. claims with respect to SPS Articles 5.1, 5.2, and 2.2 were limited to poultry meat and eggs; and that the Panel disregarded India's arguments under SPS Article 5.1. All of these claims fail because, *inter alia*: India cannot refute that the Panel's found that India's measures are not based on a risk assessment; and because India has failed to show the materiality of its evidence with respect to the impact on the Panel's objectivity.

8. India's challenges to the Panel's conclusion that India breached Article 3.1 also fail. India claims the terms of reference for the Panel's consultation with the World Organization for Animal Health (OIE)[1] were inconsistent with SPS Article 11.2, DSU Article 13.1, and DSU Article 3.2. But the Panel consultation with the OIE was permissible and consistent with the SPS Agreement and the DSU. Contrary to what India argues, moreover, the Panel clearly did not delegate its responsibilities to the OIE, but rather carefully examined and assessed the text of the OIE Code. Moreover, the relevant evidence confirms that, contrary to India's assertions, the

[1] The World Organization for Animal Health is referred to as OIE because it chose to keep its historical acronym from when the organization was titled the Office International des Epizootics.

Panel's conclusions concerning the OIE Code and that India breached SPS Article 3.1 are correct.

9. India's challenges to the Panel's conclusion that India breached Article 2.3 reflect key misunderstandings of what the Panel did and of the standard set forth in Article 11 of the DSU. India asserts that the OIE Code renders contrary to Article 11 of the DSU the Panel's decision to consult with the individual experts about whether the record evidence supports India's assertion of LPNAI-freedom. Yet India fails to establish any basis to conclude that what the OIE Code determines a Panel's duty under Article 11 for purposes of WTO dispute settlement. The OIE Code applies to OIE Members, not panels. India likewise fails to establish the alleged factual basis for its claim, that is, that the Panel had done anything inconsistent with the Code.

10. India also argues that the Panel's questions to the experts improperly shifted the burden of proof with respect to the question of whether India had LPNAI. Yet India's argument misunderstands the allocation of the burden of proof in a WTO dispute settlement proceeding, and India is in any event incorrect in arguing that the Panel's questions to the experts on the subject of whether India is free of LPNAI reflect an allocation by the Panel of the burden of proof, as is clear when those questions are viewed as a whole, rather than selectively as India presents them. Further, India argues that the Panel's questions to the individual experts delegated decision-making authority to the experts regarding the evidence on India's claims of LPNAI-freedom. India's argument on appeal fails, both because the Panel conducted its own objective assessment of the answer to that question, and because the Panel's questions to the experts in no way delegated decision-making responsibility but instead properly sought scientific and technical assistance in evaluating scientific and technical evidence.

11. India's arguments about the U.S. Article 6 claims equally lack merit. India contends that the Panel improperly concluded that India's measures fail to recognize the concept of disease-free areas and areas of low disease prevalence notwithstanding the content of India's Livestock Act. Yet the Panel properly understood what it means to "recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence," and properly recognized that nothing about the Livestock Act meant that India recognizes such areas. Contrary to what India asserts, moreover, the Panel decided the Article 6 claims that the United States brought.

12. India asserts that the Panel breached its obligations under Article 11 of the DSU by allegedly disregarding a statement in exhibit IND-121 that, according to India, constitutes evidence of Indian compliance with its obligations under the first sentence of Article 6.2 to recognize the concepts of disease-free areas and areas of low disease prevalence. Yet nothing about the Panel's handling of exhibit IND-121 was contrary to the Panel's obligation under Article 11 to make an objective assessment of the evidence, and in fact, Exhibit IND-121 does not provide any support for the idea that India recognizes the concept of disease-free areas or areas of low disease prevalence with respect to AI.

13. India additionally contends that the Panel incorrectly interpreted the relationship between Articles 6.1 and 6.3. Yet the Panel is correct in its conclusion that a request for recognition of a specific area under Article 6.3 is not a prerequisite to the existence of obligations under Article 6.1, and that India is in breach of its Article 6.1 obligations.

14. India's challenges to the Panel's conclusion that India breached Article 5.6 likewise are without merit. Contrary to India's argument, the U.S. challenges contain no internal inconsistencies. Moreover, India fails to recognize critical findings made by the Panel. India is incorrect that the United States limited its claim under Article 5.6 to any subset of the products listed in S.O. 1663(E). Further, India is mistaken in suggesting that the Panel committed error by allegedly "allowing" the United States to specify India's ALOP or by accepting U.S. methodology for ascertaining India's ALOP. To the contrary, the Panel did *not* accept U.S. position regarding India's ALOP but instead found that ALOP to be very high – before concluding that the United States' proposed alternative measures would achieve that high ALOP. Additionally, India is incorrect in claiming that the Panel did not precisely identify the alternative measure to India's import prohibitions. . The Panel in fact identified in paragraph 7.529 the precise OIE Code recommendations that serve as the proposed alternative measures.

II. BACKGROUND

15. In case of use, the United States in this Section sets out certain key facts from the Panel's record. The U.S. legal arguments on appeal are set out starting in Section IV.

A. What is Avian Influenza

16. Avian influenza ("AI") is viral disease that affects birds, particularly water fowl such as duck and geese, with no signs of apparent illness.[2] Sometimes, the viruses that cause AI can spread to domestic poultry where they can cause outbreaks of a very serious disease known as highly pathogenic avian influenza (HPAI).[3] The various subtypes of AI virus fall in one of two groups based upon their ability to cause disease in birds" (i) HPAI, which was just referenced, and (ii) low pathogenic avian influenza (LPAI).[4]

17. As noted, HPAI is a very serious disease. It is very infectious and causes high mortality in birds. The symptoms of an HPAI infection are very visible and include lesions, bleeding, and dead tissue. The virus subtypes that cause HPAI all have surface that is classified either as H5 or H7.[5] However, most H5 and H7 viruses are believed to be LPAI.[6]

18. Infection from LPAI may be asymptomatic or have very mild symptoms, such as the birds having ruffled feathers, reduced egg products, or mild respiratory symptoms. In other words, unlike HPAI with its very visible symptoms, it is possible to miss an LPAI infection.[7]

---

2 Panel Report, para. 2.6

3 Panel Report, para. 2.6.

4 Panel Report, para. 2.7.

5 Panel Report, para. 2.9.

6 Panel Report, para. 2.11.

7 Panel Report, para. 2.11.

LPAI viruses are endemic to various species of wild birds and found in more than 100 different wild bird species, particularly wild aquatic birds such as ducks, geese and gulls.[8]

19. Scientific investigations indicate that the wild bird reservoir is the original source of H5/H7 LPAI viruses and that these viruses, once they start circulating into poultry, can mutate into HPAI viruses. Typically, the longer an H5 or H7 LPAI virus circulates in poultry, the more likely it is that it will mutate.[9]

B. The World Organization for Animal Health and the OIE Code

20. The OIE is an international organization tasked with improving animal health.[10] As part of that mission, the OIE develops international standards with respect to protecting animal health including with respect to avian influenza.[11] These standards are drafted by the OIE Terrestrial Animal Health Standards Commission (the Code Commission), which draws upon the expertise of internationally renowned specialists to prepare draft texts for new standards or to revise them in light of advances in veterinary science.[12] The text that contains the specific recommendations for avian influenza is the Terrestrial Animal Health Code ("OIE Code"), specifically Chapter 10.4.[13]

21. The OIE requires that its members notify the OIE of any detection of HPAI and of certain types of LPAI in their territories. Collectively, the types of HPAI and LPAI that have to be notified are known as "notifiable avian influenza" (NAI). Separately, under the nomenclature of the OIE Code, they are referred to highly pathogenic notifiable avian influenza (HPNAI), which is all HPAI and low pathogenicity notifiable avian influenza (LPNAI), which is defined as as "all influenza A viruses of H5 and H7 subtype that are not HPNAI viruses.[14]

22. The User's Guide to the OIE Code states that recommendations in the OIE Code "are designed to prevent the disease in question from being introduced into the importing country, taking into account the nature of the commodity and the animal health status of the exporting country."[15] Another OIE publication notes that:

---

8 Panel Report, para. 2.12.

9 Panel Report, para. 2.17

10 Panel Report, para. 2.49.

11 Panel Report, para. 2.50.

12 Panel Report, para. 2.51.

13 Panel report, para. 2.50, 2.59.

14 Panel Report, paras. 2.11 & 2.15.

15 Panel Report, para. 2.54 (quoting Panel Report).

> OIE standards provide for trade in animals and animal products to take place with an optimal level of animal health security, based on the most up to date scientific information and available techniques.[16]

The following is a sample recommendation from the OIE Code regard the trade in eggs with respect to avian influenza.

Article 10.4.13 **Recommendations for importation from a NAI-free country, zone or compartment**
<u>For eggs for human consumption</u> Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the eggs were produced and packed in a NAI-free country, zone or compartment; 2) the eggs are transported in new or appropriately sanitized packaging materials.
Article 10.4.14 **Recommendations for importation from a HPNAI-free country, zone or compartment**
<u>For eggs for human consumption</u> Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the eggs were produced and packed in a HPNAI-free country, zone or compartment; 2) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.); 3) the eggs are transported in new or appropriately sanitized packaging materials.

23. In short, the OIE has both a process by which members make notifications to it concerning outbreaks of avian influenza and a set of international standards that concern conducting trade with respect to the risk arising from avian influenza.

---

[16] Panel Report, para. 2.56, quoting Rights and Obligations of OIE Members.

C. The Measures

24. "The measures at issue in this dispute are India's AI measures, which are those measures that 'prohibit the importation of various agricultural products into India from those countries reporting [NAI]'."[17] One of the legal instruments through which India maintains its measures it titled S.O. 1663(E).[18] This particular document, which runs one page, provides in part that it prohibits "the import into India from countries reporting Notifiable Avian Influenza (both Highly Pathogenic Avian Influenza and Low Pathogenic Influenza, the following livestock products…."[19] The document then goes on to note the various agricultural products that fall with the scope of this import prohibition.

III. THE STANDARD OF REVIEW UNDER ARTICLE 11 OF THE DSU

25. As India has brought numerous claims in this appeal pursuant to Article 11 of the DSU, the United States sets forth the standard of review for such claims at the very outset before addressing India's specific claims made under that provision.

26. Article 11 of the DSU provides as follows:

> Function of Panels
>
> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

27. A claim by a party that a panel failed to undertake an objective assessment per DSU Article 11 is an extraordinary claim that must stand by itself, rather than be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements." Indeed, this "very serious allegation"[20] requires the appellant to demonstrate not simply error, but an "egregious error" by the panel.[21] In particular,

---

17 Panel Report, para. 2.22.

18 *Id.*

19 Panel Report, para. 2.32.

20 *E.g., US – Zeroing (EC) (AB)*, para. 253

21 *EC – Hormones (AB)*, para. 133.

the panel's error must constitute a deliberate disregard of evidence or gross negligence amounting to bad faith.[22] As the Appellate Body in *EC – Fasteners* observed:

> [N]ot every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU. It is incumbent on a participant raising a claim under Article 11 on appeal to explain why the alleged error meets the standard of review under that provision. An attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope of this provision. In particular, when alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11. Rather, a participant must explain why such evidence is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment. It is also unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment.[23]

Panels thus enjoy discretion as to the relative weight assigned to a particular piece of evidence on the panel record, and the Appellate Body will not "interfere lightly" with the panel's fact-finding authority.[24] The Appellate Body in *EC – Hormones (AB)* observed that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings."[25]

28. As demonstrated in detail below, none of India's many Article 11 complaints in this appeal meet the standard. Instead, India's Article 11 claims reflect mere disagreement that the Panel did not afford India's evidence and arguments the weight India believes warranted. In short, the Panel in this dispute fulfilled its obligation to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."

---

22 *EC – Hormones (AB)*, para. 133, 138.

23 *EC – Fasteners (China) (AB)*, para. 442.

24 *EC – Sardines (AB)*, para. 299.

25 *EC – Hormones (AB)*, para. 135

IV. INDIA HAS FAILED TO ESTABLISH THAT THE PANEL ERRED IN ITS FINDINGS ON ARTICLE 2.2, 5.1, AND 5.2 OF THE SPS AGREEMENT

29. The Panel found that India did not base its measures on a risk assessment within the meaning of SPS Agreement Annex A(4).[26] In the absence of a risk assessment, the Panel found India's AI measures to be inconsistent with SPS Article 5.1 because they are not based on a risk assessment and SPS Article 5.2 because there is no risk assessment that takes into account the factors set forth in that provision.[27] The Panel further found that because India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement, India's AI measures were also inconsistent with SPS Article 2.2 because they are not based on scientific principles and are maintained without sufficient scientific evidence.[28]

30. India challenges the Panel's finding on four grounds. The first is a legal challenge alleging that the Panel incorrectly interpreted and applied SPS Article 2.2. According to India, a Member "can either base its sanitary measure" through SPS Article 2.2 "by directly establishing a link between the SPS measure[] and the scientific principle and sufficient scientific evidence or alternatively the respondent country can follow the systemic process underlined in" in SPS Article 5.1 "by conducting the risk assessment and thus also comply with the requirements in" SPS Article 2.2.[29] India's argument rejects the plain meaning of these provisions and the articulation in previously adopted reports on the relationship between these provisions.

31. India's remaining three challenges are brought under DSU Article 11.[30] They are:

- The Panel failed to make an objective assessment by disregarding India's arguments and evidence that were presented to establish that its measures are based on scientific principles and sufficient scientific evidence per SPS Article 2.2;[31]
- The Panel failed to find that U.S. claims with respect to SPS Articles 5.1, 5.2, and 2.2 were limited to poultry meat and eggs;[32] and

---

26 Panel Report, para. 7.317.

27 Panel Report, paras. 7.318-7.319.

28 Panel Report, paras. 7.332.

29 India, Appellant Submission, 18.

30 India, Appellant Submission, para. 14.

31 *See e.g.*, India, Appellant Submission, paras. 27-34.

32 *See e.g.*, India, Appellant Submission, paras. 47-51.

- The Panel disregarded India's arguments under SPS Article 5.1.[33]

These claims fail on a number of grounds. India casts its argument as a breach of DSU Article 11, but its arguments in relation to an independent basis to support its measure under Article 2.2 are, in essence, claims that the Panel erred in its interpretation and application of Article 2.2. Therefore, India has erred in pleading a breach of Article 11. India refuses to acknowledge the Panel's finding that India's measures are not based on a risk assessment within the meaning of Article 5.1. This breach is a sufficient basis for the Panel's conclusion that India also breached Article 2.2, as the Appellate Body has concluded in a number of previous reports. India's claims also fail because India has failed to show how the evidence it cites was so material to its case that the Panel's objectivity is called into question through its treatment of that evidence. A mere difference of opinion on the weight to be accorded evidence is not itself a basis for a breach of Article 11.

32. In light of the foregoing, India asks the Appellate Body to complete the legal analysis to find that India's AI measures are consistent with SPS Article 2.2. Because the Panel's findings are correct, there is no basis to reverse them or to "complete the legal analysis." Furthermore, the facts India asserts as part of its request are in dispute, which provides an additional basis to decline India's request.

A. The Panel Properly Interpreted the Relationship of Articles 2.2, 5.1, and 5.2

33. Per the citations referenced by India in its Appellant Submission, the United States understands[34] India to be taking issue with the findings in these two paragraphs[35] of the Panel Report:

[33] *See e.g.*, India, Appellant Submission, paras. 59-63.

[34] Even after reviewing India's appellant submission, the United States remains somewhat puzzled regarding the legal error India is asserting concerning the Panel's findings with respect to SPS Article 2.2. The heading to this section of India's appellant submission claims the Panel "committed a legal error by incorrectly determining the standard of review under Article 2.2 of the SPS Agreement." India, Appellant Submission, Heading to Section III.A.(b). (p.4). The standard of review, however, in assessing a claim under Article 2.2, as with any provision of the SPS Agreement, is simply Article 11 of the DSU. *EC – Hormones (AB)*, para. 116 ("Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements.")

[35] India, Appellee submission, paras. 14 (first bullet) & 20. The footnotes within these paragraphs have been removed.

> Para. 7.282: The relationship between these three provisions has led panels and the Appellate Body to conclude that, when an SPS measure is not based on a risk assessment conducted according to the requirements in Article 5.1 and 5.2, "this measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence". In practical terms, this means that a violation of Articles 5.1 and 5.2 entails a violation of the more general Article 2.2 of the SPS Agreement. Nonetheless, the opposite is not always the case due to the broader scope of Article 2.2; indeed, not all instances of violation of Article 2.2 entail a violation of Articles 5.1 and 5.2.
>
> Para. 7.331: Article 2.2 requires *inter alia* that SPS measures be based on scientific principles and not be maintained without sufficient scientific evidence. As explained in paragraph 7.282 above, where an SPS measure is not based on a risk assessment as required by Articles 5.1 and 5.2 of the SPS Agreement, this measure is presumed not to be based on scientific principles and to be maintained without sufficient scientific evidence, in contravention of Article 2.2 of the SPS Agreement.

34. As a preliminary matter, the Appellate Body has previously noted that claims under DSU Article 11 and claims relating to errors in interpreting or applying provisions of the covered agreements are distinct and should not be plead in the alternative.[36] Here, India has alleged that the Panel breached DSU Article 11 on multiple grounds. However, its arguments that the Panel failed to make an objective assessment by disregarding India's arguments and evidence (presented to establish that its measures are based on scientific principles and sufficient scientific evidence under Article 2.2) do not relate to the objectivity of the Panel's assessment of the matter. Rather, India is arguing that the Panel erred in finding a breach of Article 2.2 when India believes that, properly interpreted and applied, Article 2.2 permits India to demonstrate an independent basis for its measure. This argument in essence claims that the Panel erred in its interpretation and application of Article 2.2. India has therefore erred in claiming a breach of Article 11, and India's appeal can be rejected on this basis.

35. Furthermore, as explained in more detail below, the Panel's findings are a direct restatement of prior findings made by previous panel and Appellate Body reports. Yet, India does not even acknowledge as much and instead claims, without any authority, that the Panel's findings are legally incorrect because they do not allow India to somehow independently establish that its measures are consistent with SPS Article 2.2. As India puts it, a Member can "<u>either</u> base its sanitary measure under Article 2.2 … <u>or</u> alternatively … follow the systemic process underlined in Article 5.1 … and thus also comply with the requirements in Article 2.2."[37]

---

[36] *China – Rare Earths (AB)*, para. 5.173 ("[i]n most cases … an issue will either be one of application of the law to the facts or an issue of the objective assessment of facts, and not both.")

[37] India, Appellee Submission, para. 18 (emphases added).

That is, in India's view, a party can assert its measure is consistent with SPS Article 2.2 and avoid any finding of breach with respect to SPS Articles 5.1 and 5.2 even if the obligations in those provisions have not been met. This argument cannot be reconciled with the obligation to base an SPS measure on a risk assessment – that is, to ensure the measure is rationally related to the scientific evidence underlying the assessment of risks.

B. The Correct Legal Interpretation of SPS Articles 2.2, 5.1, and 5.2.

36. Before proceeding to address the specific arguments India advances regarding its legal theory, the United States reiterates the plain rationales for why the Panel's findings are indeed legally proper. Although these points are reflected in prior reports, they bear repetition in light of India's confusing position.

37. First, the Panel's findings are consistent with the plain meaning of these provisions, which confirms that (i) Article 2.2 is a general obligation that would encompass the obligations in Articles 5.1[38] and 5.2[39] and (ii) there is no basis to claim SPS Article 2.2[40] is a defense that excuses the risk assessment obligations in SPS Articles 5.1 and 5.2. India ignores the Appellate Body's previous guidance that these provisions should "constantly be read together".[41]

38. The texts of Articles 2.2, 5.1, and 5.2 interrelate in several respects including with respect to the relationship between science and measures ("based on scientific principles and … not maintained without sufficient scientific evidence" and "take into account available scientific evidence"). However, SPS Article 2.2's text is broader and more general in character, such that SPS Articles 5.1 and 5.2 might constitute specific applications of Article 2.2, but not encompass all conceivable situations where SPS Article 2.2 might apply. Thus, while it may be the case that a Member has acted consistently with SPS Articles 5.1 and 5.2, there may be situations where Article 2.2 could nonetheless be breached.

39. Second, the Panel's findings are consistent with numerous previous panel and Appellate Body reports. The Appellate Body has reached this conclusion on each occasion it has analyzed these provisions:

---

[38] SPS Art. 5.1: Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

[39] SPS Art. 5.2: In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

[40] SPS Art. 2.2: Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

[41] *Australia – Apples (AB)*, para. 209, quoting *EC – Hormones (AB)*, para. 180.

- *EC – Hormones*: "The Panel considered that Article 5.1 may be viewed as a specific application of the basic obligations contained in Article 2.2 of the SPS Agreement … We agree with this general consideration and would also stress that Articles 2.2 and 5.1 should constantly be read together. Article 2.2 informs Article 5.1: the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1."[42]

- *Australia – Salmon*: "We agree with the Panel, and, therefore, conclude that, by maintaining an import prohibition … in violation of Article 5.1, Australia has, by implication, also acted inconsistently with Article 2.2 of the SPS Agreement."[43]

- *Japan – Agricultural Products II*: "In our Report in European Communities – Hormones, we agreed with a statement by the panel in that case that Article 5.1 may be viewed as a specific application of the basic obligations contained in Article 2.2. This statement can not possibly be interpreted as support for limiting the scope of Article 2.2 "in favour" of Article 5.1."[44]

- *US – Continued Suspension*: "This requirement [Article 2.2] is made operative in other provisions of the SPS Agreement, including Article 5.1, which requires SPS measures to be "based on" a risk assessment."[45]

- *Australia – Apples*: "The Appellate Body has also held that there is a one-way, dependent relationship in law between the more specific provisions of Article 5.1 or Article 5.2, on the one hand, and the more general provisions of Article 2.2, on the other hand. Thus, the Appellate Body has ruled that a violation of Article 5.1 or Article 5.2 can be presumed to imply a violation of Article 2.2, but that the reverse does not hold true—that is, a violation of Article 2.2 does not imply a violation of Article 5.1."[46]

As is evident, paragraphs 7.282 and 7.331 of the Panel Report closely track these Appellate Body findings. India does not – because it cannot – point to any aspect of the Panel's findings that are in contravention of this previous analysis.

40. Thus, without any basis in the text of the SPS Agreement or prior WTO reports, India makes the remarkable contention that a party can satisfy SPS Article 2.2 in a manner that somehow excuses it from the risk assessment obligations in SPS Articles 5.1 and 5.2. India

---

42 *EC – Hormones (AB)*, para. 180.

43 *Australia – Salmon (AB)*, para. 138

44 *Japan – Agricultural Products II*, para. 82.

45 *US – Continued Suspension (AB)*, para. 674.

46 *Australia – Apples (AB)*, para. 340.

presents four arguments for why SPS Article 2.2 should be interpreted to preclude consideration of whether SPS Articles 5.1 and 5.2 were breached in this dispute. None of these provide a basis to overcome the text of these provisions and their relationship as understood in previous reports – notably, the Appellate Body's characterization of the relationship between the more general SPS Article 2.2 and more specific Articles 5.1, and 5.2 as a "one-way, dependent relationship".[47]

41. First, India argues that this interpretation is warranted because the United States brought an independent claim under SPS Article 2.2.[48] This argument is a *non sequitur*. The United States brought both types of Article 2.2 claims, consequential and independent. India does not explain, and cannot explain, why bringing an independent claim under Article 2.2 in any way indicates that the U.S. claim under Article 5.1 (and the consequential claim under 2.2) supports India's concept that the hypothetical failure to show an independent breach of Article 2.2 somehow serves as a bar to establishing an Article 5.1 claim and consequential Article 2.2 breach.

42. Indeed, India cannot point to anything in the text of these provisions – or any other reasoning – that suggests that when a Party asserts SPS Article 2.2 has been breached on account of a failure to have a risk assessment consistent with SPS Articles 5.1 and 5.2, and also for another independent reason, that that the former claims are converted into subsidiary claims dependent for their success on the latter claim. But these claims are also not exclusive of one another – that is, there is nothing in the text of Article 2.2 that precludes multiple bases for breaching that obligation, and India does not explain how these claims could be exclusive. If a panel were presented with differing bases for the alleged breach of SPS Article 2.2, unless the panel decided to exercise judicial economy, it would make findings on each of these different bases for the alleged breach. Despite India's arguments, that the United States also advanced an independent claim under Article 2.2 cannot change the fact that India's measures are not based on a risk assessment in breach of SPS Articles 5.1 and 5.2 – and as a consequence, India also breached SPS Article 2.2.

43. The second argument presented by India is premised on the contention that the Panel improperly conflated SPS Articles 2.2 and 5.1.[49] This argument lacks any basis in the record or logic. In fact, it is India that would conflate the provisions, because India argues that a failure to prevail on an Article 2.2 claim would prevent the Panel from reaching Article 5.1. Further, the Panel's reasoning on the relationship between these articles was sound, and plainly does not conflate them:

---

47 *Australia – Apples (AB)*, para. 340.

48 India, Appellant Submission, paras. 20-21.

49 India, Appellee Submission, para. 21.

> In practical terms, this means that a violation of Articles 5.1 and 5.2 entails a violation of the more general Article 2.2 of the SPS Agreement. Nonetheless, the opposite is not always the case due to the broader scope of Article 2.2; indeed, not all instances of violation of Article 2.2 entail a violation of Articles 5.1 and 5.2.[50]

Thus, the Panel did not render these provisions "redundant" but rather correctly recognized that SPS Article 2.2 could be breached even in the absence of a breach of SPS Articles 5.1 and 5.2.

44. Third, India argues that prior panel and appellate body reports supports its position. Specifically, India cites *Japan – Agricultural Products II (AB)*, *EC – Hormones (AB)*, and *US – Poultry* as supporting its position.[51] India, however, does not accurately describe the findings in these reports.[52]

- *Japan – Agricultural Products II (AB)*: The reference cited by India[53] simply stands for the proposition that Article 2.2 may be breached outside the confines of an Article 5.1 claim, which the Panel here noted as well.[54]

- *EC – Hormones (AB)*: The Appellate Body simply noted that Article 2.2 can be breached outside the context of Article 5.1. "Had we reversed the Panel's conclusion in respect of the inconsistency of the EC measures with Article 5.1, it would have been logically necessary to inquire whether Article 2.2 might nevertheless have been violated."[55]

- *US – Poultry*: "As explained above, in paragraph 7.168, where an SPS measure is not based on a risk assessment as required in Article 5.1 and 5.2 of the SPS Agreement, this measure is presumed not to be based on scientific principles and to be maintained without sufficient scientific evidence."

---

50 Panel Report, para. 7.282.

51 India, Appellee Submission, paras. 22-24.

52 These reports actually support the U.S. position concerning the relationship between Articles 5.1, 5.2, and 2.2. *See* e.g., *EC – Hormones (AB)*, para. 179-180.

53 India, Appellee Submission, para. 22.

54 *Japan – Agricultural Products II (AB)*, para. 82 ("We do not agree with Japan's proposition that direct application of Article 2.2 of the SPS Agreement should be limited to situations in which the scientific evidence is "patently" insufficient, and that the issue raised in this dispute should have been dealt with under Article 5.1 of the SPS Agreement. There is nothing in the text of either Articles 2.2 or 5.1, or any other provision of the SPS Agreement, that requires or sanctions such limitation of the scope of Article 2.2.")

55 Para. 250.

In short, all of these reports support the finding made by the Panel that a failure to base measures on a risk assessment per SPS Articles 5.1 and 5.2 creates a presumption that Article 2.2 has been breached.

45. The final argument made by India is that it based its defense under Article 2.2 and accordingly "the relevant text before the Panel was Article 2.2 of the SPS Agreement and not Article 5.1 of the SPS Agreement."[56] India provides no basis in the DSU to support a view that India's preferred manner of stating its defense could serve to bar the Panel from examining provisions cited by both parties. To the contrary, under DSU Article 7, the Panel was charged by the DSB in its terms of reference to examine the matter set out in the U.S. panel request in the light of the provisions of the covered agreements cited by the parties to the dispute.[57] In examining the U.S. claims, therefore, the Panel appropriately considered all those provisions serving as relevant context, and there is no basis for India to assert that the Panel was precluded from examining those provisions.

C. The Panel's Assessment of Findings with Respect to its SPS Article 5.1, 5.2, and 2.2 Findings are Consistent with DSU Article 11

46. Before proceeding to address the specific arguments made by India, it is important to recall (i) the issue before the Panel, (ii) the relevant findings made by the Panel on that issue that India considers not to be the result of an objective assessment and (iii) and the evidentiary basis that underpins those findings. By having that context, one can evaluate whether the evidence submitted by India was indeed so material that the Panel's alleged failure to rely on it can be said to establish that the Panel did not engage in an objective assessment. This is particularly true because India's submission does not in fact identify the precise findings upon which India bases its Article 11 claim.

---

[56] India, Appellee Submission, para. 25.

[57] "To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS430/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

47. The question before the Panel was as follows:

> The issue before the Panel is whether India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement. In particular, the United States claims that India did not undertake a risk assessment and failed to ensure that its AI measures are based on a risk assessment in violation of Article 5.1 of the SPS Agreement. The United States further claims that without a risk assessment, India could not have taken into account available scientific evidence and the other factors noted in Article 5.2, thereby breaching that provision as well.[58]

48. The findings at issue[59] address the question posed above. Specifically the Panel found that that India breached Articles 5.1 and 5.2 by failing to base its measures on a risk assessment and this failure means that India's measures can also be presumed to breach SPS Article 2.2.

> Paragraph 7.318: In the absence of a risk assessment, we do not find it necessary to continue our analysis under Article 5.1 of the SPS Agreement. We therefore find that India's AI measures are inconsistent with Article 5.1 of the SPS Agreement because they are not based on a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations.
>
> Paragraph 7.319: Having concluded that India's AI measures are not based on a risk assessment, it is not possible to examine whether India could have taken into account in the assessment of risks the factors set out in Article 5.2 of the SPS Agreement. The Panel also finds that, in the absence of a risk assessment, India's AI measures are inconsistent with Article 5.2 of the SPS Agreement because they are not based on a risk assessment that takes into account the factors set forth in Article 5.2.
>
> Paragraph 7.331: Article 2.2 requires *inter alia* that SPS measures be based on scientific principles and not be maintained without sufficient scientific evidence. As explained in paragraph 7.282 above, where an SPS measure is not based on a risk assessment as required by Articles 5.1 and 5.2 of the SPS Agreement, this measure is presumed not to be based on scientific principles and to be maintained without sufficient scientific evidence, in contravention of Article 2.2 of the SPS Agreement.

---

[58] Panel Report, para. 7.302 (footnotes omitted); *see also* para. 7.328.

[59] *See e.g.*, India, Appellant Submission, paras. 14, footnotes 14-17, 33.

> Paragraph 7.332: Having found in paragraphs 7.318 and 7.319 above that India's AI measures are not based on a risk assessment and are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement, we further find that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement, because they are not based on scientific principles and are maintained without sufficient scientific evidence.

In short, the Panel's findings at issue, including with respect to Article 2.2, concern whether India's measures are based on a risk assessment.

49. As reflected in the Panel Report, India put forward no evidence whatsoever to suggest it had actually based it measures on a risk assessment.[60] To the contrary, India conscientiously avoided the multiple opportunities afforded by the Panel to address whether or not it could show it measures were based on a risk assessment and rather claimed it had no obligation with respect to a risk assessment. Indeed, the Panel quoted India's position in the Panel Report:

> {T}he Panel asked India to clarify whether it has a risk assessment for its AI measures and, if so, to provide it to the Panel. India did not do so, responding that it was "not required to conduct a risk assessment for measures which conform to the international standards."[61]

50. The Panel directly and repeatedly asked India – including through two written questions – to answer whether its measures were based on a risk assessment, which India pointedly refused to answer by asserting it "was not required to conduct a risk assessment …."[62] Moreover, in its submissions, the United States noted that India has refused to answer queries about whether it has a risk assessment, including in the WTO SPS Committee and in a request made to India pursuant to Article 5.8 of the SPS Agreement.[63] Thus, in evaluating India's various claims in this section, a threshold question is: has India cited any evidence it brought to the Panel's attention *indicating that its measure was in fact based on a risk assessment.* The answer as seen below is no.

1. The Panel Made an Objective Assessment with Respect to Article 2.2

51. The thrust of India's argument in Section A(c) of its submission is that that the Panel breached DSU Article 11 by not analyzing the following two arguments: (i) certain studies put forward by India, which India defines as including a risk assessment by Australia (India does not claim to base its measures on the Australian Risk Assessment) – and (ii) its claim that other

---

60 Panel Report, paras. 7.294 – 7.301.

61 Panel Report, para. 7.312.

62 Panel Questions Nos. 31 and 59, Panel Report, para. 7.312.

63 U.S. First Written Submission, paras. 13, 86, 113-114; U.S. Second Written Submission, para. 35; U.S. Comments on India's Response to Panel Question 60;

countries impose import restrictions on account of AI.[64] India fails to explain how either of these assertions are even relevant, let alone so material to the question of whether India's measures are based on a risk assessment as to call into question the Panel's objectivity.

52. With respect to the purported scientific studies, the Panel – contrary to India's Article 11 claim of error – in fact did acknowledge that India had invoked them as an argument.[65] India, however, did not discharge its burden of showing the relevance of this purported evidence to the issue before the Panel, which was whether India's measures are *based on* a risk assessment. In particular, India did not explain before the Panel, or even now, (1) why these studies would constitute a risk assessment or (2) why they would be relevant to the obligations in SPS Articles 5.1 and 5.2 if India has not even asserted that its measures are "based on" them.[66]

53. In this respect, the United States notes that the Appellate Body's findings in *EC – Hormones* are instructive. In *EC – Hormones*, the EC put forward studies that asserted a general risk of harm. The Appellate Body noted the following:

> [T]he studies submitted by the respondent constitute general studies which do indeed show the existence of a general risk of cancer; but they do not focus on and do not address the particular kind of risk here at stake — the carcinogenic or genotoxic potential of the residues of those hormones found in meat derived from cattle to which the hormones had been administered for growth promotion purposes — as is required by paragraph 4 of Annex A of the SPS Agreement. Those general studies are, in other words, relevant but do not appear to be sufficiently specific to the case at hand.[67]

The obligation to conduct a risk assessment "is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of a … measure."[68] Here, India has not explained the relationship between its measures and these studies. For example, India does not tie these studies to the trade in products that its measures cover. Accordingly, India cannot establish the relevance of these studies to the Panel's findings concerning whether India had based its measures on a risk assessment. If the studies are not relevant to assessing the specific risks at issue in this dispute, then India cannot meet its burden to establish that the evidence was

---

64 India, Appellant Submission, paras 32-33, 36, 40-43.

65 Panel Report, para. 7.297.

66 The United States would dispute that these studies even suggest the type of risk India is alleging. As noted in the U.S. Second Written Submission, paras. 36-49.

67 *EC – Hormones (AB)*, para. 200.

68 *See Japan – Apples (AB)*, paras. 202-203.

"so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment."[69]

54. The Australian Risk Assessment is similarly irrelevant to the Article 5.1 inquiry. India did not – and still does not – claim that its measures are based on this risk assessment. Accordingly, India fails to explain why the Panel should give it any more weight than it did, which was to acknowledge it and find that India did not purport to base its measures on it.[70] Similarly, while the Australia may have based a measure on that assessment, India provides no evidence or argument that India's measure was the same as any Australian measure supported by the Australian assessment.

55. With respect to India's second category of "evidence" – claims that other countries impose import restriction on account of AI – such evidence says nothing about whether India's measures were based on a risk assessment. The issue before the Panel was the consistency of India's measures with its obligations under the SPS Agreement. There was no need – or authority – for the Panel to determine the rationale or propriety of other Members' measures.

56. The United States notes one final point concerning India's argument. India has not explained, to the Panel previously or now to the Appellate Body, why any of this evidence is relevant to the obligation under SPS Article 2.2.

57. India omits any discussion of its measure – which are import prohibitions on the entire territory of a country in response to notifications of notifiable avian influenza – in this section and indeed throughout its submission. Specifically, India fails to tie the purported pieces of evidence it references to the measures it maintains. Indeed, the evidence India cites, such as the Australian Risk Assessment, would in fact suggest that India's measures are maintained without sufficient scientific evidence.[71] Moreover, India fails not only to establish the link before the Appellate Body, but also to cite anywhere during the proceedings where it made such a demonstration before the Panel. DSU Article 11, which does not require a Panel to refer to each argument put forward by a Party, would not require a Panel to discuss an argument that is facially incomplete.

2. The Panel Properly Ruled That India Lacked a Risk Assessment for any of the Products Subject to its Measures

58. India claims that the Panel failed to make an objective assessment pursuant to Article 11 by making findings on a claim not argued by the United States.[72] In particular, India asserts that although U.S. claims with respect to Article 2.2 were limited on a product basis to poultry meat

---

69 *EC – Fasteners (AB)*, para. 442.

70 Panel Report, para. 7.313.

71 India, Appellant Submission, pars 41-42.

72 India, Appellant Submission, para. 47.

and eggs, the Panel's findings are not similarly limited.[73] If the United States is discerning India's position accurately, the thrust of it is that the United States argued that India may have breached SPS Article 2.2 not only consequentially as a result of the breaches of Articles 5.1, 5.2, and 5.6, but also independently per the terms of SPS Articles 2.2 itself.[74]

59. India's claim has no merit for four reasons. First, India has to meet the case brought by the United States and address the findings the Panel made, not what India would have preferred the United States to argue and the Panel to accordingly to have decided. India's argument is premised on the contention that the Panel ruled on behalf of the United States with respect to claims not made by the United States. This is incorrect. The Panel found a breach of Article 2.2 (as a consequential to the breach of Article 5.1), and did not go on to address the U.S. additional line of argumentation regarding an independent breach of Article 2.2. In other words, this is not a case where the United States said the independent breach extends to two products and the Panel found it extends to four; this is a case where the finding in question did not occur.[75]

60. Second, the purported limitation India asserts did not happen. With respect to the risk assessment claims that are at issue here, the United States' position was that India failed to base its measure on a risk assessment with respect to *all products*. Indeed, the United States argued in its First Written Submission that one of the deficiencies in a document that India might invoke as a risk assessment – the Summary Document – would be that it *only* addressed poultry meat and eggs:

> Although India bans numerous products, the only two products referenced are poultry meat and eggs, presumably for human consumption. The majority of products that India prohibits, such as hatching eggs, poultry semen, feathers, etc., are not referenced at all. Even with respect to poultry meat and eggs, the Summary Document fails to note any actual likelihood of transmission, including with respect to LPNAI.[76]

Remarkably, India asserted before the Panel that because the United States challenged the Summary Document, *which was deficient for the United States precisely because it addressed these two products only*, that the United States sought to limit its claims to just these two

---

[73] India, Appellant Submission, para. 51.

[74] India, Appellant Submission, para. 52.

[75] Thus, this situation is different from that in the Appellate Body's report in *Chile – Price Band (AB)* where the issue was that Argentina has not put forward any argumentation on a particular provision. Here, there is no dispute that the risk assessment and consequential claims under Articles 5.1, 5.2, and 2.2 were argued by the United States.

[76] United States, First Written Submission, para. 117.

products.[77] Because the United States met its burden with respect to Article 5.1 and 5.2 for the measure as a whole – and thus all products subject to that measure[78] – the consequential breach of SPS Article 2.2 extends likewise.[79]

61. Third, India can cite no authority for the notion that when a Party brings one claim that is more limited in scope that all other claims must likewise be so limited. That is particularly true here because India's claim appears to reflect its continued misunderstanding of the relationship between SPS Articles 5.1, 5.2, and 2.2. In particular, Articles 5.1 and 5.2 are specific applications of SPS Article 2.2. Even had the United States brought a claim that SPS Article 2.2 was breached with respect to poultry meat and eggs independent of any risk assessment claims, why would that result in the risk assessment claims being also narrowed? As SPS Article 2.2 is broader than SPS Articles 5.1 and 5.2, it is perfectly feasible for the United States to make two claims with different products being implicated.

62. Finally, the United States notes that India explicitly claims it is not appealing the panel's findings in response to the preliminary ruling request, which rejected India's argument that the listing of products in the Panel Request rendered the Panel Request vague. Although India may wish to avoid addressing that finding, a finding made by the Panel to the arguments in India's preliminary ruling request is just as applicable to the arguments made by India now. Specifically, WTO dispute settlement is about assessing the consistency of a specific measure against the covered agreements, not a product.[80] Here, the United States established that the measure – India's import prohibitions – is inconsistent with its obligations under SPS Article 5.1, 5.2, and 2.2, and accordingly all the products that are covered by the measure are within the scope of this dispute.

3. The Panel Made an Objective Assessment of the Facts with Respect to the United States' Claim under SPS Articles 5.1 and 5.2.

63. India claims that the Panel misrepresented India's position by quoting India in the Panel Report as stating that India is not required to conduct a risk assessment because its measures conform to international standards.[81] In particular, the Panel wrote that:

> We need to establish whether India has a risk assessment that falls within the definition provided in Annex A(4) of the SPS Agreement. Further to the United States' contention that India has not undertaken

---

[77] India, FWS, para. 148, *see also* United States, Response to Panel Question 11(e) (addressing India's claim that the United States had limited its arguments to only poultry meat and eggs).

[78] India, Appellant Submission, para. 57.

[79] *See* United States, Second Oral Opening Statement, paras. 59-61 (noting other misrepresented arguments that India cites to suggest that U.S. claims were limited.)

[80] Preliminary Ruling, para. 3.92.

[81] India, Appellant Submission, para. 59.

> a risk assessment, and since India had not come forward with one, the Panel asked India to clarify whether it has a risk assessment for its AI measures and, if so, to provide it to the Panel. India did not do so, responding that it was "not required to conduct a risk assessment for measures which conform to the international standards"[82]

India does not claim that the Panel's quotation of an Indian submission is incorrect. In fact, the point quoted by the Panel was also made by India at other times including in India's first and second written submissions:

> As stated before, the United States accused India of maintaining a measure without conducting a risk assessment. It was always India's understanding that having adopted an OIE recommendation, it was not required to further conduct a risk assessment.[83]

> 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.[84]

India's grievance appears to be that that Panel did not repeat its arguments repeatedly throughout its findings.[85] Indeed, India made this same demand during interim review of the Panel's report.[86] There is no requirement under DSU Article 11 that a panel restate a party's arguments in full each time they are referenced. The quote from India is correct and indeed goes to the issue at hand: whether India has a risk assessment.[87] India fails to explain how this can amount to an error, much less an egregious error. India has therefore presented no basis for a DSU Article 11 claim. To the contrary, the Panel properly found that India did not base its measures on a risk assessment because all of the evidence on this point supports that view – including India's own statements.

---

82 Panel Report, para. 7.312 (citing India's response to Panel question Nos. 31 and 59).

83 India, First Written Submission, para. 7.

84 India, Second Written Submission, para. 85.

85 India, Appellant Submission, para. 59-60.

86 Panel Report, para. 6.3 ("We also note that many of India's comments concerning paragraphs of the Interim Report contain requests for the insertion into the Report of lengthy recitations of the arguments and evidence submitted by India in the course of the proceedings.")

87 The United States reference its response to Panel Questions 59-60, which reiterates much of the evidence on that point.

D. India's Request to Complete the Legal Analysis on a Possible Additional Basis for a 2.2 Breach is Not Warranted

64. India requests that the Appellate Body "complete the analysis" to find that India's measures are consistent with SPS Article 2.2. Specifically, this finding under SPS Article 2.2 would *not* be related to the Article 2.2 breaches found by the Panel in this dispute as a consequence of the breaches of Articles 5.1, 5.2, and 5.6. Instead, it would go to an additional line of argument presented by the United States, and not addressed in the panel report, that India's measure breached Article 2.2 because it is maintained without sufficient scientific evidence.

65. The Appellate Body's approach to completing the analysis in past report provides a further basis not to do so in this appeal. Article 17.13 of the DSU states that the "Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel." The Appellate Body has found that in certain appeals, if it has reversed a panel's finding pursuant to Article 17.13 of the DSU, it "may examine and decide an issue that was not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties." But such circumstances are not found in this dispute.

66. Here, the United States presented three lines of argument for why India's measures breached Article 2.2: consequential to an Article 5.1/5.2 breach, consequential to an Article 5.6 breach, and as an independent breach of Article 2.2 as being maintained without sufficient scientific evidence. The Panel found in favor of the United States on two lines of reasoning – consequential to a 5.1/5.2 breach, and consequential to a 5.6 breach – and did not address the third line of U.S. reasoning. If India does not prevail in its claims of error with respect to both the Panel's findings on 5.1/5.2 and 5.6, the Article 2.2 findings will stand. On the other hand, if India were to obtain a reversal of the Panel's findings on both Article 5.1/5.2 and the 5.6 claim, the consequential 2.2 findings would similarly be affected. In either circumstance, an additional finding on the independent Article 2.2 claim would not be necessary to resolve the dispute.[88]

V. INDIA'S CHALLENGE TO THE PANEL'S FINDING THAT INDIA BREACHED SPS ARTICLE 3.1 IS WITHOUT MERIT

67. The Panel found India's AI measures to be inconsistent with SPS Article 3.1 because they are not based on the relevant international standard, Chapter 10.4 of the OIE Code.[89] To the contrary, the Panel found that India's measures and Chapter 10.4 of the OIE contradict one

[88] Were the Panel's Article 2.2 findings based on both the Article 5.1/5.2 and the Article 5.6 claim reversed, then completion of the analysis would assist in resolving the dispute had *the United States* requested it. To be sure, the United States stands behind its position that India's measure is being maintained without sufficient scientific evidence in breach of Article 2.2. However, the Panel's evaluation of that argument would have required the Panel's examination of certain scientific evidence, and it is not certain that the panel made the necessary factual findings to support a legal conclusion. Accordingly, the United States is making no such request to complete the analysis.

[89] Panel Report, paras. 7.273-7.274, 8.1.c(ii).

another.[90] Among the specific findings made by the Panel with respect to the OIE Code are the following three:

- OIE Code Article 10.4.1.10 does not support imposing import prohibitions on poultry products;[91]
- The product-specific recommendations in Chapter 10.4 of the OIE Code provide that poultry products can be imported from countries reporting LPNAI or even regardless of the countries NAI status if the appropriate risk-mitigation conditions are carried out.[92] Accordingly, the product-specific recommendations do not envisage imposing import prohibitions on poultry products;[93] and
- The OIE Code envisages AI measures allows for the possibility of importing from or HPNAI-free zones and compartments rather than only NAI or HPNAI-free countries.[94]

68. The Panel, having concluded that India's AI measures breach SPS Article 3.1 because they are not based on the OIE Code, also rejected India's claim that its measures conform to the OIE Code within the meaning of SPS Article 3.2. Accordingly, India is not able to claim that its measures are entitled to a presumption of consistency with the SPS Agreement and GATT 1994.[95]

69. India challenges the Panel's findings that India is in breach of Article 3.1 on three grounds. First, India claims the terms of reference for the Panel's consultation with the OIE were inconsistent with SPS Article 11.2, DSU Article 13.1, and DSU Article 3.2.[96] In particular, India is asserting it was the Panel's task to interpret the OIE Code in accordance with the Vienna Convention on the Law of Treaties (VCLT) per DSU Article 3.2.[97]

70. Second, India claims the Panel acted inconsistently with DSU Article 11 by delegating the function of making an objective assessment to the OIE. India claims this delegation also breaches DSU Article 3.2.

---

90 Panel Report, para. 7.272.

91 Panel Report, para. 7.239.

92 Panel Report, para. 7.252.

93 Panel Report, para. 7.253.

94 Panel Report, para. 7.263.

95 Panel Report, para. 7.275.

96 *See e.g.*, India, Appellant Submission, paras. 92, 93, 100.

97 *See e.g.*, India, Appellant Submission, paras. 92, 99.

71. Third, India claims that the Panel's conclusions with respect to SPS Articles 3.1 and 3.2 breached DSU Article 11 because they are not supported by the available evidence and accordingly do not constitute an objective assessment of the matter.[98]

72. Following these challenges, India requests the Appellate Body to complete the analysis and find that India's measures are consistent with SPS Article 3.2 or alternatively SPS Article 3.1.[99]

73. As discussed below, each of India's grounds for appeal is meritless. In particular, the Panel's consultation with the OIE was permissible and consistent with the SPS Agreement and the DSU. The Panel, as evident in its findings, clearly did not delegate its responsibilities to the OIE, but rather carefully examined and assessed the text of the OIE Code. Moreover, the relevant evidence confirms that the Panel's conclusions concerning the OIE Code and that India breached SPS Article 3.1 are correct. Finally, there is no need to complete the analysis because the Panel's findings are correct and, in any event, India is not able to establish that there are sufficient undisputed facts in order for the analysis to be completed in the manner it seeks.

A. The Panel's Examination of the OIE Code, Including Its Consultation with the OIE, is Not Inconsistent with SPS Article 11.2 and DSU Articles 13.1 and 3.2.

74. India asserts that the Panel acted inconsistently with SPS Article 11.2 and DSU Article 13.2 because the "Panel's terms of reference to the OIE were beyond the scope of consultation" provided for in those provisions.[100] In particular, India asserts that it was legal error for the Panel to include in its consultations with the certain questions regarding the proper interpretation of the OIE Code. India's arguments, however, have no basis in the text of the WTO Agreement.

75. Articles 11.2 of the SPS Agreement and Article 13.2 of the DSU provide as follows:

> SPS Article 11.2: In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.
>
> DSU Article 13.2: Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a

98 *See e.g.*, India, Appellant Submission, paras. 92, 125.

99 *See e.g.*, India, Appellant Submission, paras. 134-135.

100 India, Appellant Submission, para. 93.

> panel may request an advisory report in writing from an expert review group.

76. Quite apart from the appropriateness of a given question by a panel, or whether a conclusion could properly be drawn from an answer to a given question, neither of these provisions on their face limit the questions that a panel may pose to an international standard setting body. Rather, both provisions afford a considerable discretion to a panel to seek relevant information. Article 13.2 of the DSU provides that a panel may seek information from any relevant source. Article 11.2 of the SPS Agreement provides that, where a dispute involves scientific and technical issues, panels may seek advice, including from a relevant international organization. The present dispute – involving appropriate AI control measures – certainly involves scientific and technical issues, and the OIE is clearly a relevant international organization on these matters.

77. India argues that under Article 11.2, the questions posed to the international organization must be limited to scientific and technical issues. The United States certainly agrees that these would be appropriate issues for panel questions. And as discussed below, India has not shown that the panel's questions went beyond those matters. But the text of Article 11.2 does *not in fact* establish that a panel would err if it issued questions on other issues. First, the authority of a panel under DSU Article 13.2 is not limited in an SPS dispute by SPS Agreement Article 11.2. Therefore, there would be no error for a panel in an SPS dispute to issue questions relating to issues other than scientific and technical issues. Second, Article 11.2 encourages certain questions when the dispute involves scientific and technical issues – and the present dispute certainly does. Once the trigger in the first clause of Article 11.2 is met, the provision encourages seeking "advice". The provision itself does not limit the information a panel may seek generally or from an international organization.

78. The Appellate Body has recognized the full scope of Panel's authority to investigate matters and obtain information in order to carry out its assessment:

> {T}he DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU to "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* …".[101]

[101] *US – Shrimp (AB)*, para. 106 (emphasis original).

The provisions referenced by India – SPS Article 11.2 and DSU 13.2 – are among the provisions that provide a panel with "significant investigative authority."[102]

79. And although all of the Panel's questions in this dispute concerned legal and technical matters, DSU Article 13.2 provides no such limitation. For example, a panel could seek views on legal matters – indeed, Article 13.2 provides a panel authority broader authority to seek information from *amicus curie*, the submission of which are likely to include views on legal issues.[103]

80. India also argues that the OIE Code is a "treaty," that its interpretation must be governed by principles of public international law reflected in the Vienna Convention, and that it would be improper to ask an international organization any questions regarding the legal interpretation of a treaty. This argument is fundamentally flawed for two reasons. First, India simply asserts that the OIE Code is a treaty – without any explanation. This argument has no basis – the OIE code is an instrument promulgated by an international organization, not a treaty.[104]

81. Second, India cannot establish why it would be inconsistent under the WTO Agreement for a panel to seek advice on the proper interpretation of a "treaty". Whether that advice was used properly in the course of the dispute might be an issue in such a hypothetical situation, but India has failed to identify how the initial act of seeking advice would be inconsistent with any provision of the WTO Agreement.

82. Leaving these somewhat theoretical points behind, in the circumstances of this dispute, the Panel has done exactly what Article 11.2 of the SPS Agreement suggests: the Panel sought

---

[102] *US – Continued Suspension (AB)*, para. 439.

[103] *US – Shrimp (AB)*, paras. 107-110.

[104] SPS Agreement, Annex A, para. 3 provides the definition for International Standards, guidelines, and recommendations:

> (a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;
>
> (b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;
>
> (c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and
>
> (d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.

legal and technical advice from the OIE, including with respect to the proper interpretation of the standard promulgated by the OIE. Indeed, the Appellate Body has found that determining the existence and content of international standards are *questions of fact*, not questions of law.[105]

83. Although the United States believes that the logic of the Appellate Body's finding that determining international standards are factual questions is self-evident, the United States notes three other points that further establish that the interpretation of a standard such as the OIE Code is inherently a factual query.

84. First, it is consistent with how drafters of the SPS Agreement understood international standards would operate under the Agreement. They were fully aware based on representations made by the relevant standard setting organizations that the standards rather than treaty obligations were actually *scientifically based recommendations*:

> As has been stressed repeatedly, the International Zoosanitary Code takes the form of recommendations drafted on the basis of solid scientific information, which offer a variety of strategies for importing countries depending on the sanitary situation of the exporting country and the type of product traded.[106]

The United States emphasizes the reference to science because that is the basis for how these recommendations are formulated. They are not the result of a political negotiation but a synthesis of scientific awareness, which of course means that understanding these standards requires a factual rather than legal understanding.

85. Second, the evidence put before the Panel by the United States in this dispute confirms that this situation – the OIE Code consisting of scientific recommendations – continues to the present:

---

[105] *EC – Hormones (AB)*, para 132 ("The determination of whether or not a certain event did occur in time and space is typically a question of fact; for example, the question of whether or not Codex has adopted an international standard, guideline or recommendation on MGA is a factual question.").

[106] Negotiating Group on Agriculture: Working Group on Sanitary and Phytosanitary Regulations and Barriers, Comments by the International Office Of Epizootics (OIE), Meeting of 2-3 April 1990, MTN.GNG/NG5/WGSP/W/19 (May 4, 1990), p.1 (emphasis added); *see also* Negotiating Group on Agriculture: Working Group on Sanitary and Phytosanitary Regulations and Barriers, Summary Of The Main Points Raised At The Third Meeting Of The Working Group On Sanitary And Phytosanitary Regulations And Barriers – Note by the Secretariat 22 Sept. 1989, ("The representative of OIE briefly described the steps towards harmonization undertaken by that organization, and its work in identifying different methodologies which had equivalent results. He noted that more precision was required with regard to the role his organization was expected to play in terms of the GATT objectives, so that it could develop an appropriate work programme.")

> The recommendations in each of the disease chapters in Volume II of 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. Correctly applied, OIE recommendations provide for trade in animals and animal products to take place with an optimal level of animal health security, based on the most up to date scientific information and available techniques.[107]

Indeed, as the United States noted to the Panel, the User's Guide to the Code explicitly states that the "purpose of this guide is to assist Veterinary Authorities of OIE Members to use the OIE Terrestrial Animal Health Code … in the application of animal health measures to international trade in animal and animal products."[108] It is thus a technical document as opposed to an agreement in which states negotiates their respective rights and obligations.

86. Third, India's currently stated position that the interpretation of the OIE Code is a matter of treaty interpretation is not consistent with India's earlier positions in this dispute. Initially, India provided technical materials to help advance its view of the OIE Code. For example, in its First Written Submission, India made no reference to the Vienna Convention on the Law of Treaties with respect to the OIE Code, but instead cited multiple reports from the OIE Terrestrial Animal Health Standards Commission to argue in favor of its interpretation.[109] Only after it became apparent that the Panel might request technical assistance from the OIE did India argue that the Vienna Convention governed the OIE Code, and on this basis argue that that there was no need to consult with the OIE.[110]

87. Thus, India's arguments, which are premised on the notion that the examination of an international standard is exclusively a legal exercise to be performed by the Panel, are erroneous *ab initio*.

88. Finally, India fails to explain what principle divides the questions posed by the Panel into permissible technical (and thus purportedly proper) and other into prohibited interpretative (and

---

[107] United States, Response to Panel Question 6, para. 35, quoting OIE User's Guide (Exhibit US-117), p. 1.

[108] United States, Response to Panel Question 6(c), para. 35, quoting Exhibit US-117.

[109] India, First Written Submission, paras. 127-130, IND Exhibits 64, 65, & 67.

[110] *See* India, Letter to Stuart Harbinson dated July 11, 2013, response to Panel Q. 1a concerning experts. ("An analysis of whether India's measure conforms to the OIE Code will require that the OIE Code is interpreted in accordance with the rules of interpretation under the Vienna Convention on the Law of Treaties …") Notably, India saw no irony with making that statement and noting just a page earlier that the OIE Code is essentially a scientific document ("At the outset India believes that the scientific evidence presented by the United States simply provides factual background on the nature [sic] disease. This scientific evidence does not for instance derogate from the science underlying the OIE Code. It only reconfirms the recommendations already existing in the OIE Code.")

thus breaching these obligations), and why this results in the Panel acting contrary to SPS Article 11.2 and DSU Article 13.2.[111] The following example illustrates the incoherence of India's approach.

Question 10: Technical Per India[112]	Question 11: Interpretative per India
1. This question relates to the meaning of Articles 1.2.3.6), 10.4.1.1) and 10.4.1.10) of the Terrestrial Code, quoted below, in relevant part, for ease of reference: *** Bearing in mind the above recommendations, please respond to the following questions: a. Please explain the purpose behind Article 10.4.1.10) of the Terrestrial Code. b. What categories of AI must be notified to the OIE? Is there any difference among the three abovementioned editions of the Terrestrial Code, i.e. the 20th to 22nd editions?	In March 2007, the OIE Terrestrial Animal Health Standards Commission (TAHSC) noted as follows: > The intention is to restrict the reporting of low pathogenic notifiable avian influenza (LPNAI) and HPNAI to poultry only, for purpose of international trade. The reporting of occurrences of HPNAI in birds other than poultry is required for the purpose of global surveillance for avian influenza but is not intended to lead to immediate bans on trade. The imposition of inappropriate (immediate) trade bans following reports of HPNAI in birds other than poultry discourages reporting and hinders global surveillance for avian influenza.[113] Similarly, in September 2007, the TAHSC stated as follows: *** Furthermore, the OIE Annual Report of 2007 reads as follows: *** In this context, kindly respond to the following questions: a. What is the purpose of the reporting requirements for LPNAI in poultry?

111 India, Appellant Submission, para. 98.

112 Questions from the Panel to the World Organisation for Animal Health (OIE) (October 18, 2014).

113 India, First Written Submission, paras. 128-130, and Exhibit IND-65.

	b. In light of the TAHSC reports mentioned above, please explain what is meant by requiring reporting of LPNAI and HPNAI in poultry for "trade purposes", as opposed to reporting HPNAI in birds other than poultry, which is "not intended to lead to immediate bans on trade." c. When an exporting country reports LPNAI in poultry, what recommendations to importing countries does the Terrestrial Code contain for "trade purposes"?

What India calls the technical question – which coincidentally concerns a provision India argued supported its position[114] – is asking directly about the meaning and operation of a particular provision in the OIE Code. What India calls an interpretative question is asking about statements made at meetings by the OIE's standards commission and what applicable recommendation might exist with respect to a particular scenario. India does not explain why the latter question that concerns technical meetings is somehow more "interpretative" of the OIE Code than the former which directly asks about a provision in the OIE Code.

89. In sum, for the reasons set out above, India provides no explanation, legal or otherwise, for why the Panel's questions to the OIE Secretariat were inconsistent with SPS Article 11.2 or DSU Article 13.2

1. The Panel Acted Consistently with DSU Article 3.2

90. India claims the Panel breached DSU Article 3.2 because the Panel did not interpret the OIE Code in accordance with customary rules of interpretation of public international law. As explained *infra* in addressing India's Article 11 claim on the Panel's assessment of this claim, India has not – and still does not – explain why interpreting the OIE Code in accordance with customary rules would result in any different outcome than what the Panel found. In particular, there would still be no text of the OIE Code recommending the imposition of import prohibitions. But with respect to the immediate legal question of whether consulting with the OIE could – as India argues – breach DSU Article 3.2, the United States begins its analysis with the text of the provision. DSU Article 3.2 states the following:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members *under the covered agreements*, and *to*

[114] India, First Written Submission, para. 248.

> *clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law*. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.[115]

Under the plain text of DSU Article 3.2, the customary rules of interpretation apply to interpreting the *covered agreements*. The covered agreements do not of course include the OIE Code.[116] Accordingly, India has no basis for any claim of error under Article 3.2 of the DSU. And the text of Article 3.2 does not itself impose an obligation that can be breached for failure to apply customary rules of interpretation of public international law. Rather, an adjudicative body may err in its interpretation of a provision of the covered agreements if it fails to read that provision in accordance with customary rules. That is, the error would be one of interpretation of a substantive provision, not a procedural breach of the interpretive approach reflected in Article 3.2.

B. The Panel's Assessment of Findings with Respect to its SPS Article 3.1 and 3.2 Findings are Consistent with DSU Article 11

91. India's claims concerning the objectivity of the Panel's assessment ignores the basic clarity of the evidence before the Panel. The United States reiterates an observation it made during the Panel proceedings regarding the measure at issue and the relevant international standards:

> On one hand, S.O. 1663(E) is a brief, one page notice that imposes blanket prohibitions on an entire country. The prohibition applies irrespective of whether the outbreak is of HPNAI or LPNAI. And the prohibition makes no distinctions among the affected products. On the other hand, the OIE Code includes a nearly 20 page avian influenza chapter that provides particularized recommendations that take into account the disease situation of the exporting country, zone, or compartment and the precise product in order to arrive at a mitigation measure that allows for trade with an "optimal level of security." Unlike S.O. 1663(E), the OIE Code does not recommend the imposition of a blanket import prohibition when a country reports Notifiable Avian Influenza.[117]
>
> ***
>
> if India's position was correct, the OIE recommendations for avian influenza could be turned into a single sentence: impose a

---

115 Emphases added.

116 DSU Appendix 1.

117 U.S. Second Oral Opening Statement, para. 6.

> prohibition on a country as soon as it reports notifiable avian influenza.[118]

In short, the United States explained that where a measure has a form and operation wholly disparate from, and contradictory to, an international standard, the measure cannot be said to be based upon that standard. That was the crux of the U.S. challenge to India's measures under SPS Article 3.1, and was fully supported by the Panel's findings.

92. With that insight, the United States in order to demonstrate the objectivity of the Panel's analysis explains (i) the issue before the Panel; (ii) the relevant findings made by the Panel on that issue that India argues is incompatible with an objective assessment of the matter; and (iii) and the evidentiary basis that underpins the Panel's findings.

93. The question as correctly framed by the Panel was as follows:

> The question before the Panel is whether India's AI measures are inconsistent with Article 3.1 of the SPS Agreement, as claimed by the United States. In particular, the Panel must assess whether India's AI measures are "based on" a relevant international standard, guideline, or recommendation pursuant to Article 3.1 of the SPS Agreement. In response, India argues that its AI measures "conform to" the Terrestrial Code and that, accordingly, their consistency with both the SPS Agreement and the GATT 1994 is to be presumed pursuant to Article 3.2 of the SPS Agreement.[119]

In short, the question as framed by the Panel was correct: whether the United States has established that India breached SPS Article 3.1 because India's measures were so divergent with the OIE Code they were not based upon it, or whether India was correct in arguing that its measure conformed to the OIE Code.

94. While there are many findings made by the Panel with respect to the OIE Code, the United States highlights three that are particularly salient to the issue as evidenced by the Parties' disputing contentions regarding them.

95. *First*, the Panel made a finding regarding Article 10.4.1.10 of the OIE Code, which India asserted as calling for the imposition of import prohibitions as soon as a country reported an outbreak of notifiable avian influenza.[120] The Panel found as follows with respect to that issue:

> Paragraph 7.238. The explanations provided by the OIE resonate with the argument of the United States that "[w]here the [Terrestrial] Code recommends prohibitions, it explicitly so provides". We recall

---

118 *Id.*, para. 8.

119 Panel Report, para. 7.192.

120 *See e.g.*, Panel Report, para. 7.234, India, First Written Submission, para. 138.

> that, in response to a question from the Panel, the OIE agreed with this statement and noted that indeed "any restrictions recommended would be explicitly provided in the Terrestrial Code chapters, including in Chapter 10.4".
>
> Paragraph 7.239: Accordingly, on the basis of the wording of Article 10.4.1.10 as well as the explanations provided by the OIE, we find no basis for the *a contrario* interpretation of Article 10.4.1.10 advocated by India. We therefore conclude that Article 10.4.1.10 of the Terrestrial Code does not envisage the imposition of an import prohibition with respect to poultry products.

The evidence for this position, independent of the OIE's comments and documentation, included (1) the text of the provision itself:

> A Member should not impose immediate bans on the trade in poultry commodities in response to a notification, according to Article 1.1.3. of the Terrestrial Code, of infection with HPAI and LPAI virus in birds other than poultry, including wild birds;[121] and

(2) the United States also provided an example in the OIE Code where restrictions are explicitly provided:

> Veterinary Authorities of countries free from avian chlamydiosis may prohibit importation or transit through their territory, from countries considered infected with avian chlamydiosis, of birds of the Psittacidae family.[122]

In other words, this evidence showed that when the OIE Code calls for bans, it can state so plainly.

96. *Second*, the Panel made findings regarding the product-specific recommendations of the OIE Code:

> Paragraph 7.251: Hence, it appears to us that the OIE agrees with the approach to the interpretation of the product-specific recommendations in Chapter 10.4 of the Terrestrial Code advocated by the United States. We recall that the OIE agreed with the statement of the United States that where the Terrestrial Code recommends prohibitions, it explicitly so provides. Indeed, we do not find any recommendations for import prohibitions in Chapter 10.4 of the Terrestrial Code. We have examined the text of each of the product-specific recommendations in Chapter 10.4 outlined in

---

121 Panel Report, para. 7.239.

122 Panel Report, para. 7.238, n. 534

> the table in paragraph 7.230 above and we find no basis for the interpretation of the product-specific recommendations advocated by India.
>
> Paragraph 7.252: We have found a number of product-specific recommendations in Chapter 10.4 that envisage allowing the importation of relevant poultry products from countries reporting LPNAI or even regardless of the countries' NAI status, provided that appropriate risk mitigation conditions are fulfilled. In particular, Articles 10.4.8 (day-old live poultry), 10.4.11 (hatching eggs of poultry), 10.4.14 (eggs for human consumption), 10.4.17 (poultry semen) and 10.4.19 (fresh meat of poultry) provide for the risk mitigation conditions necessary for the importation of the products concerned from a HPNAI-free country, zone or compartment, which by definition might not be LPNAI-free. Articles 10.4.6 (live birds other than poultry), 10.4.9 (day-old live birds other than poultry), 10.4.12 (hatching eggs from birds other than poultry), 10.4.15 (egg products of poultry), 10.4.18 (semen of birds other than poultry), 10.4.20 (meat products of poultry), 10.4.21 (products of poultry origin, other than feather meal and poultry meal, intended for use in animal feeding, or for agricultural or industrial use), 10.4.22 (feathers and down of poultry), 10.4.23 (feathers and down of birds other than poultry) and 10.4.24 (feather meal and poultry meal) contain the risk mitigation conditions for the importation of the products concerned regardless of the NAI status of the country of origin.
>
> Paragraph 7.253: On the basis of the foregoing, we conclude that the product-specific recommendations in Chapter 10.4 of the Terrestrial do not envisage, either explicitly or implicitly, the imposition of import prohibitions with respect to poultry products.

Again, as is evident, the Panel's analysis of evidence clearly focused on, and incorporated, the text of the OIE Code provisions themselves.

97. *Third*, the Panel made findings that the OIE Code's recommendations could be applied on the basis of zones and compartments in additions to countries.

> Paragraph 7.258: In addition to these general provisions, we also observe that Chapter 10.4 includes numerous product-specific recommendations foreseeing the measures to be applied by importing countries depending on the NAI status of the country, zone or compartment from which the products originate. For instance, Articles 10.4.5 (live poultry (other than day-old poultry)), 10.4.7 (day-old live poultry), 10.4.10 (hatching eggs of poultry), 10.4.13 (eggs for human consumption), 10.4.16 (poultry semen) and 10.4.19 (fresh meat of poultry) provide that the importation of the

> products concerned may take place not only from a NAI-free country, but also from a NAI-free zone or compartment. In addition, Articles 10.4.8 (day-old live poultry), 10.4.11 (hatching eggs of poultry), 10.4.14 (eggs for human consumption), 10.4.17 (poultry semen) and 10.4.19 (fresh meat of poultry) provide that the importation of the products concerned may take place not only from a HPNAI-free country, but also from a HPNAI-free zone or compartment, which would mean a zone or compartment which is not necessarily free from LPNAI.
>
> Paragraph 7.259: In our view, the text of Chapter 10.4 indicates that the recommendations contained therein are not only intended for country-wide purposes; rather, they are intended to also apply to zones and compartments.

These findings per the Panel are made on the basis of the Panel's scrutiny of the OIE Code's text. With the findings and evidentiary basis understood, the United States addresses each of India's Article 11 challenges.

1. India has No Basis for its Article 11 Claim that the Panel Delegated Its Responsibility to Conduct an Objective Assessment

98. India's first Article 11 claim relating to the Panel's findings on Article 3.1 is that the Panel improperly delegated to the OIE its responsibility to conduct an objective assessment of the matter. India has no basis for this claim. Indeed, it fails for the following four reasons.

99. First, as discussed above with respect to India's separate legal claim related to the Panel's consultation with the OIE, India has not established that the Panel committed any error in consulting with the OIE regarding the interpretation of the OIE Code. Indeed the propriety of the Panel seeking such consultation is confirmed by SPS Article 11.2 which explicitly encourages a Panel, in a dispute involving scientific and technical issues to obtain views from relevant international organizations.[123]

100. Second, based on a plain reading of the panel report, the Panel fully engaged with all the evidence on the record – most notably the text of the OIE Code itself – and reached its own conclusions. India asserts that he Panel "simply accepted the interpretation provided by the OIE" with respect to (i) Article 10.4.1.10, (ii) the product specific recommendations of the OIE Code, and (iii) the Panel's analysis of zones and compartments"[124] To the contrary, however, a

---

[123] *Japan – Agricultural Products II*, para. 127 ("Article 11.2 of the SPS Agreement explicitly instructs panels in disputes under this Agreement involving scientific and technical issues to "seek advice from experts".).

[124] India, Appellee Submission, para. 104-106.

review of the Panel's actual findings on these matters – as explained above – shows that for each of those findings the Panel made its own analysis focusing on the text of the OIE Code.[125]

101. Third, contrary to the implication of India's argument, there is nothing wrong with the fact that the Panel's discussion references the OIE's comments. Indeed, India does not explain why it expected the Panel *not* to refer to the OIE's views after the OIE furnished them to the Panel. India's reference to the Appellate Body's decision in *India – Quantitative Restrictions* is unavailing; in fact, the findings in that dispute illustrate the weakness of India's arguments here. In *Quantitative Restrictions*, India challenged the panel's consultation process with an international organization (the IMF), and the Appellate Body found that India not established any error by the panel. The Appellate Body explained:

> The Panel gave considerable weight to the views expressed by the IMF in its reply to these questions. However, nothing in the Panel Report supports India's argument that the Panel delegated to the IMF its judicial function to make an objective assessment of the matter. A careful reading of the Panel Report makes clear that the Panel did not simply accept the views of the IMF. The Panel critically assessed these views and also considered other data and opinions in reaching its conclusions.[126]

The current dispute is similar in that a careful reading of the Panel report shows that the Panel "did not simply accept" the views of the OIE.

102. Finally, India fails to meet the standard for a valid Article 11 claim of error; that is, India has not demonstrated how the Panel committed an egregious error with respect to the evidence or that the Panel's objectivity was compromised. India appears to try and make the requisite showing by claiming that the Panel failed to appropriately assess India's argument that purportedly found inconsistencies in the OIE's responses.[127] India cannot not identify which, if any, alleged inconsistencies it has in mind with respect to the OIE's answers to the Panel's questions[128] and how these supposed inconsistencies would affect the objectivity of the Panel's assessment, particularly since the Panel examined the text of the Code of itself.

---

[125] Indeed, this is presumably what India wants since it demanded that the Panel interpret the OIE Code in accordance with the Vienna Convention.

[126] *India – Quantitative Restrictions (AB)*, para. 149.

[127] India, Appellee Submission, paras. 103-104.

[128] In fact, India does not even bother to cite the OIE Responses to note which, if any, responses were specifically problematic or not susceptible to consideration by the Panel.

2. India's Second Article 11 Claim Fails because the Evidence Cited by India Was Irrelevant to the Issues before the Panel

103. India's second Article 11 claim relating to the Panel's findings on Article 3.1 alleges that the Panel contravened Article 11 by disregarding 3 pieces of evidence. Before proceeding to address the pieces referenced by India, the United States recalls the terms of reference for the Panel:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS430/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[129]

In short, these standard terms of reference provided the Panel authority to examine the matters in the U.S. Panel Request, which concerned India's measures – not measures maintained by Members throughout the world. With that consideration in mind, the United States addresses the three pieces of evidence upon which India bases its claim of error under Article 11.

104. First, India claims the Panel ignored the practice of other countries with respect to AI control measures.[130] This argument fails as an initial matter because the measures adopted by other countries do not necessarily reflect their view of the OIE Code. India's argument is premised on the implicit assumptions that other Member's control measures are not based on a risk assessment (which may justify the adoption of a measure different than that recommended by the OIE Code), and that such measures reflect are consistent with Article 3 of the SPS Agreement. But India presents no bases for these assumptions. Indeed, India cites to Australia's practice, but Australia in this dispute has disagreed with how India has interpreted its documents and measures.[131] Further, it is conceivable that some Members have both an incorrect view of the OIE Code and as a result, have adopted WTO-inconsistent measures. However, it was not the mandate of the Panel to make determinations with respect to other Member's measures. Rather, the Panel's task was to determine the consistency of India's measures.

105. Second, India claims that the Panel ignored a statement made by Australia before the Panel concerning its measures in which it said they conform to the OIE Code and only allow importation of chicken meat from a country that is free of both HPNAI and LPNAI.[132] The same points made by the United States to the practices of other countries apply equally here. India is not in a position to speak for Australia; there is no reason as to why Australia's views regarding

---

129 WT/DS430/4, para. 2

130 India, Appellee Submission, paras. 109-110.

131 Australia, Oral Statement ("However the conclusions drawn by India from the Australian risk assessment are a misreading of the document.")

132 India, Appellee Submission, paras. 111-114.

the OIE Code are dispositive (assuming India properly stated them); and the Panel was not in a position to adjudicate the merits of Australia's measures. Moreover, India does not claim that it maintains the same practices or measures that Australia does. Thus, India fails to explain why the Panel needed to discuss this matter any further.

106. Third, India argues that the Panel disregarded India's argument that the United States "impliedly" recognized that trade restrictions could be imposed by bringing an SPS Article 6 claim. According to India, the reason the United States seeks a regionalization claim is because it recognizes that import prohibitions are proper but wants them applied in a regionalized fashion.[133] This argument, however, has no basis in logic. In particular, it forgets that one of the findings made by the Panel was that the OIE Code actually provides that the product specific recommendations within can be applied on a zone or compartment basis.[134]

107. The following example regarding eggs illustrates this point. The United States recalls the following OIE Code provisions governing the importation of eggs from NAI-free and HPNAI free countries, zones, or compartments.

S.O. 1663(E), para. (1)(ii)(e): eggs and egg products (except specific pathogen free eggs)
Article 10.4.13 **Recommendations for importation from a NAI-free country, zone or compartment** <u>For eggs for human consumption</u> Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the eggs were produced and packed in a NAI-free country, zone or compartment; 2) the eggs are transported in new or appropriately sanitized packaging materials.
Article 10.4.14 **Recommendations for importation from a HPNAI-free country, zone or compartment** <u>For eggs for human consumption</u>

133 India, Appellee Submission, paras. 116-117.

134 Panel Report, para. 7.263 ("we conclude that the Terrestrial Code envisages that AI measures allow for the possibility of importing from NAI or HPNAI-free zones and compartments; and not only from NAI or HPNAI-free countries.")

> Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:
>
> 1) the eggs were produced and packed in a HPNAI-free country, zone or compartment;
>
> 2) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.);
>
> 3) the eggs are transported in new or appropriately sanitized packaging materials.

As indicated above, when the territory in question is HPNAI free (meaning it has detected LPNAI), an additional condition is imposed with respect to safe trade when compared to when the territory is completely free of NAI. Under a regionalized system, it could be the case that a country has multiple zone with different statuses, meaning that the burden can be reduced in those zones or compartments that are completely free of NAI.

108. Thus, India has failed to show why any of the foregoing pieces of "evidence" are so material that it was an error for the Panel to disregard it.

3. The Panel Did Not Act Inconsistently with DSU Article 3.3

109. In what may be a separate Article 11 claim of error, or perhaps intended to support India's other Article 11 claims, India reiterates its assertion that the Panel's analysis was somehow inconsistent with DSU Article 3.3. The United States has explained above that India's argument has no merit, because the OIE Code is not a covered agreement under DSU Article 3.3. The only additional note that the United States makes is that contrary to India's assertion, the OIE Code could not be context to the SPS Agreement per the VCLT. As India notes, context may include agreements made by parties to a treaty as part of the conclusion of that treaty. The 22nd volume of the OIE, which the Panel found to be the relevant international standard was concluded in 2013.[135] It obviously was not part of the conclusion of the Uruguay Round Agreements.

4. The Panel's Conclusion Concerning the OIE Code is Supported by the Available Evidence

110. India brings yet another Article 11 challenge – without distinguishing it from prior claims – that the Panel's findings are not supported by evidence. As noted as the outset, the Panel's conclusion is supported by evidence including most importantly the plain text of the OIE Code itself. The United States further notes that in its submissions, the United States provided

[135] Panel Report, para. 7.210.

additional information that directly touched upon the Code such as the User's Guide to the OIE Code,[136] Reports of the OIE,[137] scholarly articles,[138] and statements by OIE officials.[139]

111. India's argument on this Article 11 claim focuses on three pieces of evidence in the panel record. None of these pieces of evidence in any way undermine the Panel's findings on the proper meaning of the OIE Code.

112. First, India relies on a statement made in a letter from a U.S. official to India requesting India to reconsider its measures, in part because they imposed restrictions for more than 3 months provided for in the OIE Code.[140] India argues that this letter establishes the opinion of the United States that the OIE Code warrants import prohibitions for a period of three months after an outbreak of NAI.[141] As an initial matter, the United States does not agree with how India is reading the documents. But regardless, a request to allow a trade accommodation does not suggest that a Member is asserting a particular interpretation of either the OIE Code, or the WTO Agreement.

113. Second, India points to various U.S. exhibits that, according to India, discuss the purported legitimacy of import barriers on account of HPAI. What India does not claim is that they documents are opining or relevant to the OIE Code. Moreover, India fails to recognize that these documents would not be inconsistent with U.S. positions or the Panel's findings on the OIE Code. Indeed, the United States made clear in its First Written Submission that countries are entitled to control for both HPAI and LPAI.[142] But the issue here is whether an import prohibition on all products, rather than less restrictive control measures, can be said to be based on the OIE Code. And, as explained and confirmed by the evidence, what the OIE Code provides is that there are less restrictive measures than an across-the-board ban on all products that ensure safe trade. Further, India does not suggest that any of these purported exhibits go to the interpretation of the OIE Code or that India even presented them to the Panel to make such a case.

---

136 Exhibit US-117.

137 See e.g., US FWS, para. 58, Exhibit US-123

138 See e.g., Exhibit US-48

139 Exhibit US-119.

140 India, Appellant Submission, para. 126-127.

141 The OIE Code provides that a party can be considered free of a disease after 3 months have passed and certain other conditions are satisfied. Panel Report, para. 7.257 citing OIE Code Articles, 10.4.3 and 10.4.4

142 U.S. FWS para. 25 ("WTO Members have a legitimate interest in seeking to protect their poultry stocks from HPAI exposure – and as discussed below the milder disease known as LPAI as well.")

114. Finally, India points to two particular provisions of the OIE Code, and related responses by the OIE in its advice to the Panel: Article 10.4.19 & 10.4.20.[143] These provisions provide as follows.

Article 10.4.19

Recommendations for importation from either a NAI or HPNAI-free country, zone or compartment

For fresh meat of poultry

Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the entire consignment of fresh meat comes from poultry:

1) which have been kept in a country, zone or compartment free from HPNAI since they were hatched or for at least the past 21 days;

2) which have been slaughtered in an approved abattoir in a country, zone or compartment free from HPNAI and have been subjected to ante- and post-mortem inspections in accordance with Chapter 6.2. and have been found free of any signs suggestive of NAI.

Article 10.4.20

Recommendations for the importation of meat products of poultry

Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:

1) the commodity is derived from fresh meat which meet the requirements of Article 10.4.19.; or

2) the commodity has been processed to ensure the destruction of NAI virus in accordance with Article 10.4.26.;

AND

3) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus.

India asserts that the OIE Responses note that if a country cannot fulfill the requirements of Article 10.4.19 because it is not HPNAI free, then it could export processed products per Article 10.4.20. From this, India jumps to the conclusion that "a country would face trade restrictions if

[143] India, Appellant Submission, para. 132.

requirement of HPNAI freedom is not fulfilled."[144] But this conclusion is unwarranted: neither the OIE code provision, nor the OIE in its advice to the panel, supports India's position. India's argument is also based on a selective quotation from the OIE response. The OIE response also includes the following explanation:

> The provisions of Articles 10.4.19 and 10.4.20 provide a basis for safe trade in poultry meat from an exporting country that is free from HPNAI but not free from NAI (i.e the status for LPNAI is unknown, or LPNAI has been reported).

In other words, the OIE Code is saying that trade in the relevant products conducted by the methods in these OIE recommendations is safe per the relevant science. As noted in the Panel Report, that was the position made by the United States, which the OIE confirmed.[145] That is not the same as saying the OIE is recommending the imposition of import prohibitions.

115. In conclusion, India's final challenge under DSU Article 11 is also without merit. India has failed to engage the findings made by the Panel and the evidentiary support for them, and has not shown that the Panel disregarded any relevant evidence. Moreover, India has most certainly not shown any error that would meet the Article 11 standard of calling into question the Panel's objectivity.

VI. INDIA APPEAL OF THE PANEL'S FINDINGS UNDER ARTICLE 2.3 OF THE SPS AGREEMENT IS WITHOUT MERIT.

116. The Panel's report concludes, consistent with the arguments made to the Panel by the United States, that India's AI measures breach Article 2.3 in three different ways.[146] India's appeal – which is without merit – addresses only one of these bases for the finding of a breach of Article 2.3. Accordingly, as India has not even appealed the other two bases for the Panel's finding of a breach, India's appeal could not result in reversal of the Panel's ultimate conclusion that India's AI measures breach Article 2.3.

117. With respect to the first sentence of Article 2.3,[147] the Panel agreed with the U.S. position[148] that India engages in two forms of discrimination against imported products and in favor of domestic products. First, under S.O. 1663(E), if there is an NAI outbreak anywhere in the exporting country, the importation of the covered product into India is prohibited, but India

---

144 India, Appellee Submission, paras. 131-133.

145 Panel Report, para. 7.246, 7.250-7.251.

146 Panel Report, paras. 7-335-7.478.

147 Article 2.3, first sentence, provides: "Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members."

148 *See* Panel Report, para. 7.472.

permits the sale of *domestic* products in India following an outbreak of NAI, provided that the product originates outside a zone within 10 km of the location where NAI is detected.[149] Second, India prohibits the importation of the covered products if LPNAI is detected in the exporting country, whereas India does not maintain surveillance sufficient to detect LPNAI in India's *domestic* poultry.[150] Indeed, the Panel found that the United States had established the three elements of a claim under Article 2.3, first sentence, with respect to each of the two forms of discrimination that the United States identified in India's measures.[151]

118. In addition to concluding that India has breached the first sentence of Article 2.3, the Panel report finds that India's measures constitute a disguised restriction on international trade, in breach of the second sentence of Article 2.3.[152] This represents a third manner in which India's AI measures are in breach of Article 2.3.

119. On appeal, India has raised a series of arguments which relate only to the second of the three ways that the Panel found India's measures to be in breach of Article 2.3 – *i.e.*, that India prohibits the importation of the covered products if LPNAI is detected in the exporting country, whereas India does not maintain surveillance sufficient to detect LPNAI in India's domestic poultry. In particular, India raises a series of challenges under Article 11 of the DSU styled, not as challenges to the Panel's analysis, but as challenges to its interaction with the three individual experts that it appointed to assist the Panel with scientific and technical questions related to India's domestic AI surveillance regime and disease status.[153] These arguments reflect both key misunderstandings of what the Panel did and of the standard set forth in Article 11 of the DSU.

120. India asserts that the OIE Code renders contrary to Article 11 of the DSU the Panel's decision to consult with the individual experts about whether the record evidence supports India's assertion of LPNAI-freedom.[154] Yet India fails to establish any basis to conclude that what the OIE Code provides determines a Panel's duty under Article 11 for purposes of WTO dispute settlement. The OIE Code applies to OIE Members, not panels. And India fails even to establish the alleged factual basis for its claim, that is, that the Panel had done anything inconsistent with the Code.

121. India argues that the Panel's questions to the experts improperly shifted the burden of

---

149 *See* Panel Report, para. 7.392.

150 *See* Panel Report, para. 7.392.

151 Panel Report, paras. 7.389-7.472.

152 Panel Report, para. 7.479. Article 2.3, second sentence, provides: "Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade."

153 *See* Panel Communication to the Parties, 10 September, 2013.

154 India's Appellant Submission, paras. 289-297.

proof with respect to the question of whether India had LPNAI.[155] Yet India's argument misunderstands the allocation of the burden of proof in a WTO dispute settlement proceeding. India is in any event incorrect in arguing that the Panel's questions to the experts on the subject of whether India is free of LPNAI reflect an allocation by the Panel of the burden of proof, as is clear when those questions are viewed as a whole, rather than selectively as India presents them.

122. India argues that the Panel's questions to the individual experts delegated decision-making authority to the experts regarding the evidence on India's claims of LPNAI-freedom.[156] Yet India's argument on appeal fails, both because the Panel conducted its own objective assessment of the answer to that question, and because the Panel's questions to the experts in no way delegated decision-making responsibility but instead simply and properly sought scientific and technical assistance in evaluating scientific and technical evidence.

123. In sum, as the United States will explain in detail below, India is incorrect that there was anything improper in the form or content of the Panel's consultation with the experts, and India's arguments, styled as assertions that the Panel breached Article 11 of the DSU in different ways, are fundamentally not proper claims of error for an appeal.

A. India Fails to Establish that the Panel's Consultations with Individual Experts Regarding India's Surveillance and whether LPNAI is Exotic to India were Inconsistent with the Panel's Obligation Under Article 11 to Conduct an Objective Assessment

124. India argues that "[t]he Panel's terms of reference[157] to the individual experts were … beyond the scope of the OIE Code which with respect to avian influenza does not provide for a review of member countries' domestic surveillance regime and allows self-certification of freedom from avian influenza by member countries." According to India "[t]he Panel, therefore, acted inconsistently with the OIE Code." India highlights Article 1.6.1 of the OIE Code, in particular, as the provision of the OIE Code with which this consultation was allegedly inconsistent.[158]

125. India fails to establish that any aspect of the Panel's questions to the individual experts, or its analysis of India's surveillance and claims of LPNAI freedom, was inconsistent with the Panel's obligation to conduct an objective assessment under Article 11 of the DSU. First, India fails to establish any basis to conclude that what the OIE Code provides itself determines a Panel's duty under Article 11. Second, the OIE Code applies to OIE Members, not panels. Third, India fails to establish the alleged factual basis for its argument, that the Panel had done

---

155 India's Appellant Submission, paras. 298-305.

156 India's Appellant Submission, paras. 305-307.

157 The India's Appellant Submission, para. 290. Consistent with the Panel's explanation to the experts, the questions that followed addressed these topics.

158 India's Appellant Submission, para. 290.

anything inconsistent with the Code.

126. As an initial matter, the Panel did not provide "terms of reference" to the experts that it appointed. Rather, the Panel posed to the experts a series of questions about what the record evidence showed on the topic of India's avian influenza surveillance. The Panel explained to the experts that "the Panel's questions address avian influenza surveillance, in particular with respect to evidence submitted by the parties on India's surveillance regime for low pathogenicity avian influenza, and on India's domestic disease situation."[159] Consistent with the Panel's explanation to the experts, the questions that followed addressed these topics.[160]

127. The Panel asked the individual experts three questions about what the evidence showed regarding whether India maintained surveillance capable of reliably detecting LPNAI, and three questions regarding what the evidence showed regarding India's claim that LPNAI is exotic to poultry in India. With respect to the second topic – India's claimed LPNAI freedom – the Panel first inquired directly whether the record evidence supports India's claim.[161] The Panel also asked what the record evidence suggested about certain questions bearing on the likelihood of India being free of LPNAI including the plausibility that a country that had experienced multiple H5N1 outbreaks was free if LPNAI,[162] and what could be inferred about the LPNAI situation in India from a scientific study that detected antibodies to H5 and H7 AI in ducks in India.[163] Those questions were pertinent, and warranted, because India had offered an alleged absence of LPNAI from India as a purported justification for excluding imported products on account of LPNAI -- while at the same time not conducting tests to ascertain whether poultry in India had LPNAI.

128. India ignores the requirements of Article 11 of the DSU when it argues that the OIE Code required the Panel to defer to India's self-assessment that it had no LPNAI, and accordingly precluded the Panel from asking the individual experts to assess whether the record evidence supported India's claim to be free of LPNAI Article 11 of the DSU requires a panel to make "an objective assessment of the facts of the case." This includes an assessment of whether the evidence in the record establishes the veracity of the assertions made in the dispute by the parties. Accordingly, even if the OIE Code had provided that, for purposes of trade or any other purpose, an OIE Member should defer to another OIE Member's self-assessment that it has no AI, that would not have absolved *the Panel* of its responsibility to assess the record evidence and determine whether that evidence supported India's assertion of LPNAI freedom.

129. India, moreover, fails to identify anything in the OIE Code that indicates the Code means to prescribe the weight that a WTO panel – as opposed to OIE Members – must give to self-

---

159 Questions from the Panel to Individual Experts, 24 October 2013, para. 1.3.

160 Questions from the Panel to Individual Experts, 24 October 2013.

161 Questions from the Panel to Individual Experts, 24 October 2013, question 1.

162 Questions from the Panel to Individual Experts, 24 October 2013, question 2.

163 Questions from the Panel to Individual Experts, 24 October 2013, question 3.

reports by an OIE Member of its disease-situation with respect to a listed disease for which the OIE does not grant official recognition – such as AI. The portion of the OIE Code on which India relies, Article 1.6.1:[164] addresses what an OIE Member making a claim of its disease-status with respect to a disease can or should do, as well as what the OIE may or will not do in response. It does not speak to any other entity, and India offers no reason to believe that it seeks to prescribe what any other entity can or should do.

130. In addition, there is nothing about the OIE Code that supports the alleged factual basis for India's claim – that is, that the Panel would have done anything inconsistent with the Code. India seems to believe that the fact that *the OIE* reviews disease–freedom claims made by Members with respect to six animal diseases – not including AI – means that for other OIE-listed diseases, a country's self-report of its AI situation must be accepted as unassailably correct.[165] And India further believes that such a self-report would need to be accepted not just by the OIE, but apparently by other OIE Members, the WTO, and even the Panel in this dispute. There is nothing in the text of the OIE Code to support this assertion. And there is nothing about the fact that the OIE makes official determinations of disease status with respect to six particular diseases that would support such a conclusion – let alone render the Panel's decision to consult with experts about what the record evidence shows about whether AI is absent from India inconsistent with the Panel's duty to make an objective assessment.

131. Indeed, the OIE's procedures hardly suggest that the OIE thinks a country's self-reports of disease freedom must be accepted unquestioningly by any country or entity for any purpose – including for purposes of trade in the self-reporting country's products – let alone that they must be accepted unquestioningly for purposes of WTO dispute settlement.

132. Article 1.6.1 of the OIE Code, on which India's Appellant Submission relies,[166] provides that "Member Countries may wish to make a self-declaration as to the freedom of a country, zone, or compartment from an OIE listed disease. The Member Country may inform the OIE of its *claimed* status and the OIE may publish the claim. *Publication does not imply endorsement of the claim*" (emphasis added).[167] Self-declarations of disease status are thus merely claims, not official disease statuses – a point the OIE underscored in its response to the Panel's questions.[168] Indeed, the OIE noted to the Panel that "[b]y providing the relevant epidemiological evidence, the OIE Member country can prove to a potential importing country that the country (or a zone under discussion), meets the provisions of the specific disease chapter. Self-declarations should be based on sound evidence demonstrating that the requirements for the claimed disease status

---

164 *See* India's Appellant Submission, para. 290.

165 India's Appellant Submission, paras. 291-294.

166 India's Appellant Submission, para. 290.

167 OIE Code, Art. 1.6.1.

168 *See* OIE responses to questions 9-9.2.

have been met in accordance with the OIE standards."[169] The self-declaration procedure thus fully envisions that importing countries have the ability to consider the evidence behind a self-declaration when determining whether to rely on that self-declaration, and need not accept the self- declaration if it is unsupported. In light of this, the Panel here certainly could not have failed to make an objective assessment by considering whether the evidence supports India's self-assertion of LPNAI freedom, and by asking the individual experts questions related to whether the record evidence supports that self-assertion.

133. The OIE Code Chapter on AI, moreover, is fully consistent with the Panel's approach, belying India's contention that the Panel failed to make an objective assessment. That Chapter is itself clear that self-declarations of freedom from AI must be supported by evidence of surveillance capable of justifying the self-categorization—laying out guidance on what surveillance can support claims of disease-freedom with respect to AI.[170] The Code provides that "a Member declaring freedom from NAI or HPNAI for the entire country, or a zone or a compartment should provide evidence for the existence of an effective surveillance programme,"[171] and that "[a] Member should justify the surveillance strategy chosen as adequate to detect the presence of NAIV infection in accordance with Chapter 1.1. and the prevailing epidemiological situation."[172] The OIE further emphasized in its response to the Panel's questions that self-declarations of AI status must be supported by evidence of surveillance capable of justifying the self-categorization.[173] Thus, far from suggesting that other OIE Members, and other entities, such as the Panel in this dispute, are somehow precluded by the OIE Code from considering the adequacy of a country's surveillance to detect LPNAI and thus to establish its absence – as India claims in its Appellant Submission[174] – pursuant to the OIE Code importing countries should consider whether an exporting Member has provided evidence of surveillance capable of serving as a basis for its self-reported AI situation.

134. The Panel in this dispute concluded, on the basis of the record evidence, that "India does not have in place a surveillance system capable of reliably detecting [LPNAI] risk within its territory."[175] Accordingly, the OIE guidelines would suggest that India's self-assertions of LPNAI freedom lack the factual basis necessary for importing countries (or anyone else) to consider accepting them – including for the purpose of importing Indian products.

135. The adequacy of India's LPNAI surveillance was a crucial issue in this dispute, and India

---

169 OIE response to Panel question 9.1.

170 *See* OIE Code, Chapters 10.4.27-10.4.32 (Exhibit US-1).

171 Article 10.4.30, para. 1 (Exhibit US-1).

172 Article 10.4.29, para. 1 (Exhibit US-1).

173 *See* OIE response to Panel question 9.1.

174 India's Appellant Submission, para. 288.

175 Panel Report, para. 7.424.

asserted a purported absence of LPNAI in India as a defense to the prima facie case of arbitrary and unjustifiable discrimination made out by the United States with respect to India's LPNAI-based import bans. The adequacy of India's LPNAI surveillance to reliably detect LPNAI and to support India's claim of freedom from LPNAI, moreover, were technical questions on which the Panel could reasonably seek expert assistance in interpreting the evidence put forward by the parties. Article 11.2 of the SPS Agreement provides that "[i]n a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute." It was fully consistent with the Panel's obligation, under Article 11 of the DSU, to make an objective assessment of the evidence for the Panel to have asked the experts what the evidence showed about India's AI surveillance and whether India could support its assertion that it had no LPNAI.

136. Finally, the United States would note that India's argument that the OIE Code precluded the Panel's consultation with the experts rests on Article 1.6 of the OIE Code, even though that Article was never made a part of the record before the Panel. As explained above,[176] the contents of an international standard are a question of fact in WTO dispute settlement. Accordingly, India's argument about the import of Chapter 1.6 asks the Appellate Body to rely on facts not in evidence before the Panel. The Panel could not have failed to make an objective assessment of the evidence by failing to rely on factual information that neither party presented to it.

B. There is no merit to India's claim of error related to alleged burden-shifting

137. India also argues that the Panel's questions to the experts improperly shifted the burden of proof with respect to the question of whether India had LPNAI. India's argument fails because it misunderstands the allocation of the burden of proof in a WTO dispute settlement proceeding, and because India is incorrect in arguing that the Panel's questions to the experts on the subject of whether India is free of LPNAI, viewed as a whole, reflect an allocation by the Panel of the burden of proof.

138. As the Panel in this dispute noted,[177] the Appellate Body has explained that in an SPS dispute: "The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that prima facie case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency."[178] Accordingly, a complaining party is not "responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent with a given provision of a covered agreement."[179] Rather, "although the complaining party bears the burden of proving its case, the responding party must prove the case

---

176 *See supra.*

177 Panel Report, para. 7.442.

178 *Japan Apples (AB)*, para. 152 (quoting *EC – Hormones (AB)*, para. 98).

179 *Japan Apples (AB)*, para. 154.

it seeks to make in response."[180] Accordingly, as the panel explained,[181] while the United States had the burden of establishing a prima facie case, India had the burden of proving those facts it asserted in attempting to rebut that case.

139. Here, the United States had established that "India treats domestic and imported products differently with respect to the risk for LPNAI, depending on whether that risk originates within India or in another Member,"[182] and that accordingly India's measures discriminate between India and other Members.[183] The United States had also noted that the risks applicable to Indian products and imported products are the same in relation to AI, yet India's measures ban only imported products because it has failed to implement measures that would effectively detect LPNAI and lead to restrictions on domestic products on account of LPNAI.[184] The United States had thus made out a prima facie case that India's measures discriminate against imported products in an apparently arbitrary manner, and without apparent justification. If India wished to rebut this *prima facie* showing, India had the burden of establishing the facts supporting any justification for the discriminatory treatment that it chose to offer in response to the U.S. prima facie case.

140. The Panel correctly explained that India's explanation for the differential treatment that it applies to imported products is that, according to India, LPNAI is exotic to India, and India argues that a disease exotic to a Member's territory is cause for greater concern.[185] The Panel therefore properly proceeded to assess whether the factual premise of India's asserted justification for differential treatment – LPNAI being exotic to India – was supported by the evidence in the record. And the Panel properly looked to see whether India, the party putting the purported absence of LPNAI forward as a response to the U.S. prima facie case, was capable of establishing the point through evidence in the record.

141. India argues that "it was the United States which had submitted that LPNAI should be present in India."[186] This, however, was not a fact that the United States needed to establish as part of its prima facie case. Rather, with respect to the second form of discrimination identified by the United States, the U.S. case centered on the fact that India imposed LPNAI-based import bans but at the same time failed to undertake surveillance capable of reliably detecting LPNAI domestically. Therefore, India's domestic surveillance was not capable of resulting on the

---

180 *Japan Apples (AB)*, para. 154.

181 *See* Panel Report, para. 7.442.

182 Panel Report, para. 7.425.

183 Panel Report, para. 7.425.

184 *See* Panel Report, para. 7.438.

185 Panel Report, para. 7.441.

186 India's Appellant Submission, para. 299.

imposition of restrictions on Indian products should LPNAI incidents occur in India.[187] The Panel found the United States had established these points.[188] India has not on appeal contested that this conclusion was justified by the record evidence.

142. By contrast, India itself asserted that LPNAI was absent from India, in an effort to rebut the U.S. prima facie case. Therefore, this alleged absence was a fact that India needed to establish. Accordingly, even if the Panel's questions to the experts in fact reflected an allocation of the burden of proof in the manner that India suggests, that allocation would be fully consistent with the allocation of the burden of proof in a WTO dispute settlement proceeding.

143. India also argues that the OIE Code requires OIE Members to report incidents of LPNAI that they detect, and that since India never reported to the OIE an occurrence of LPNAI," the panel should have accepted India's failure to report any outbreaks as establishing an absence of LPNAI in India.[189] This argument has no merit, and amounts to a repackaging of its argument that its own assertion of LPNAI freedom should have been accepted as a fact even in the absence of scientific evidence in the record to support it – contrary to the established principle that a party asserting a fact in dispute settlement proceedings is responsible for proving it.[190]

144. India's suggestion that a failure to report LPNAI to the OIE could in and of itself establish an absence of LPNAI is, moreover, contrary to both logic and the OIE Code, both of which clearly establish that an absence of reported AI detections is evidence of an actual lack of disease only when there is evidence of surveillance that will detect the disease should it occur.[191] Nothing about the OIE's self-reporting system for LPNAI or the fact that India had never made a report of LPNAI in India to the OIE changes the fact that it was India who had the burden to demonstrate, based on record evidence, that this failure to report LPNAI stemmed from an actual absence of LPNAI in India.

145. Moreover, India is incorrect in arguing that the Panel's questions to the experts on the subject of whether India is free of LPNAI, viewed as a whole, reflect an allocation by the Panel of the burden of proof. For instance, seeking to understand the results of a scientific study submitted by the United States, the Panel asked the experts "please provide your professional opinion on what can be inferred from the finding of H5 and H7 antibodies in ducks in India about the LPNAI situation in India?"[192] The Panel also asked the experts "In light of the above statements as well as evidence submitted by the parties about India's LPNAI situation, including Exhibits US-89, US-90, US-92, US-106, US-122, US-143, US-144, US-145, IND-47, IND-115

---

187 Panel Report, para. 7.412; U.S. First Written Submission, para. 174.

188 Panel Report, paras 7.423-7.424.

189 India's Appellant Submission, para. 303.

190 *See supra*.

191 *See supra*.

192 Questions from the Panel to Individual Experts, 24 October 2013, question 3.

and IND-117, is it plausible that a country that has experienced multiple H5N1 HPNAI outbreaks is free of LPNAI?"[193] In addition, the Panel asked the experts to comment on whether evidence provided by India supports India's assertion, in its First Written Submission, that LPNAI is exotic to poultry in India.[194] The Panel was thus simply asking for a series of expert comments on what the record evidence showed regarding different points made by the parties in relation to India's LPNAI situation. It is only the Panel's *report*, and not its questions to the individual experts, that allocated the burden of proof on different points.

146. In any event, there is certainly nothing about the Panel's framing of its questions to the experts that involves willful disregard, distortion, or misrepresentation of the evidence[195] that would result in a failure by the Panel to have made an objective assessment pursuant to Article 11 of the DSU. Indeed, for an Article 11 claim to succeed, an appellant must demonstrate that the Panel committed "an egregious error that calls into question the [Panel's] good faith."[196] India has established no error at all with respect to the Panel's framing of its questions to the experts, let alone one so egregious as to meet this high bar.

C. Nothing about the Panel's questions to the individual experts delegated the Panel's decision-making responsibilities to those experts

147. India argues that the "Panel's questions to the individual experts delegated the determination of India's LPNAI status to the individual experts."[197] The Panel's questions to the individual experts, however, resulted in no delegation of the Panel's decision-making responsibilities.

148. As an initial matter, the question raised by India's response to the U.S. prima facie case was not about disease "status" – i.e., what unverified disease-status claim India had on file with the OIE – but whether India could support its assertion that LPNAI was exotic to India. That was the question the Panel answered in its report. India's argument on appeal fails because, first, the Panel conducted its own objective assessment of the answer to that question, and, second, the Panel's questions to the experts in no way delegated decision-making responsibility but instead simply and properly sought scientific and technical assistance in evaluating scientific and technical evidence. The United States would note, however, that to the extent India is taking issue with the Panel report's discussion or use of the experts' views – as opposed to the questions that the Panel posed to the experts – that issue would fall beyond the scope of the appeal.[198]

---

193 Questions from the Panel to Individual Experts, 24 October 2013, question 2.

194 Questions from the Panel to Individual Experts, 24 October 2013, question 1.

195 *EC – Hormones (AB)*, para. 133.

196 *EC – Hormones (AB)*, para. 133.

197 India's Appellant Submission, section E(d).

198 *See EC – Tube or Pipe Fittings (AB)*, para. 141 (declining to review, pursuant to DSU Art. 17.6, findings not challenged on appeal).

India's notice of appeal refers only to the questions that the Panel put to the experts, not to the Panel report's discussion or use of the experts' views.[199]

149. First, the Panel in this dispute did *not* delegate its Article 11 responsibility to make an objective assessment of the evidence to the experts. Indeed, the panel made clear that it felt there was insufficient record evidence to support India's assertion that LPNAI was exotic to India.[200] In particular, having already found that India's surveillance regime was not adequate to reliably detect LPNAI, the Panel returned to this point, explaining that "without a suitable surveillance system capable of reliably detecting LPNAI, it is difficult for India to maintain its assertion that LPNAI does not exist."[201] The Panel further emphasized that "our conclusion [constitutes] a determination whether the assertion that LPNAI is exotic to India is supported by the facts and the evidence before us."[202]

150. The Panel further highlighted, in response to requests for review of precise aspects of the interim report, that its conclusions regarding India's claims of LPNAI-freedom were based on the Panel's own review of the record evidence. The Panel explained that it "is of the view that the text and context of paragraph 7.454," where the Panel concluded that the evidence did not support India's contention that LPNAI is exotic to India, "indicate that the Panel has reached its conclusions based on the evidence before it."[203]

151. The Panel made the same point with respect to paragraph 7.457, where the Panel reached the conclusion, in light of India's failure to establish that LPNAI is exotic to India, that India's discrimination against imported products on account of LPNAI is arbitrary and unjustifiable. The Panel explained that "it is evident from the text and the context of paragraph 7.457 that the Panel has reached its conclusion based on the evidence before it."[204]

152. Second, the Panel's approach to posing questions to the experts was fully consistent with the specific factual issue before it, as well as with relevant provisions of the SPS Agreement and the DSU. As discussed above, India's assertion of LPNAI-freedom was its response to the U.S. prima facie case of a breach of Article 2.3 of the SPS Agreement stemming from India's imposition of LPNAI-based import bans while not maintaining surveillance capable of reliably detecting LPNAI in India. The Panel therefore assessed whether the factual premise of India's asserted justification for differential treatment – LPNAI being exotic to India – was supported by the evidence in the record. This required consideration of scientific and technical evidence in the record, including scientific and technical studies and articles. Accordingly, the Panel asked the

---

199 Notification of an Appeal by India, para. 17(c).

200 Panel Report, paras 7-454-7-455.

201 Panel Report, para. 7.454.

202 Panel Report, para. 7.455.

203 Panel Report, para. 6.56.

204 Panel Report, para. 6.57.

individual experts for comments on what the record evidence showed regarding different points made by the parties in relation to India's LPNAI situation. In particular, the Panel asked the experts "please provide your professional opinion on what can be inferred from the finding of H5 and H7 antibodies in ducks in India about the LPNAI situation in India?"[205] The Panel also asked the experts "In light of the above statements as well as evidence submitted by the parties about India's LPNAI situation, including Exhibits US-89, US-90, US-92, US-106, US-122, US-143, US-144, US-145, IND-47, IND-115 and IND-117, is it plausible that a country that has experienced multiple H5N1 HPNAI outbreaks is free of LPNAI?"[206] In addition, the Panel asked the experts to comment on whether evidence provided by India supports India's assertion, in its First Written Submission, that LPNAI is exotic to poultry in India.[207]

153. This consultation with the experts was consistent with that envisioned in Article 11.2 of the SPS Agreement, which provides that "[i]n a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute." Further, Article 13.2 of the DSU provides that "[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. Neither Article 11.2 of the SPS Agreement nor Article 13.2 of the DSU provide any limitation on a panel's ability to ask experts whether technical evidence in the record reveals a factual basis for scientific or technical claims made by a party to a dispute. Indeed, there would be little value or meaning to such consultation if a Panel could not ask experts this precise type of question.

154. The questions posed to the panel here were indeed factual ones – they addressed what scientific and technical facts could be ascertained from the scientific and technical evidence in the record. They are not questions of legal characterization, such as the one that the Appellate Body in *Australia – Apples* expressed "certain reservations" about the panel there having put to its experts. In that dispute, the Panel had asked experts to opine about whether a particular measure would achieve Australia's appropriate level of protection – a fundamentally legal question.[208] Here, the questions put to the experts were factual, and concern the scientific and technical inferences that can be drawn from scientific and technical evidence.

155. In sum, the Panel fully and properly complied with its obligations under the DSU and the SPS Agreement. There was certainly nothing about the Panel's framing of its questions to the experts that would meet the high bar for establishing a breach by the Panel of its obligation to make an objective assessment of the evidence.

156. India's contention that the Panel breached Article 11 of the DSU by somehow delegating decision-making responsibility through its questions to the individual experts is particularly unfounded in light of India's failure to argue below that the questions reflected improper

---

205 Questions from the Panel to Individual Experts, 24 October 2013, question 3.

206 Questions from the Panel to Individual Experts, 24 October 2013, question 2.

207 Questions from the Panel to Individual Experts, 24 October 2013, question 1.

208 *Australia – Apples (AB)*, para. 384.

delegation, even though India had numerous opportunities to do so. The Panel provided India with a copy of the questions at the same time that it posed the questions to the experts.[209] The Panel also provided India with an opportunity for comment after the experts answered the Panel's questions.[210] India responded with an extensive submission,[211] and further addressed the Panel's questions to the experts in its opening statement at the second meeting of the Panel.[212] Yet India never asserted that the Panel's questions to the experts amounted to an improper delegation of the Panel's decision-making responsibilities. The Appellate Body has explained that a claim a Panel breached Article 11 of the DSU amounts to an assertion that it denied a party fundamental fairness or due process.[213] India cannot plausibly claim that the Panel denied it due process or fundamental fairness by doing something in its framing of its questions to the experts to which India did not object below.

VII. THE PANEL'S ANALYSIS OF THE U.S. ARTICLE 6 CLAIMS WAS CORRECT

157. India claims that in examining the U.S. Article 6 claims, the Panel committed both legal errors and breaches of its obligations under Article 11 of the DSU. India's Article 6 arguments lack merit.

158. India contends that the Panel improperly concluded that India's measures fail to recognize the concept of disease-free areas and areas of low disease prevalence notwithstanding the content of India's Livestock Act. Yet the Panel properly understood what it means to "recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence," and properly recognized that nothing about the Livestock Act meant that India recognizes such areas.

159. India contends that the "United States claim was with respect to non-recognition of the concept under Article 6.1 and 6.2 of the SPS Agreement, whereas the conclusion of the Panel was on account of non-implementation of the concepts recognized in Article 6.2 and 6.1 of the SPS Agreement."[214] Yet the Panel concluded that India does not recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, and breaches Articles 6.2 and 6.2 of the SPS Agreement as a result.

160. India asserts that the Panel breached its obligations under Article 11 of the DSU by allegedly disregarding a statement in exhibit IND-121 that, according to India, constitutes

---

209 *See* Panel communications to the experts (copied to the parties), dated 24 and 25 October, 2013.

210 *See* Internal Timetable for the Panel Proceedings, draft of 10 September 2013.

211 Comments to Individual Expert & OIE Response by India, 28 November 2013.

212 Opening Statement by India at the Second Substantive Meeting of the Panel With The Parties, 18 Dec. 2013, paras. 1-5.

213 *EC – Hormones (AB)*, para. 133.

214 India's Appellant Submission, para. 222.

evidence of Indian compliance with its obligations under the first sentence of Article 6.2 to recognize the concepts of disease-free areas and areas of low disease prevalence. Yet nothing about the Panel's handling of exhibit IND-121 was contrary to the Panel's obligation under Article 11 of the DSU to make an objective assessment of the evidence, and in fact, Exhibit IND-121 does not provide any support the idea that India recognizes the concept of disease-free areas or areas of low disease prevalence with respect to AI.

161. India contends that the Panel incorrectly interpreted the relationship between Articles 6.1 and 6.3. Yet the Panel is correct in its conclusion that a request for recognition of a specific area under Article 6.3 is not a prerequisite to the existence of obligations under Article 6.1, and that India is in breach of its Article 6.1 obligations.

162. The United States explains in further detail in this section why India's appeal of the Panel's findings under Article 6 claims should be rejected.

A. India's Argument that the Panel Committed Error In Finding a Breach of Article 6.2 Rests on a Misreading of the Panel Report

163. India argues that the Panel's Article 6.2 analysis improperly focused on the S.O. 1663(E), the key legal instrument containing India's AI measures, which establishes that India's import prohibitions due to NAI incidents will apply on a country-basis. According to India, the Panel should instead have focused on the underlying legislation that provided the authority for S.O. 1663(E), India's Livestock Act, which merely provides India's central government with the authority to regulate the importation of livestock and livestock products as it sees fit. This argument is without merit, as it rests on misunderstanding of Article 6.2 and of what the Panel found.

164. Before turning to the specifics of India's argument, it is helpful to recall the Panel's findings on Article 6.2:

> We recall our discussion of the word "recognize" in paragraph 7.668 above, and in particular our conclusion that the word means to "[a]cknowledge the existence, legality, or validity of [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration ". This definition, however, does not clarify whether the recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence must be done explicitly, and if so, whether it should be done in writing through a legislative or administrative act. In our view, *the format of such recognition will depend on the circumstances of each particular case*. Given the text of Article 6.2, we do not think that it is the prerogative of this Panel to prescribe to India or any other Member the manner in which it should "recognize" the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. However, in our view, to comply with Article 6.2, SPS measures adopted by WTO Members must at a minimum not deny or contradict the recognition of the concepts of such areas when these concepts are relevant with respect

> to the disease at issue.[215]

165. India has not challenged any aspect of this legal conclusion on appeal. Following this reasoning, the Panel then engaged with the record evidence. The Panel explained that in the context of this particular case, the text of S.O. 1663(E) – which explicitly requires the application of import bans on a country-basis – serves as a strong indication that India does not recognize the concepts of disease-free areas. The Panel noted:

> We recall that S.O. 1663(E) prohibits the importation of certain agricultural products from countries reporting NAI. S.O. 1663(E) thus prohibits the importation of the products enumerated therein on a country-wide basis. There is nothing on the face of S.O. 1663(E) that allows for the recognition of disease-free areas and/or areas of low disease prevalence within a country that notifies NAI to the OIE. Hence, we cannot conclude that S.O. 1663(E) recognizes the concept of these areas either explicitly or implicitly. Rather, S.O. 1663(E) reflects the opposite: by imposing a prohibition on a country-wide basis, it contradicts the requirement to recognize the concept of disease-free areas and areas of low disease prevalence.[216]

166. The Panel also noted that in the course of the proceeding, India had asserted that notwithstanding the phrasing of S.O. 1663(E), India did recognize the concept of disease free areas. The Panel correctly noted, however, that there was no evidence to support this assertion made for the purposes of India's defense in this proceeding. The Panel concluded: "In the absence of any substantiating evidence to support that assertion, we are unable to overcome the clear and unequivocal language to the contrary as reflected on the face of a measure at issue (that is, S.O. 1663(E))."[217]

167. The Panel acknowledged India's argument that, under its Livestock Act, the Indian central government had the authority to regulate the importation of livestock and livestock products as it saw fit. The Panel found, however, that that India had provided no evidence that India had used its discretion under the Livestock Act to recognize the concept of disease free areas. The Panel explained:

> We accept that there is broad discretion inherent in the general powers conferred by Sections 3 and 3A [of the Livestock Act]; such broad discretion might encompass a very considerable range of activity. Nevertheless, there is no evidence on the record of this dispute that the Indian Central Government has used its discretion to either recognize, or deny or contradict the recognition of, the concept of these areas. These considerations allow us to conclude

---

215 Panel Report, para. 7.698 (emphasis added).

216 Panel Report, para. 7.702.

217 Panel Report, para. 7.703.

> that the Livestock Act may empower India's authorities to recognize the concepts of disease-free areas and areas of low disease prevalence, notwithstanding the fact that this discretion has not been exercised for this purpose.[218]

168. The Panel was thus clear that while the Livestock Act provided broad discretion that the Indian government could in the future use to recognize the concepts of pest- and disease-free areas, the Livestock Act did not in any way reflect that India *had recognized* disease-free areas.

169. India takes the position that the content of S.O. 1663(E) is irrelevant to the Article 6.2 analysis in light of the Livestock Act. India's reasoning appears to be that (1) the Livestock Act is the underlying legislation providing India's Central government the ability to regulate livestock imports, while S.O. 1663(E) "*implements* the task of regulating the import of livestock product [sic] into India" (emphasis added),[219] and (2) the Panel did not find that Article 6.2 requires a Member "to implement the concept [of disease-free areas] in its domestic measures."[220] This reasoning is illogical. The fact that the Panel did not identify a requirement to embody the concept of disease-free areas in any *particular* measure does not mean, for purposes of an Article 6.2 analysis, that it is dispositive, or even relevant, that S.O. 1663(E) is an instrument through which India implements its general authority to regulate livestock importation. S.O. 1663(E) is clearly a measure at issue in the dispute,[221] and as the Panel found, "by imposing a prohibition on a country-wide basis, [S.O. 1663(E)] contradicts the requirement to recognize the concept of disease-free areas and areas of low disease prevalence."[222]

170. Seeking a way around the Panel's conclusion that there was no evidence of recognition of the concept of disease-free areas that could contradict the clear language of S.O. 1663(E), India tries to confuse the idea of recognizing the concept with having the capacity to do so in the future. In particular, India: (1) seems to equate the Panel's correct discussion of the need to examine the particular situation regarding the format of recognition with a conclusion that "India is not required to implement the concept domestically"[223] in the absence of a request compliant with Article 6.3 to recognize a specific disease-free area, and then (2) tries to equate "implement[ing] the concept" with "recognizing the concept." India's argument makes no sense. In fact, the Panel left no doubt that there is a distinction between recognizing specific disease-free areas and recognizing *the concept* of disease-free areas,[224] and that Article 6.2 requires, not

---

218 Panel Report, para. 7.701.

219 India's Appellant Submission, para. 213.

220 India's Appellant Submission, para. 218.

221 Panel Report, para. 2.22.

222 Panel Report, para. 7.702.

223 India's Appellant Submission, para. 219.

224 Panel Report, paras. 7.670-7.677.

just *a capacity* to recognize *the concept* of disease-free areas (for instance, in the event of a request to recognize a specific disease-free area), but actual recognition of the concepts.[225] This conclusion reflects a correct understanding of the text of Article 6, which provides that: "Members shall … recognize the concepts of pest- or disease-free areas or areas of low pest or disease prevalence."

171. As explained above, the Panel's conclusion that India had not *recognized the concept* of disease-free areas was based on this understanding. The Panel highlighted that S.O. 1663(E) imposes import prohibitions on a country-wide basis, and that, while India might have the capacity to recognize the concept of disease-free areas in the future, there was no other evidence that could show that notwithstanding the clear text of S.O. 1663(E), India nonetheless recognizes the concept with respect to AI.

B. The Panel made findings on the claim brought by the United States, not a different claim.

172. India's argument that the Panel made findings on a claim not brought by the United States rests on a mistaken depiction of what the Panel did. India asserts that "[t]he United States claim was with respect to non-recognition of the concept under Article 6.1 and 6.2 of the SPS Agreement, whereas the conclusion of the Panel was on account of non-implementation of the concepts recognized in Article 6.2 and 6.1 of the SPS Agreement."[226]. This misrepresents both the U.S. claims and what the Panel concluded. The Panel, properly recognized that:

> With respect to Article 6.2, the United States claims that India's AI measures are inconsistent with its first sentence because they do not recognize the concept of disease-free areas or areas of low disease prevalence, and with its second sentence because, by precluding the recognition of disease-free areas with respect to AI, India's measures preclude it from determining AI-free areas based on the factors explicitly mentioned in Article 6.2, second sentence.[227]

This U.S. claim – that India fails to recognize the concepts of disease-free areas and areas of low disease prevalence – was precisely the issue that the Panel decided.

173. India's argument to the contrary has no basis in the record of this dispute. In particular, as noted above, the Panel did not conclude that India breached Article 6.2 "on account of non-implementation of the concepts"[228] of disease free areas or areas of low disease prevalence. Rather, the Panel found that India had breached the first sentence of Article 6.2 because it did not recognize "the *concept* of disease-free areas and areas of low disease prevalence with respect to

---

225 Panel Report, paras. 7.698-7.706.

226 India's Appellant Submission, para. 222.

227 Panel Report, para. 7.643.

228 India's Appellant Submission, para. 222.

AI."[229] The Panel then concluded that India breaches Article 6.2, second sentence, because "our finding that India's AI measures fail to recognize the concept of disease-free areas and areas of low disease prevalence leads inevitably to a finding that India has also failed to determine those areas based on the factors listed in Article 6.2, second sentence."[230] Next, "[h]aving found that India failed to recognize the concepts of disease-free areas and areas of low disease prevalence," the Panel found India to be consequentially in breach of the first sentence of Article 6.1[231] And the Panel also found India to be in breach of its obligation under the second sentence of Article 6.1 to account for certain factors when assessing the SPS characteristics of a region.[232] The Panel thus did not rest its conclusions on Article 6 on India's failure to "implement" anything. Instead, these conclusions stem from India's failure to have *recognized* the concepts of disease-free areas and areas of low disease prevalence with respect to AI.

C. Exhibit IND-121 Shows the Opposite of What India Contends, and the Panel Properly Did Not Rely on it.

174. India asserts that the Panel breached its obligations under Article 11 of the DSU by allegedly disregarding a statement in Exhibit IND-121 that, according to India, constitutes evidence of Indian compliance with its obligations under the first sentence of Article 6.2 of the SPS Agreement to recognize the concepts of disease-free areas and areas of low disease prevalence. Nothing about the Panel's handling of Exhibit IND-121, however, was contrary to the Panel's obligation under Article 11 of the DSU to make an objective assessment of the evidence.

175. India has not established that this evidence was "so material" to its case that the Panel was required to deal more explicitly with it.[233] And India cannot establish that the evidence was "material" in this way because Exhibit IND-121 does not support the idea that India recognizes the concept of disease-free areas or areas of low disease prevalence with respect to AI. The actual text of the paragraph that India cites does not indicate that India recognizes the concept of disease-free areas or would entertain a proposal to recognize a specific area.[234] That India was not indicating recognition of the concept, and does not recognize the concept, is underscored by that paragraph's the broader context, including the remainder of Exhibit IND-121 and the broader exchange of which it forms part. Moreover, the Panel was looking to see whether India had any evidence that it recognized the concepts of disease-free areas and areas of low disease

---

229 Panel Report, para. 7.706 (emphasis added).

230 Panel Report, para. 7.708.

231 Panel Report, para. 7.709.

232 Panel Report, para. 7.710.

233 *Argentina – Import Measures (AB)*, para. 5.176 ("[F]or an Article 11 claim to succeed a party must explain why the evidence is so material to its case that the panel's failure to address such evidence has a bearing on the objectivity of the panel's factual assessment.")

234 *See infra*.

prevalence that could overcome the "clear and unequivocal language to the contrary" in S.O. 1663(E),[235] the legal instrument containing India's import prohibition, and Exhibit IND-121 long predated that legal instrument.

176. The Panel was clearly aware of Exhibit IND-121 when it concluded that "[i]n the absence of any substantiating evidence to support [India's] assertion [that it did recognize the concept of disease-free areas], we are unable to overcome the clear and unequivocal language to the contrary as reflected on the face of a measure at issue (that is, S.O. 1663(E))."[236] Indeed, footnotes in the paragraph of the Panel report immediately following that conclusion and two paragraphs above it explicitly reference exhibit IND-121.[237] Moreover, while the Panel declined to rely on exchanges between the parties as affirmative evidence of India's failure to recognize disease-free areas,[238] the Panel indicated that it was "tak[ing] note of these exchanges,"[239] and the Panel never stated that in assessing whether there was evidence of recognition of the concept of disease-free areas that could "overcome the clear and unequivocal language to the contrary as reflected on the face of a measure at issue (that is, S.O. 1663(E)),"[240] that the Panel had not taken into account Exhibit IND-121 or any other exhibit submitted by India or the United States.

177. The Appellate Body has explained that the weighing of evidence is within the discretion of the panel,[241] and that it is not an error under Article 11 of the DSU for a panel "to fail to accord the weight to the evidence that one of the parties believes should be accorded to it."[242] A panel, moreover, "is not required to discuss, in its report, each and every piece of evidence."[243] In light of the Panel's clear awareness of Exhibit IND-121 and its conclusion that India had not put forth evidence substantiating its assertion that it recognizes the concept of disease-free areas notwithstanding the language of S.O. 1663(E), India's argument amounts to a quibble with the Panel's weighing of the evidence and could not establish a breach of Article 11.

178. Not only is Exhibit IND-121 not so material as to have the ability to give rise to a breach of Article 11, that exhibit, whether viewed alone or in context, does not support India's position at all. In the U.S. First Written Submission, the United States pointed out that not only does S.O. 1663(E) explicitly require a ban on covered imports from all parts of a country whenever there is

---

235 Panel Report, para. 7.703.

236 Panel Report, para. 7.703.

237 Panel Report, para. 7.701, fn. 1219, para. 7.704, fn. 1221.

238 Panel Report, para. 7.705.

239 Panel Report, para. 7.705.

240 Panel Report, para. 7.703.

241 *Korea – Dairy (AB)*, para. 137.

242 *Korea – Alcoholic Beverages (AB)*, para. 164.

243 *Brazil – Retreaded Tyres (AB)*, para. 202.

a detection of HPAI or notifiable LPAI anywhere in the country,[244] but that India has required country-level certification despite (1) requests by the United States dating back to at least 2006 that India adjust its required certification to recognize the concept of disease free regions or zones, and (2) requests that India regionalize its AI-related import restrictions made at numerous meetings of the WTO's SPS Committee[245] The United States noted that India had explained its refusal to alter its requirement for country-level certification on the grounds that the requirement is "uniform," and that it has a "uniform" policy of requiring country-level certification.[246] The United States also explained that, consistent with that approach, at the May 2012 meeting of the OIE, the Indian delegate criticized the OIE Code's avian influenza chapter, asserting that for India "the concept of zoning looked irrelevant as far as avian influenza was concerned."[247] India offered exhibit IND-121 in response, asserting on the basis of this document that "India had indicated to the United States that it was willing to consider trade from compartments, yet, to date the United States has neither made a request to India nor submitted relevant documentation evidencing establishment of bio-secure compartments."[248]

179. [[

*** WTO Confidential Information ***

[249]

180.

*** WTO Confidential Information ***

---

244 U.S. First Written Submission, para. 145.

245 U.S. First Written Submission, para. 148.

246 U.S. First Written Submission, para. 148.

247 U.S. First Written Submission, para. 148.

248 India's First Written Submission, para. 252 (citing exhibit IND-121).

249 Exhibit IND-121, p. 22 (emphasis added).

[250]

181.

*** WTO Confidential Information ***

182.

*** WTO Confidential Information ***

[251]

*** WTO Confidential Information ***

[252]]] Even India's appellant submission appears to recognize that India was not expressing a willingness to consider a proposal for recognition of specific disease free areas, but instead only that India would "consider *the issue* of

250 Exhibit IND-121, p. 23 (emphasis added).

251 Exhibit IND-121, p. 14, box 1.

252 [[

*** WTO Confidential Information ***

]]

compartmentalization."[253]

183. The broader context of the interactions of which Exhibit IND-121 was a single piece underscores that neither in that exhibit nor elsewhere did India indicate that it had recognized the applicability of the concepts of disease-free areas or areas of low disease prevalence with respect to AI. As early as 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."[254] Additionally, as the United States explained to the Panel, both before and after exhibit IND-121 (which is dated January 2010), India's failure to apply its AI measures on a less-than-country-wide basis was raised in meetings of the WTO SPS Committee.[255] In those meetings, India's delegate never indicated that this complaint was ill-founded and that India would consider applications from Members seeking regionalized treatment for their imports.[256] Further, as the United States pointed out to the Panel,[257] as recently as the May 2012 meeting of the OIE, the Indian delegate criticized the OIE Code's avian influenza chapter, asserting that for India "the concept of zoning looked irrelevant as far as avian influenza was concerned."[258]

184. A lengthy period passed between the Indian comments in exhibit IND-121 and commencement of this dispute. Not only did India provide no indication that it had concluded its internal debate and actually decided to recognize the concept of zoning or compartmentalization with respect to avian influenza, and not only did India's OIE delegate explain that for India "the concept of zoning looked irrelevant as far as avian influenza was concerned," but despite receiving repeated requests not to apply its measures on a country-wide basis, including at meetings of the WTO SPS Committee, India promulgated new iterations of its avian influenza

---

253 India's Appellant Submission, para. 226 (emphasis added).

254 Letter from Mr. R.K. Chaudary to Ms. Deepa Dhankar (Jan. 9, 2007), p.3, box 6 (Exhibit US-124); *see also* Exhibit US-120, p.5. The Indian statement immediately below this one (*see* exhibit US-124, p.3, box 7) makes clear that "uniform" refers to the fact that the requirement is applied to all countries.

255 Exhibit US-82, para. 37 ("The European Union also urged India to recognize the principle of regionalisation[.]"); Exhibit US-83, para. 26 ("The European Union called on India to … recognise the principle of regionalization as foreseen under the SPS Agreement."); Exhibit US-84, para. 39 ("The European Union also requested India to recognize the regionalisation principle of the SPS Agreement[.]"); Exhibit US-85, para. 38 ("Moreover, India did not recognize the regionalization principle[.]"); Exhibit US-86, para. 40 ("The European Communities requested India to … recognize the regionalization principle as applied in the European Communities."); Exhibit US-87, para. 43 ("The European Communities regretted that India did not adhere to the principle of regionalization[.]").

256 Exhibits US-81, US-82, US-83, US-84, US-85, US-86, and US-87.

257 *See* Panel Report, para. 7.705.

258 OIE, 80th General Session FR (Exhibit US-80), para. 231.

measures that on their face applied to products from anywhere in a country reporting NAI.[259]

185. The text and context of Exhibit IND-121 demonstrate that it was perfectly consistent with Article 11 of the DSU, and eminently reasonable, for the Panel not to have found that this exhibit was evidence of any recognition by India of disease-free areas or areas of low disease prevalence. Indeed, the text and context of Exhibit IND-121 make clear that it was reasonable and consistent with Article 11 for the Panel not to specifically discuss this exhibit in the Panel's report before concluding that there was an absence of evidence to support India's assertion that it recognized the concepts of disease-free areas and areas of low disease prevalence. Whether viewed on its own terms or in the context of the full set of interactions between the parties, it provides no support for India's contention that it had recognized the concepts of disease-free areas or areas of low disease prevalence. Moreover, the Panel was looking to see whether India had any evidence that it recognized the concepts of disease-free areas and areas of low disease prevalence that could overcome the "clear and unequivocal language to the contrary" in S.O. 1663(E),[260] the legal instrument containing India's import prohibition, and exhibit IND-121 long predated that legal instrument. Given Exhibit IND-121's inability to support India's position, this is a far cry from the situation at issue in *US/Canada – Continued Suspension*, which India cites,[261] where the evidence not considered by the Panel was found by the Appellate Body to be on its face supportive of the responding Member's position.[262]

D. The Panel Correctly Concluded a Request under Article 6.3 is Not a Prerequisite to the Existence of Obligations under Article 6.1

186. India contends that the Panel erred in concluding that obligations in the first sentence of Article 6.1 arise independently of whether an exporting Member has made a proposal to recognize a specific disease-free area. According to India, Article 6.3 requires the opposite conclusion. India, however, is mistaken in its analysis of the relationship between Articles 6.1 and 6.3. The Panel is correct in its conclusion that a request under Article 6.3 is not a prerequisite to the existence of obligations under Article 6.1.

187. The Panel explained that:

> Article 6.3 refers to a situation that is distinct from those in Articles 6.1 and 6.2. It is addressed not to Members generally, as are the first two paragraphs of Article 6, but to exporting Members that claim to have areas within their territory that are pest- or disease-free areas or areas of low pest or disease prevalence. Article 6.3 puts the onus on these Members to prove such claims to importing Members. This paragraph is not directly linked to the first two paragraphs of

259 S.O. 616(E) (Exhibit US-78); S.O. 2976(E) (Exhibit US-79); S.O. 1663(E) (Exhibit US-80).

260 Panel Report, para. 7.703.

261 India's Appellant Submission, para. 232.

262 *US/Canada – Continued Suspension (AB)*, para. 615.

> Article 6, or to what WTO Members must do generally with respect to adapting measures to SPS characteristics of certain areas, or in particular to recognizing specific area concepts.[263]

188. Indeed, Article 6.1 begins: "Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area …" The Panel correctly noted that:

> A plain reading of Article 6.1, first sentence, makes clear that it creates a free-standing obligation. There is no conditional language linking the obligation to Article 6.3, to an extraneous event such as the request of an exporting Member to recognize an area, or to any other event or situation. We further note that the language of Article 6.1, first sentence, is framed in the present tense ("are adapted"), which leads us to consider that the adaptation of the measure to the SPS characteristics of the area is an element of the SPS measure *as such*, which the implementing Member must ensure.[264]

189. Thus, the Panel recognized that the text of Article 6.1 refutes the idea that obligations under that Article can arise only after an exporting Member requests recognition of specific pest- or disease-free areas or areas of low pest or disease prevalence pursuant to Article 6.3.[265] The Panel supported its reasoning with the observation that "other provisions in the SPS Agreement that foresee an interaction between the importing and exporting Members, such as Article 4, explicitly condition the importing Member's actions upon an action by the exporting Member."[266] There is no such explicit condition in either Article 6.1 or Article 6.2.

190. India claims that its understanding of the relationship between Articles 6.3 and 6.1 is supported by the OIE Code.[267] As an initial matter, India has not explained how a statement by the OIE would be pertinent to the legal interpretation of the WTO Agreement. In any event, nothing in the OIE Code supports India's legal interpretation.

191. The passages of Article 4.3 of the OIE Code that India quotes simply makes the obvious points that (1) an exporting country's sanitary procedures can properly impact the requirements imposed by an importing country on the import of products from the exporting country; and (2) when a veterinary service of an exporting country asserts that a zone or compartment has a distinct health status, it should be able to explain the basis for the assertion. These statements are

---

263 Panel Report, para. 7.674.

264 Panel Report, para. 7.675.

265 Panel Report, para. 7.675.

266 Panel Report, para. 7.679.

267 India's Appellant Submission, para. 238.

fully consistent with Panel's interpretation of Article 6 of the SPS Agreement.

192. India's Appellant Submission at one point appears to advance the theory that Article 6.1 requires only that sanitary and phytosanitary measures be adopted "to the sanitary or phytosanitary characteristics of the area of the exporting country" because "the word area … includes the area of the exporting country from where the product originated."[268] India seems to suggest that a requirement under Article 6.1 to adapt measures to the characteristics of sub-national areas can be triggered only by a request pursuant to Article 6.3. This theory reads non-existent distinctions into the text of Article 6.1. As the Panel pointed out,[269] where the SPS Agreement foresees that a requirement for a Member will arise only upon action by another, the Agreement so states explicitly. Yet Article 6.1 makes no distinction between when a Member must adapt measures to the characteristics of a country or to the characteristics of some other area. India's proposed reading of Article 6.1 also ignores the second sentence of the Article, which discusses factors that Members should take into account "[i]n assessing the sanitary characteristics of a region." Use of the term *region* as opposed to "country" or "area" in this sentence is telling, as it makes clear that there is an obligation to adapt SPS measures to the SPS characteristics not just of countries or of areas that have been put forward as disease-free areas or areas of low disease prevalence, but of "region[s]." There is no indication anywhere in Article 6 that any precipitating event is required before adaptation to the characteristics of a region must occur.

193. Crucially, moreover, the phrasing of the first sentence of Article 6.1 – "ensure that their sanitary or phytosanitary measures are adapted" – makes clear that it covers not only a failure to recognize particular disease-free areas where an exporting Member has made the necessary demonstration, but also adoption of measures that fail to permit the importing Member to account for relevant differences in the sanitary or phytosanitary characteristics of different areas. After all, a Member could not have ensured that its measures are adapted where its measures contradict the concepts of disease-free areas and areas of low disease prevalence, leaving no possibility for adaptation to the characteristics of a specific area should an exporting Member demonstrate the existence of such an area, and leaving no indication that a request to demonstrate the existence of a specific disease-free area or area of low disease prevalence would be entertained. Accordingly, the Panel here correctly concluded that its determination that India had not recognized the concepts of disease-free areas and areas of low disease prevalence with respect to AI required the conclusion that India also breached the first sentence of Article 6.1 of the SPS Agreement.

VIII. INDIA HAS FAILED TO ESTABLISH THAT THE PANEL ERRED IN ITS FINDINGS ON ARTICLE 5.6 OF THE SPS AGREEMENT

194. The Panel found that India's AI measures are inconsistent with SPS Article 5.6. In particular, the Panel found that the United States identified measures based on the OIE Code as a reasonably available alternative to India's AI measures for the products that are within the scope

---

268 India's Appellant Submission, para. 236.

269 Panel Report, para. 7.679.

of Chapter 10.4 and that this alternative is technically and economically feasible, would achieve India's ALOP, and is significantly less restrictive to trade than India's AI measures.[270]

195. India challenges the Panel's findings with respect to SPS Article 5.6 asserting they are inconsistent with the Panel's obligations under Article 11 for three reasons:

- Because the United States allegedly limited its claim to measures related to LPNAI, the Panel ruled on a claim not argued by the United States;
- The United States failed to make a *prima facie* case with respect to the identification of India's ALOP; and
- The Panel failed to identify the proposed alternative measure with precision and thereby committed an error by concluding the alternative measure would satisfy India's ALOP. Also, India argues that the United States presented a prima facie case with respect to only two products and upon occurrence of HPNAI.[271]

India asserts the first two challenges are brought pursuant to DSU Article 11, while the last is a legal challenge.[272] India's claims are inconsistent with one another on their face. As will be demonstrated, India's claims fails to recognize critical findings made by the Panel such as the measures that were identified by the United States, as well as Panel findings that these measures provide for an optimal level of security.[273]

A. The Panel Properly Ruled on the Article 5.6 Claim Before it

196. India's Article 11 claim of error fails because the Panel ruled precisely on the claim brought by the United States – and nothing India references suggests the contrary. India commences this section of its submission by complaining that that the United States limited its evidence and argument so that its Article 5.6 claim applied to India's measures only to the extent it imposed trade restrictions on countries reporting LPNAI, and that the Panel ruled further.[274] But the record in this dispute provides no basis for India's assertion regarding the scope of the U.S. Article 5.6 claim. Indeed, this position is inconsistent with India's own arguments in this appeal: only a few pages later in India's Appellant submission, in the context of its next Article 11 claim, India argues that the U.S. claim was with respect to two products and HPNAI.[275]

---

270 India, Appellant Submission, para. 7.597.

271 India, Appellant Submission, para. 253.

272 India, Appellant Submission, paras. 253, 254,271, 278.

273 Panel Report, para. 7.581.

274 India, Appellant Submission, para. 257.

275 India, Appellant Submission, para. 278-279.

197. India does not reference or explain the precise language upon which India bases its assertion that the United States limited its Article 5.6 claim to measures addressed to LPNAI. It does, however, provide a footnote that cites some portions of U.S. submissions.[276] Examining them though, there is nothing that supports the proposition that India advances: that the United States limited its Article 5.6 claim. For example, India's footnote cites paragraph 69 of the U.S. responses to the Panel's questions.

> Question 36: India asserts, at paragraph 255 of its first written submission, that "[the United States] suggests that India would not need to carry out other inspection or controls to make sure that the consignment itself is not contaminated but should place full faith on the United States attestation and import the products without other controls." In view of India's assertion, kindly describe in greater detail the "measures based on the OIE Code" referred to in paragraphs 134-140 of the United States' first written submission.
>
> 69. India's argument reflects a misreading of both the U.S. position and the OIE Code. The United States is not arguing that India is not entitled to conduct customs measures, but that there are alternatives to an outright ban and that the recommendations in the OIE Code constitute precisely such an alternative. The United States noted in first written submission that for almost all of the products that India bans, there is a specific recommendation in the OIE Code that provides for safe importation. For example, for fresh poultry meat, OIE Code Article 10.4.19 provides that a veterinary certificate should be provided that attests that poultry from which the meat was derived has been kept in a country, zone, or compartment free from HPNAI since they were hatched or at least 21 days and have been slaughtered and subject to inspection. Article 10.4.14 provides that eggs for human consumption from an HPNAI free country requires a certificate attesting they produced or packed in an HPNAI free territory, have had surface sanitation, and are transported in new and appropriately sanitized materials.

This is the entirety of the reference excerpt. It captures actually the U.S. claim that the recommendations in the OIE Code are the specified alternative measure. Thus, nothing in this example cited by India indicates a limitation on the U.S. Article 5.6 claim. Similarly, with respect to the other two citations India notes in its footnote,[277] they concern arguments about

---

[276] India, Appellant Submission, para. 257, n. 420 citing US FWS, paras. 136-140; US replies to Panel Questions dated Sept. 3, 2013, para. 69; US SWS, paras. 56-57.

[277] India, Appellant Submission, para. 257, n. 420 citing US FWS, paras. 136-140 & US SWS, paras. 56-57.

whether the OIE Code would achieve India's ALOP, not the scope of the U.S. challenge, and are thus just as irrelevant.

198. Moreover, India fails to engage with the Panel finding that does determine the scope of the U.S. challenge: the identified alternative measure. The Panel Report makes clear that the United States was proposing the OIE Code against India's measure. Where the OIE provides a recommendation allows for safe trade, then that was the United States submitted should be the alternative measures. The United States provided evidence to that point and it was acknowledged and referenced by the Panel:

> Para 7.529: Our task under these circumstances is to determine whether the United States has identified one or more alternatives to India's AI measures. We observe that, in its various submissions, the United States referred to "measures based on the Terrestrial Code" and to "the Terrestrial Code" as reasonably available alternatives to a prohibition on the importation of products from countries reporting NAI. The United States asserted that "for almost all of the products India bans, there is a specific recommendation in the Terrestrial Code that provides for safe importation". In particular, the United States identifies the recommendations in Chapter 10.4 that correspond to the products covered by S.O. 1663(E) (to the extent that those products are within the scope of Chapter 10.4 of the Terrestrial Code) in table format, which is reproduced below

S.O. 1663: Bans from all countries reporting NAI (including LPNAI and HPNAI)	**Alternative OIE Code Recommendation**
domestic and wild birds (including poultry and captive birds);	Articles 10.4.5 and 10.4.6
day old chicks, ducks, turkey, and other newly hatched avian species;	Articles 10.4.7 and 10.4.8
un-processed meat and meat products from Avian species, including domesticated, wild birds and poultry;	Articles 10.4.19 and 10.4.20
hatching eggs;	Articles 10.4.10, 10.4.11, and 10.4.12
eggs and egg products (except Specific Pathogen Free eggs);	Articles 10.4.13, 10.4.14, and 10.4.15
un-processed feathers;	Article 10.4.22 and Article 10.4.23
products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use; and	Article[] 10.4.21
semen of domestic and wild birds including poultry.	Articles 10.4.17 and 10.4.18

Accordingly, the record affirmatively shows that the United States 5.6 claim was addressed to SO 1663's ban on countries reporting "NAI (including LPNAI and HPNAI)."[278]

1. The United States Made a Prima Facie Case for its Article 5.6 claim.

199. India makes a second DSU Article 11 claim based on two arguments, neither of which is supported by the record. First, India, notes that the United States attempted to discern India's ALOP through examination of India's domestic measure.[279] But India does not explain – and cannot explain – how or why this means the United States did not make a *prima facie* case, or how or why this supports any conclusion that the Panel failed to conduct an objective assessment. First, India's measures do not state India's ALOP, and in these circumstances, the element of a *prima facie* case requiring an identification of the ALOP must be based on inferred ALOP supported by record evidence. This is precisely what the United States did in presenting its *prima facie* case. Second, in response to rebuttal arguments provided by India, the Panel ultimately agreed with India that India had a higher ALOP than that presented in the U.S. *prima facie* case. The fact that the Panel engaged with the parties' arguments and found more in favor of India's position on its inferred ALOP in no way shows a lack of objective assessment. To the contrary, it confirms that the Panel made an objective assessment of this matter.

200. The second complaint advanced by India is that the Panel breached DSU Article 11 by allowing the United States to specify India's ALOP. But the panel report plainly shows that India's contention is untrue. As noted, the United States had argued that the inferred ALOP should be low, based on the level of protection indicated by India's domestic measures. But the Panel did not agree:

> Paragraph 7.570: [W]e conclude that India's ALOP is very high or very conservative. We consider that this formulation of India's ALOP is consistent with India's statement that its ALOP is achieved by S.O. 1663(E), as well as the particularities of India's AI situation and the manner in which AI is transmitted. We also consider that this formulation of India's ALOP is sufficiently precise to enable the application of the SPS Agreement (including the provisions of Article 5.6).

201. Accordingly, the record shows that the Panel did not allow the United States to specify India's ALOP, and this DSU Article 11 challenge fails as well.

---

[278] As the Panel correctly noted, there were two instances the United States did not identify an alternative as there was no comparable OIE recommendation. Those products were live pigs and pathological material and biological products from birds.[278] The Panel correctly found for those products that the United States had not proposed an alternative measure for purposes of SPS Article 5.6

[279] The United States had to ascertain India's ALOP because India has not previously specified or revealed it, including when asked in a request from the United States pursuant How the United States tried to determine

2. The Alternative Measure Was Adequate Identified

202. India claims the Panel made a legal error because it did not precisely identify the alternative measure to its own import prohibitions, except for with respect to two, unidentified products.[280] This is wrong. As just noted, the Panel in fact identified in paragraph 7.529 the precise OIE Code recommendations that serve as the proposed alternative measures – and it did so on the basis of evidence provided by the United States.[281]

203. India's assertion seems to rest on India's argument that the OIE Code achieves different levels of protection depending on the recommendation adopted.[282] The Panel, however, properly rejected India's argument regarding different levels of protection in the OIE Code, and found that the Code achieves a high level of protection:

> The Panel takes particular note of the OIE's multiple references to the fact that OIE standards and guidelines, and in particular the recommendations in the Terrestrial Code, facilitate "safe trade". We understand "safe" to mean "free from risk". Moreover, we recall that the recommendations in the Terrestrial Code, if correctly applied, provide for trade in animals and animal products to take place with an "optimal level" of animal health security, based on the most up to date scientific information and available techniques.[283] Furthermore, the recommendations in Chapter 10.4 specifically address the measures necessary to ensure safe trade because of concerns of AI. Indeed, "the application of measures that comply with the provisions in Chapter 10.4 can be relied upon to avoid the introduction of [AI] into an importing country".[284]

Accordingly, India has presented no support for its argument that the element of an Article 5.6 claim involving alternative measures was not sufficiently defined, and India's final Article 11 claim regarding the Panel's Article 5.6 finding has no merit.

---

280 India, Appellant Submission, paras. 275-281

281 Panel Report, para. 7.533. Moreover, the Panel noted the two products that the United States did not propose an alternative measure for: live pigs and pathological material and biological products from birds.

282 India, Appellant Submission, para. 275.

283 User's Guide, para. A.2; United States' second written submission, para. 56.

284 Panel Report, para. 7.580.

IX. CONCLUSION

204. Based on the foregoing, the United States respectfully requests the Appellate Body to reject all of India's claims on appeal, and uphold the Panel's findings.