

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

(DS430)

**RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS
FOLLOWING THE PANEL MEETING**

January 12, 2018

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<i>Australia – Salmon (Article 21.5 – Canada)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000
<i>EC – Bedlinen (Article 21.5 – India) (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005
<i>EC – Selected Customs Matters (AB)</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>EC – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
<i>India – Agricultural Products (Panel)</i>	Panel Report, <i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , WT/DS430/R and Add.1, adopted 19 June 2015, as modified by Appellate Body Report WT/DS430/AB/R
<i>India – Patents (AB)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998
<i>Russia – Pigs (AB)</i>	Appellate Body Report, <i>Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union</i> , WT/DS475/AB/R and Add.1, adopted 21 March 2017

<i>US – Continued Suspension (AB)</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008
<i>US – Continued Zeroing (EC)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – FSC (Article 21.5 – EC II) (AB)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002
<i>US – Shirts & Blouses (AB)</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997
<i>US – Shrimp (Article 21.5 – Malaysia) (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001
<i>US – Softwood Lumber IV (Article 21.5 – Canada) (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW

TABLE OF EXHIBITS

Exhibit USA-25	United States Article 5.8 Request
Exhibit USA-26	Concise Oxford Dictionary, p. 305
Exhibit USA-27	Concise Oxford Dictionary, p. 63
Exhibit USA-28	OIE Terrestrial Code Chapter 5.3

1. GENERAL

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

Response:

1. In responding to this question, the United States emphasizes two points. First, the issues raised in this question call for a careful analysis of the facts of the current dispute, and in particular, for distinguishing between the claims, measures, and arguments raised by India and the United States. And second, issues regarding the scope of a 21.5 panel proceeding where the Member subject to DSB¹ findings is the initiating party are both complex and novel; any findings on these issues should be closely tied to the facts of the current dispute, and should avoid statements that could be read as applying to different sets of circumstances and different disputes.

2. As further explained below, with respect to claims, it is India that is claiming that it has brought its measures into compliance, and the United States is not seeking to establish that any of the measures taken by India to comply breach a provision different than the ones found to have been breached in the original dispute. With respect to measures, the United States in this dispute is not seeking findings concerning measures not identified in India’s request for panel establishment. Nor, for that matter, does India appear to be seeking such findings, even though India has placed great emphasis on developments that occurred after panel establishment. In examining the measures identified in India’s panel request, both parties appear to agree that, to the extent relevant, other measures that affect the operation of those identified in the panel request may be considered to evaluate the content of the Indian measures at issue. Finally, there is no basis under the DSU² to restrict any arguments a Member may make in this proceeding. As the United States explained during the panel meeting, India’s statements seem to conflate arguments with claims.

Claims

3. The paragraph referred to in this question from the *US/Canada – Continued Suspension* Appellate Body report concerns claims, not measures:

¹ Dispute Settlement Body.

² *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

The original complainant may respond to the allegations of compliance made by the original respondent. If, however, the original complainant considers that the implementing measure *is inconsistent with provisions of the WTO agreements* not covered in the request for the establishment of a panel by the implementing Member, it may file its own request for the establishment of a panel under Article 21.5 identifying those provisions that it considers should be examined by the Article 21.5 panel. It would be for the Article 21.5 panel to determine if the implementing measure violates the WTO agreements in ways different from the original measure or whether certain claims fall outside the scope of Article 21.5 proceedings. The original complainant would be expected to do so as soon as possible after adoption of an implementation measure or after the filing of the original respondent's panel request, so that both Article 21.5 panel requests may be referred to the original panel wherever possible, allowing review of all the issues relating to substantive compliance in the same Article 21.5 proceedings.³

As an initial matter, the United States notes here – as we did at the time of the adoption of the AB report – that these findings were unnecessary *dicta*.⁴ Accordingly, we have systemic concerns with the inclusion of these statements in the Appellate Body report, and we question what weight, if any, they should be accorded in subsequent proceedings. Nonetheless, these statements are not inconsistent with position advanced by the United States in this dispute. In particular, the reference to “provisions” in this paragraph is a reference to legal claims. The Appellate Body’s statement thus opines that if an original complainant believes a measure taken to comply is inconsistent with provisions different than those which the panel or Appellate Body found to have been breached in the original proceeding, it will need to bring its own Article 21.5 proceeding to have such claims examined. Those circumstances are not present here.

Measures

4. With respect to measures, the United States recalls its response to a panel question during the Panel’s organizational phase:

³ Emphases added. Footnotes omitted.

⁴ See Communication from the United States on concerns regarding the Appellate Body’s Report (Nov. 12, 2008), WT/DS320/16; DSB Meeting Minutes of November 14, 2008, WT/DSB/M/258, para. 8.

The legal instruments cited in India’s panel request comprise the universe of measures that India can rely upon in the Article 21.5 proceeding to demonstrate compliance. However, to the extent that other measures, whether written or unwritten, serve to establish that India did not bring itself into compliance with the DSB’s recommendations by virtue of the measures cited in India’s Article 21.5 panel request, those other measures would also be relevant to the assessments of both compliance and nullification or impairment. They could include, for example, other measures that “prohibit the importation of various agricultural products into India from those countries reporting [NAI].”⁵

As this proceeding has developed, however, the United States is not seeking findings on other measures that prohibit the import of various agricultural products. Thus, the issue raised in the Panel’s question regarding other measures does not in fact arise on the facts of this dispute.

5. The United States also notes that the measures identified in the panel request are subject to a temporal delimitation. As the Appellate Body found in *EC – Chicken Cuts*, “[t]he term ‘specific measures at issue’ in Article 6.2 suggests that, as a general rule, the measures included in a panel’s terms of reference must be measures that are in existence at the time of the establishment of the panel.”⁶

6. Further, as part of resolving that disagreement as to the compliance of certain measures with the WTO Agreement, a DSU Article 21.5 panel can consider the operation of the measures identified in a panel request with respect to other measures maintained by the implementing Member. The Appellate Body’s analysis in *US – Softwood Lumber IV (Article 21.5 – Canada)* is consistent with this point:

⁵ Letter from United States to Chairperson, dated July 28, 2017.

⁶ *EC – Chicken Cuts (AB)*, para. 156.

By virtue of the remainder of its first sentence, it is also clear that the scope of Article 21.5 encompasses any “disagreement as to the existence or consistency with a covered agreement of measures taken to comply”. Canada, as well as the third participants, assert that the words "existence or consistency" are key to understanding the scope of a panel’s jurisdiction under Article 21.5. In order to make an assessment of the "existence or consistency" of "measures taken to comply", it seems to us that a panel must be able to assess measures taken to comply in their full context, including how such measures are introduced into, and how they function within, the particular system of the implementing Member. The word “existence” suggests that measures falling within the scope of Article 21.5 encompass not only positive acts, but also omissions. It also suggests that, as part of its assessment of whether a measure taken to comply exists, a panel may need to take account of facts and circumstances that impact or affect such existence. The word “consistency” implies that panels acting pursuant to Article 21.5 must objectively assess whether new measures are, in fact, consistent with relevant obligations under the covered agreements. As the Appellate Body has already stated, such an evaluation involves consideration of "that new measure in its totality" and the “fulfilment of this task requires that a panel consider both the measure itself and the measure's application”⁷ The fact that Article 21.5 mandates a panel to assess “existence” and “consistency” tends to weigh against an interpretation of Article 21.5 that would confine the scope of a panel's jurisdiction to measures that move in the direction of, or have the objective of achieving, compliance. These words also suggest that an examination of the effects of a measure may also be relevant to the determination of whether it constitutes, or forms part of, a “measure[] taken to comply”.⁷

In particular, the foregoing analysis by the Appellate Body correctly recognizes that a panel’s assessment can examine the measures identified in the panel request in the complete context of the implementing Member’s legal system.

7. Accordingly, a Member cannot artfully plead its panel request in a manner that prevents a panel from taking into account actions that frustrate compliance or otherwise confirm that the declared measures taken to comply do not actually bring the Member into compliance. For example, in a proceeding where the original respondent is claiming compliance, a panel is not limited to only scrutinizing the measures declared by the respondent as its compliance measure. A panel can – and should – as part of its assessment consider whether the characterization of the measure presented by the implementing Member is indeed accurate by considering its relationship to other measures in the Member’s system. For example, suppose a Member is found to have breached its WTO obligations because of an export ban and subsequently claims it has achieved compliance by virtue of an instruction that states the ban will not be enforced. If the Member also issues an instrument – that it does not declare as a compliance measure – that says the instruction is only valid on Mondays, or never undertook procedures to give the instrument effect, a panel can of course take such circumstances into account in finding that the

⁷ *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 67.

declared measure does not in fact bring the Member into consistency with its WTO obligations. In other words, nothing in the text of the DSU provides that Members can avoid the rulings and recommendations of the DSB simply by bringing a dispute on a carefully circumscribed panel request.

8. In this dispute, the actual operation of the Revised Avian Influenza Measure in India’s legal system is central to determining whether India has indeed brought itself into compliance. The U.S. position is straight-forward and consistent with the foregoing points: India cannot selectively highlight only those instruments that might appear to move it toward compliance. For example, the Panel in considering India’s assertion that S.O. 2337(E), as amended, means that India’s avian influenza measures conforms to the OIE Terrestrial Code⁸ is entitled to consider all of the relevant “facts and circumstances” at the time the Panel was established such as the absence of any veterinary certificates that could actually be utilized for purposes of trade and any instructions to border authorities indicating that the ban has in fact been lifted.⁹

Arguments

9. Finally, the United States notes the importance of recognizing the distinction between an argument and a claim. During the panel meeting, India asserted at various points that arguments raised by the United States should be treated as claims and required the United States to bring its own Article 21.5 proceeding. For example, India claimed that U.S. arguments concerning whether post-import testing is inconsistent with Article 2.3 of the SPS Agreement need to be decided in a separate Article 21.5 proceeding purportedly because India could not possibly know that any testing it might adopt would have to be consistent with Article 2.3 of the SPS Agreement.

10. As explained above, a claim goes to a panel’s term of reference. Here, India’s claim appears to be that the Revised Avian Influenza Measure is consistent with Article 2.3 and other provisions of the SPS Agreements. Any reasoning proffered by the United States why that is not so is an argument.¹⁰

⁸ See *e.g.*, India’s First Written Submission, para. 66.

⁹ The United States notes that the U.S. Article 5.8 Request (Exhibit USA-25) provided in response to Panel Question 1.8 also highlighted to India concerns regarding the absence of veterinary certificates: “Third, the United States continues to lack market access. One important reason relates to veterinary certificates. We understand that veterinary certificates are required by India for importation. However, veterinary certificates previously used by India have been removed from the website of India’s Department of Animal Husbandry, Dairying, and Fisheries (“DAHD”), and no alternate certificates have been agreed with the United States.”)

¹⁰ *India – Patents (AB)*, para. 88.

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

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

Responses to Questions 1.2 & 1.3:

11. The United States provides a consolidated response to Questions 1.2 and 1.3. As explained in greater detail below, the veterinary certificates (to the extent they have been adopted and operationalized at the time of panel establishment) hypothetically could constitute part of a measure taken to comply. On the facts of this case, however, the Veterinary certificates proffered by India are not within the Panel’s terms of reference because they were not in existence at the time the Panel was established. The post-import testing, however, may be.

Measure Taken To Comply

12. In determining whether a measure is taken to comply, a panel does not simply accept the original respondent’s declaration as to what constitutes the measures it has taken to comply. Not only would such acceptance frustrate the object of an Article 21.5 proceeding – which is to resolve “a disagreement as to the *existence* or consistency with a covered agreement of measures taken to comply” – it would also preclude an effective determination of compliance.¹¹ In this respect, the panel’s analysis from *Australia – Salmon (Article 21.5 – Canada)* is instructive:

We note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether a measure is one ‘taken to comply’. If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures ‘taken to comply’.¹²

Instead, a panel must make its own determination as to what measures constitute measures taken to comply.¹³ In this respect, the United States’ agrees with the Appellate Body’s analysis from *US – Softwood Lumber IV (Article 21 – Canada)* concerning how a compliance panel is to make such a determination:

¹¹ DSU Article 21.5 (emphasis added).

¹² *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10.

¹³ *EC – Bedlinen (Article 21.5 – India) (AB)*, para. 78 (“We agree with the Panel that it is, ultimately, for an Article 21.5 panel — and not for the complainant or the respondent — to determine which of the measures listed in the request for its establishment are “measures taken to comply”).

Some measures with a particularly close relationship to the declared "measure taken to comply", and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5. Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures.¹⁴

In other words, the Appellate Body had found that panels that have applied a nexus text that looks at the relationship of a particular measure with respect to the declared measure taken to comply and the DSB’s rulings and recommendations to have acted appropriately under the DSU. While the factors that may establish nexus may be particularized, they can include the timing, nature, and effect of the measure at issue. Here, both any veterinary certificates that India has adopted and post-testing requirements likely would satisfy the type of nexus elucidated by the Appellate Body.

13. With respect to veterinary certificates, they are tied closely to the declared measure taken to comply: the Revised Avian Influenza Measure. Per India, the Revised Avian Influenza Measure is an attempt to reach conformity with the OIE Terrestrial Code, which in turn relies on the use of veterinary certificates to facilitate safe trade. Indeed, India itself in its submissions references how the certificates are necessary to implement the OIE Terrestrial Code and as part of its remedying the findings from the original dispute:

For certain products, India can now accept imports of poultry and poultry products coming from countries, zones or compartments that are free from HPAI even if they have LPAI, subject to certain conditions. Such products must also comply with the veterinary certificate requirements set out in the OIE Terrestrial Code. Therefore, India has remedied the two specific inconsistencies identified by the Panel in the original dispute.¹⁵

Moreover, the certificates with avian influenza attestations are applied to address the subject of the original dispute: measures ostensibly applied by India for the control of avian influenza. The content of these certificates was also revised following the adoption of the panel and Appellate Body Report. Accordingly, the veterinary certificates share a sufficiently close nexus with the DSB’s recommendations and rulings and the declared measure to comply, in terms of nature, timing, and effect to be treated as measure taken to comply.¹⁶

¹⁴ *US – Softwood Lumber IV (Article 21 – Canada)*, para. 77.

¹⁵ India’s First Written Submission, para. 54. *See also* India’s First Written Submission, para. 72 (“Thus, under India’s current regime, if a territory has reported LPAI in poultry but is free from HPAI in poultry, it can still export poultry and poultry products provided that the veterinary certificate requirements as provided in the specific product recommendation has been met.”).

¹⁶ *See Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, subparagraph 22 (“we are of the view that in the context of this dispute at least any quarantine measure introduced by Australia subsequent to the adoption on 6 November 1998 of DSB recommendations and rulings in the original dispute – and

14. The testing requirement likewise would satisfy the type of nexus test endorsed by the Appellate Body. The testing requirement was adopted after the DSB’s recommendations and rulings; it is by nature applied to control avian influenza; and is reflected on the veterinary certificates indicating again they are part and parcel of India’s new avian influenza regime, *i.e.*, inextricable tied.¹⁷ Indeed, the reason testing would exist is because it is replacing the measure found inconsistent in the original proceeding: a complete import ban upon an outbreak of avian influenza.

Terms of Reference

15. With respect to determining whether a measure taken to comply is within the terms of reference of a dispute, the United States notes as an initial matter that they are indeed separate inquiries. An Article 21.5 proceeding does not necessarily entail issuing findings on all measures taken to comply; rather, this depends on the content of the panel request and the facts and circumstances of the dispute.¹⁸

16. With respect to veterinary certificates, there are two reasons they are outside the scope of the dispute. First, as referenced in prior U.S. submissions, there is no evidence that any veterinary certificates were in existence – *i.e.*, adopted and capable of use – on May 22, 2018: the date the panel was established.¹⁹

17. On this point, the United States notes that the Panel at the Panel Meeting requested India to provide the certificates that were provided with the various Sanitary Import Permits, and purportedly utilized for trade. India has not done so.²⁰ Instead, it appears that India (without any

within a more or less limited period of time thereafter -- that applies to imports of fresh chilled or frozen salmon from Canada, is a "measure taken to comply". The Tasmanian ban, introduced on 20 October 1999, imposes an import prohibition on all imports of salmonids into part of Australia on quarantine grounds. We thus find that it is a measure taken to comply in the sense of Article 21.5.”).

¹⁷ See *Australia – Leather II (Article 21.5 – United States)* (“Even assuming that a panel may conclude that a measure specifically identified in the request for establishment is not properly before it in a proceeding under Article 21.5, a question we do not here decide, in this case we see no basis for such a conclusion. The 1999 loan is inextricably linked to the steps taken by Australia in response to the DSB’s ruling in this dispute, in view of both its timing and its nature.”).

¹⁸ *US – FSC (Article 21.5 – EC II) (AB)*, para. 59 (“[W]e are of the view that the phrase “these dispute settlement procedures” does encompass Article 6.2 of the DSU, and that Article 6.2 is generally applicable to panel requests under Article 21.5. At the same time, given that Article 21.5 deals with compliance proceedings, Article 6.2 needs to be interpreted in the light of Article 21.5. In other words, the requirements of Article 6.2, as they apply to an original panel request, need to be adapted to a panel request under Article 21.5.”).

¹⁹ See United States’ First Written Submission, para 33 & IV.B.3 & V.A.2 generally; Exhibit USA-10; United States’ Second Written Submission, paras. 30-50.

²⁰ The United States notes that it invoked paragraph 8 of the Working Procedures at the Panel Meeting in noting that India should not be allowed to submit these certificates following the panel

cover letter or explanation) has provided three unfilled certificates with no indication of when they were issued or adopted: Exhibit IND-57 (Veterinary Certificate for Import of Poultry Meat and Poultry Meat Products); Exhibit IND-58 (Veterinary Certificate for Import of Live Poultry/Day Old Poultry/Hatching Eggs of Poultry); and Exhibit IND-49 (Veterinary Certificate for import of eggs products into India). Thus, India has still not put forward one piece of evidence before the Panel that establishes that any OIE consistent veterinary certificates could be used for trade on May 22, 2018.

18. In contrast, the evidence indicating that the certificates did not exist is more persuasive:

- The United States raised that India has removed certificates from its website before the October 2016 DSB meeting²¹ and India did not respond to the concern;
- The United States raised in its Article 5.8 Request²² that it lacked market access because veterinary certificates had been removed from DADF’s website, and requested India in question 2 to provide a copy, *inter alia*, of any veterinary certificates it maintained, and India, did not provided any;²³
- The United States submitted model certificates to India on March 21, 2017, to which again India did not suggest existing certificates could be used; and
- The United States has provided a screenshot from a web archive site confirming the certificates were still not on DADF’s website when the Panel was established;²⁴

meeting. The Panel found exception and good cause to allow their submission. However, the United States notes that India’s represented that the certificates for the SIPS would be provided in a day or so. If India subsequently provides any certificates that accompanied the SIPs, the United States requests that it be provided, consistent with paragraph 8, a period of time to investigate and comment on any such documents.

²¹ WT/DSB/M/387, para. 6.2 (Exhibit USA-8).

²² Exhibit USA-25.

²³ See *Japan – Apples (AB)*, para. 137 (“The United States could have requested Japan, pursuant to Article 5.8 of the SPS Agreement, to provide “an explanation of the reasons” for its varietal testing requirement, in particular, as it applies to apricots, pears, plums and quince. Japan would, in that case, be obliged to provide such explanation. The failure of Japan to bring forward scientific studies or reports in support of its varietal testing requirement as it applies to apricots, pears, plums and quince, would have been a strong indication that there are no such studies or report.”). Here, the United States did make a request for all instruments, including veterinary certificates, that India maintains with respect to control of avian influenza. Exhibit USA-25.

²⁴ Exhibit USA-10.

With respect to the absence of the certificates, the United States also references its closing statement before the Panel, which explained that India has only provided inconsistent and untenable reasons for why these certificates were not on DADF’s website.²⁵ Accordingly, because the evidence shows that no certificates existed on May 22, 2017, they are outside the terms of reference of this dispute.

19. Second, India did not reference the veterinary certificates in the Panel Request as being part of the Revised Avian Influenza Measure.²⁶ The United States notes that none of the other five instruments India cited as comprising the Revised Avian Influenza Measure would incorporate the veterinary certificates as a constituent component. India has not argued otherwise. Indeed, India makes a point of noting in its second written submission that in the original dispute, the veterinary certificates were not considered to be a related measure.²⁷ In other words, they were not part of the S.O. instrument. In the absence of any evidence that situation has changed, if India wished these instruments to be included in the scope of the proceeding, India would need to have explicitly referenced them in its request for panel establishment.

20. India appears to suggest that it can avoid having to identify the veterinary certificates in its Panel Request because a requirement for veterinary certificates has been in place since 2001. Such an argument is misplaced. The issue is not whether India had a general requirement for veterinary certificates; it is whether the terms of reference encompasses specific certificates, which necessitates these specific certificates existed on May 22, 2018.²⁸ Indeed, by India’s logic then, it would not need to refer whatsoever to the Revised Avian Influenza Measure in the Panel Request since India has had avian influenza measures of one form or another for more than a decade.²⁹

21. With respect to whether post-import testing falls within the terms of reference in this dispute, the United States notes as an initial matter that the Panel can of course, per the U.S. response to Question 1.1, scrutinize it in understanding the operation of the Revised Avian Influenza Measure. The United States submits that scrutiny of the post-import testing

²⁵ United States’ Closing Statement Before the Panel, para. 7.

²⁶ India’s Second Written Submission, para. 10. India noted that the five instruments it cited as comprising the Revised Avian Influenza Measure were adopted before the Panel’s establishment, and only that the veterinary certificate requirement was established in 2001. India’s Second Written Submission, paras. 9-10.

²⁷ India’s Second Written Submission, para.

²⁸ Specifically, for India’s case, they would be OIE consistent certificates existed that would actually allow for trade so that India can try and establish its claim that its new measure conforms to the OIE Terrestrial Code.

²⁹ *India – Agricultural Products (Panel)*, para. 2.34.

demonstrates the falsity of India’s claim that S.O. 2337(E) establishes an avian influenza regimes that conforms to the OIE Terrestrial Code.

22. With respect to whether post-import testing is within the terms of reference so that the Panel may issue findings upon it, the answer hinges on resolving two factual questions. First, did post-import testing exist on May 22, 2018? Considering that post-import testing is referenced in the veterinary certificates provided by India and on the one presently found on DADF’s website,³⁰ it is clear that such a requirement at least existed as the time these veterinary certificates were created. Thus, if the Panel finds these certificates were in place by May 22, 2018, then logically a requirement for post-import testing was also in place on that date.

23. Second, is post import testing part of the Revised Avian Influenza Measure identified in the Panel Request? If the Panel finds that the post-import testing requirement is a function of the veterinary certificates and that such certificates are outside the scope of this dispute, then the post import testing is also outside the scope of the dispute. If the Panel finds that the post import testing is a component of the Revised Avian Influenza Measure – for example it results from the avian influenza controls instituted through S.O. 2337(E) – then it would be within the terms of reference. While this factual conundrum may seem difficult to resolve, the United States notes its resolution can be found by following a basic principle alluded to in the Panel’s following question: the original respondent when bringing an Article 21.5 proceeding “has the onus of demonstrating that its implementing measure has cured the defects identified in the DSB’s recommendations and rulings.”³¹ If India cannot adequately explain its measure and how it rectifies the problems, then India cannot be found to have discharged its evidentiary burden – and loses its claim that the Revised Avian Influenza Measure has brought it into consistency with its WTO obligations.

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

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

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

³⁰ Exhibit IND-45 and Exhibit USA-24.

³¹ *US/Canada – Continued Suspension (AB)*, para. 362.

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

Response:

24. Yes, the Panel should apply this burden of proof. The United States notes three points. First, the Appellate Body’s analysis in this paragraph is consistent with the basic principle for the burden of proof in WTO dispute settlement – the party making the allegation bears the burden of proving it through evidence.³² Accordingly, since India is asserting the Revised Avian Influenza Measure brings it into compliance with the original panel and Appellate Body’s findings, India has the onus of demonstrating such is the case.

25. Second, it is important to emphasize the adequate explanation must place the Panel in a position to make an objective assessment. In other words, one way of determining whether an explanation is inadequate is if the explanation does not allow the Panel to make the requisite determination for consistency, such as when the original respondent (and now complainant) fails to sufficiently adduce evidence or reconcile inconsistencies in the evidence. If the Panel has fundamental questions about the claim before it, then the explanation is inadequate.

26. Finally, it is important to note that this paragraph is not suggesting that the “clear description” that needs to be provided by the implementing Member is the same as that for identifying a measure in a Panel Request per Article 6.2 of the DSU. Demonstrating the existence and content of a measure in a dispute is different than simply identifying a measure for purposes of a panel request. On this point, the Appellate Body’s finding in *US – Continued Zeroing (EC)* is instructive:

the identification of the specific measures at issue, pursuant to Article 6.2, is different from a demonstration of the existence of such measures. For the latter, a complainant would be expected to present relevant arguments and evidence during the panel proceedings showing the existence of the measures, for example, in the case of challenges brought against unwritten norms. Moreover, although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue.³³

Although this analysis was in the context of a dispute involving an unwritten measure, it has broader applicability. Specifically, this dispute too concerns the existence of a measure – whether one that brings India into compliance exists. It does not suffice for India to simply identify the measure through some nomenclature. Instead, India’s burden for a clear description requires that the Panel actually know and understand the content of the Revised Avian Influenza Measure.

³² *US – Shirts & Blouses (AB)*, p. 14.

³³ *US – Continued Zeroing (EC)*, para. 169.

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

Response:

27. Not exactly, although the distinction is a fine one. That is, as a theoretical matter, India does not need to demonstrate that the Revised Avian Influenza Measure has been applied to demonstrate compliance. As a practical matter, however, in many cases – such as in the current dispute – it will be difficult, if not impossible, to establish the actual content of the measure without evidence of its application.

28. The United States thus agrees with a prior Appellate Body report that found application must be considered in assessing compliance, but did not go as far as to suggest it needed to be demonstrated:

When the issue concerns the consistency of a new measure "taken to comply", the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality. The fulfilment of this task requires that a panel consider both the measure itself and the measure's application.³⁴

A panel as part of its objective assessment should, therefore, consider the application – or lack of it – probative in determining compliance. For example, if trade is occurring in a WTO consistent manner, then that would support the Member's claim of compliance. Conversely, in a market where there is demand for a good, but trade is not occurring, and there is no reasonable explanation as to why trade is not occurring³⁵ other than the Member's measure, then a panel can take that circumstance into account in determining that the measure is not WTO consistent.

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

Response:

29. The answer depends on the specific circumstances of the dispute. Action that occurs after panel establishment is not relevant if that action does not shed light on the actual content of the measure *as it existed at the time of panel establishment*. On the other hand, if the actions after panel establishment are found to be relevant to the content of the measure at the time of

³⁴ *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para 87 (footnote omitted).

³⁵ The United States agrees that in certain circumstances, imposing a burden of establishing trade would make it practically impossible for a Member to demonstrate compliance. For example, suppose a Member is found to have maintained a WTO inconsistent export prohibition on a commodity. Subsequently, the commodity is found to be highly toxic, and demand for it collapses. In that instance, trade in the commodity is not going to occur. (To date though, that is not the case with poultry products.)

panel establishment, those actions could be relevant. The Appellate Body’s analysis from *EC – Selected Customs Matter* speaks to this issue:

In order to determine whether the measures at issue have been administered at the time of the Panel’s establishment in a manner that is inconsistent with Article X:3(a) of the GATT 1994, the Panel was, however, entitled to rely on *evidence* of acts of administration. Thus, it is important to distinguish between, on the one hand, the measures at issue and, on the other hand, acts of administration that have been presented as evidence to substantiate the claim that the measures at issue are administered in a manner inconsistent with Article X:3(a) of the GATT 1994. The Panel failed to make the distinction between *measures* and pieces of *evidence*. While there are temporal limitations on the measures that may be within a panel’s terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel’s terms of reference may pre-date or post-date the establishment of the panel. A panel is not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment. In this case, the United States was not precluded from presenting evidence relating to acts of administration before and after the date of Panel establishment. A panel enjoys a certain discretion to determine the relevance and probative value of a piece of evidence that pre-dates or post-dates its establishment.³⁶

30. The United States notes that a panel is also entitled to consider the circumstances of any evidence that post-dates the panel request in deciding what weight to afford such evidence. For example, in this dispute, India cited certain actions at the Panel Meeting (the December 4 letter and regionalization determination) and noted it “hurried” to get them completed for the Panel Meeting. The Panel should take account of this context. It can consider it in weighing the probative value of the evidence, for example by finding that it entitled to less weight because such action may be a function of concerns regarding the course of dispute settlement rather than the actual operation of the measure. Likewise, with respect to whether the veterinary certificates India provided were operationalized on May 22, 2017, the Panel is entitled to consider why they were absent from DADF’s website while certificates for other products remained posted.

Question 1.8: At the substantive meeting the United States stated that it had made a request for information under Article 5.8 of the SPS Agreement. Please provide a copy of the request.

Response:

31. The United States has attached a copy of the request as Exhibit USA-25.

³⁶ *EC – Selected Customs Matters (AB)*, para. 188 (italics original).

2 MEASURE AT ISSUE

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

Response:

32. With respect to the first question, the United States refers to its response to Question 1.5. With respect to the second question – veterinary certificates – the answer is no. As an initial matter, the United States summarizes the various veterinary certificates provided by India:

- Exhibit IND-17 (dated June 14, 2017): Comments on a U.S. proposals for certificates and a blank certificate for poultry meat developed by India that notes post-import testing will be drawn if the consignments are originated from compartments of zones of avian influenza infected country, and a blank certificate developed for feathers;
- Exhibit IND-44 (dated October 30, 2017): a letter to Spain noting that a proposed veterinary certificate is acceptable and including the blank certificate that notes the poultry has been kept in a “country, zone or compartment free from high pathogenicity avian influenza”;
- Exhibit IND-45 (undated): various blank certificates some of which again note post import testing and importing from zones and compartments;
- Exhibits IND-57 (Veterinary Certificate for Import of Poultry Meat and Poultry Meat Products); Exhibit IND-58 (Veterinary Certificate for Import of Live Poultry/Day Old Poultry/Hatching Eggs of Poultry); and Exhibit IND-49 (Veterinary Certificate for import of eggs products into India) (all undated): blank certificates provided following the panel meeting.

Notably, India has not provided any of the actual veterinary certificates that actually accompanied the SIPs it issued. Thus, neither the United States nor the Panel actually know what certificates were actually used at the border, if any.

33. These documents do not amount to consistent application of the Revised Avian Influenza Measure for at least three reasons. First, they would not represent consistent application of a measure because of what “consistent application” requires. It is helpful to recall the meaning of this phrase. The term “consistent” means “acting or done in the same way over time, especially so as to be fair or accurate” or “unchanging in standard over time.”³⁷ And, “application” means “the action of putting something in operation.”³⁸ Thus, the words put together imply something

³⁷ Concise Oxford Dictionary, p. 305 (Exhibit USA-26).

³⁸ Concise Oxford Dictionary, p. 63 (Exhibit USA-27).

that has operated in the same manner for some period of time. These documents, however, are not consistent application – *of anything*. They are a limited number of documents that have appeared in the last few months – and for which there is no evidence that they have actually been used, or are even capable of being used. Indeed, the fact that India published most of its other certificates – and the predecessors to their certificates – on DADF's website raises questions about whether they have indeed been operationalized. India has not attempted to resolve that question, including by providing the dates they were issued. The mere preparation of some paperwork is the mere preparation of paperwork; it does not demonstrate consistent application.

34. Second, non-utilized veterinary certificates by definition would not constitute application of the Revised Avian Influenza Measure. Instead, the existence of such certificates would be relevant – if at all – in determining whether the Revised Avian Influenza Measure actually conforms to, or is based upon the OIE Terrestrial Code. Veterinary certificates are accordingly a prerequisite to assessing whether the measure actually conforms to or is based on the OIE Terrestrial Code

35. Finally, the certificates themselves lack any indication that their content and creation is driven by the Revised Avian Influenza Measure. Absent such a relationship, there is no basis to argue their existence would constitute application. For example, the certificate that India has accepted from Spain³⁹ would presumably be a function of accepting a proposal from Spain, not because S.O. 2337(E), as amended, creates such a certificate.

Question 2.23: With reference to paragraph 10 of India's second written submission, does the United States agree that "there is no obligation for exporting or importing Members to have their veterinary certificates available in the public domain such as on the website of the Ministry of Agriculture or to maintain a standard form for veterinary certificates"?

Response:

36. The United States did not argue the failure to maintain model certificates or to publish them on a website breached the SPS Agreement in the original dispute – and does not argue its breaches the SPS Agreement now.

37. Instead, the United States argues that in the circumstances of this dispute, the absence of the certificates on DADF's website creates a factual inference because *of how India's system operates*. India's claims about what other countries might do is misplaced. If in India's system, there are standard certificates that are used for trade, and any such certificates are published on the Ministry of Agriculture's website, then the absence of particular certificates can lead to the reasonable inference that such certificates are not available, *i.e.*, none that can be utilized for trade exist. In considering this inference, it is important to consider the relevant context. These certificates are limited to products that were subject to a significant WTO dispute. The United

³⁹ Exhibit IND-44.

States raised their absence as an issue that precluded trade altogether.⁴⁰ And, there is no adequate explanation as to why these certificates were not on DADF’s website,⁴¹ or any other information concerning how certificates could be obtained in the absence of the website. Under these circumstances, the United States submits that the most reasonable inference is that no certificates were in place.

Question 2.24: Please clarify what the United States requested in its letters of 20 and 21 March contained in Exhibit IND-15.

38. These letters request India to adopt proposed certificates to allow trade and for India to recognize the U.S. system for regionalization so to minimize trade disruptions in the event of avian influenza outbreak. With respect to the certificates, the United States provided proposed models that it hoped India would accept, and with respect to regionalization, the United States provided a response to the questionnaire DADF had created. The United States notes certain passages in particular to confirm that these indeed were the requests made to India:

39. With respect to regionalization

- P. 4 of the Exhibit: USDA APHIS VS is providing the enclosed, "Questionnaire for the Export of Live Poultry Hatching Eggs, Fresh Poultry Meat, and Meat Products to India from Zones Free of Avian Influenza," which describes the U.S. Veterinary infrastructure, human resources, and avian influenza related laws, regulations, and programs. The information provides an overview of the robustness of the U.S. animal health structure and our avian influenza control system. The information also describes our approach to disease eradication activities, including establishing control zones, in the event of outbreaks of Highly Pathogenic Avian Influenza (HPAI) in the United States. This should provide sufficient information to allow trade of poultry and poultry products from unaffected zones in the United States during occurrences of HPAI.
- P. 5 of the Exhibit: the United States notes that it “is providing the enclosed information because it solicited in a questionnaire posted the DADF website. As noted above, in providing the information, the United States aims to ensure that any current or future outbreak of HPAI in the United States does not serve as impediment to trade of poultry and poultry products from unaffected zones.

These statements confirm that the United States requested regionalization to minimize trade disruptions to allow trade to continue unaffected from zones that were unaffected by avian influenza.

⁴⁰ See United States’ First Written Submission, para. 29; U.S. Article 5.8 Request (Exhibit USA-25).

⁴¹ United States’ Closing Statement Before the Panel, para. 7.

40. With respect to certificates:

- PP. 4-5 of the Exhibit: The USDA Foreign Agriculture Service (FAS) will be following up shortly to provide model health certificates for the exportation to India of certain poultry and poultry products, including those described in the "List of poultry and poultry products covered under S.O. 2337(E)," dated 8th July, 2016.
- P. 6: Please find enclosed herewith the official correspondence from the U.S. Department of Agriculture, Washington providing the proposed health certificates for the export of poultry and poultry products.
- P. 7: Following up on the communication from USDA's Animal and Plant Health Inspection Service (APHIS), Veterinary Services (VS) on March 20, 2017, we are writing to provide proposed health certificates for, the export of poultry products, including the products described in the "List of poultry and poultry products covered under S.O. 2337(E)," provided by India to the United States on January 31, 2017.
- P.7: We look forward to your prompt agreement that products accompanied by these certificates may be imported into India with no other required certifications or permits Please feel free to contact us if you have any questions or concerns regarding the information provided.

These statements confirm that the United States requested that India accept proposed certificates to allow trade.

LEGAL CLAIMS

3 ARTICLE 3.1 AND 3.2

Question 3.1: Please comment on the meaning of the term "conform to" in Article 3.2 of the SPS Agreement.

- a. **When can a measure be said to "embody [an] international standard completely and, for practical purposes, convert[] it into a municipal standard" ?**
- b. **Could a measure be said to "conform to" an international standard if the wording of the measure differs from that of the standard, but the effect of the measure is the same as the intended or expected effect of the international standard? If, in these circumstances, it cannot be said to "conform to" the standard, could it be considered to be "based on" the standard?**
- c. **Does an analysis of whether a measure "conforms to an international standard" involve examination of the text of the measure at issue only, or does it also encompass examination of the way(s) in which the measure has been put into practice or operationalized?**

Response to chapeaux and part (a):

41. As found by the Appellate Body, the term "conform to" means the Member's measure "would embody the international standard *completely*."⁴² To that end, a measure can be said to embody an international standard where it adopts "all" of the elements of the international standard.⁴³ If there is a deviation between the content of the measure or an element of the international standard is missing, then the measure cannot be found to embody the international standard completely.

Response to part (b):

42. Yes. If the content of the standard is transposed completely into the municipal measure, it is possible that the measure still conforms to the international standard despite deviation in the wording of the measure. In making the assessment as to whether conformity exists despite the deviation, a panel should consider why such a deviation exists. For example, if the deviation is function of language translation, or perhaps because certain terms in the international standard

⁴² *EC – Hormones (AB)*, para. 170.

⁴³ *EC – Hormones (AB)*, para. 171.

might be confusing in a domestic system,⁴⁴ then there may be an adequate explanation to accept that the deviation does not preclude a finding of conformity.

43. In the present dispute, two points concerning transposition of the OIE Terrestrial Code into the Revised Avian Influenza Measure bear emphasis. First, India has the burden of trying to establish conformity. As the United States noted in its first written submission, S.O. 2337(E), as amended, does not contain the text of various product specific recommendations of the OIE Terrestrial Code. Even if the measure did, India’s burden would not be discharged. India would still need to demonstrate that the effect of the measure was the same as that intended by the OIE Terrestrial Code. Here though, in the absence of any text in the measure, instructions to government agencies, and in light of India’s long-standing prior interpretation of the OIE Terrestrial Code, India has fallen far short of meeting its burden that the Revised Avian Influenza Measure conforms to the international standard.

44. Second, the Panel should consider the structure of any deviations with respect to the measure generally to see if that might provide an answer for why the deviation exists. The Panel does not have to accept India’s declaration. For example, paragraphs 2(3) and 2(4) of S.O. 2337(E) appears to reflect Article 10.4.3 of the OIE Terrestrial Code, which concerns countries, zones, and compartments free from avian influenza. S.O. 2337(E) does not contain any text reflecting Article 10.4.4 of the OIE Terrestrial Code, which concerns countries, zones, and compartments free from HPAI in poultry. India’s assertion that this is just an oversight is unconvincing. To the contrary, the omission is consistent with the interpretation of S.O. 2337(E), proffered by the United States that it requires avian influenza freedom as a condition of entry. Specifically, S.O. 2337(E) as originally issued provide in paragraph 2(1) that import would only be allowed from a country, zone, or compartment “free from avian influenza.” The language “free from avian influenza” as originally drafted suggests that the omission of language concerning freedom from HPAI is not accidental. Rather, the provisions would work in conjunction. S.O 2337(E) provides that import is only allowed from territory free from avian influenza (i.e., free from LPAI) and the S.O defines in paragraph 2(3) and 2(4) what such a territory is. This reinforces that India’s subsequent deletion of “free from avian influenza” in paragraph 2(1) is simply cosmetic since India did not make any change to reflect that territories can also just be free from HPAI.

Response to part (c):

45. The analysis concerns how the measure has been operationalized. If a Member simply transposed the text of an international standard into a municipal measure, but failed to actually effectuate it or effectuates incorrectly, then the measure cannot be deemed to conform to the

⁴⁴ For example, the OIE Terrestrial Code has a glossary to define certain terms. It may be the case a term in the OIE Code has an inconsonant meaning with how that term is normally interpreted in the Member’s legal system. To avoid confusion, the Member may utilizes another term that capture the meaning envisaged by the OIE. Indeed, doing so may be consistent with the OIE Terrestrial Code since it provides that veterinary legislation should not contain definitions that create conflict or ambiguity. *See* OIE Terrestrial Code, Article 3.4.4.

international standard. For example, in the original proceeding, both the United States and India presented arguments about the same text – Chapter 10.4 of the OIE Terrestrial Code – but arrived at strikingly divergent interpretations. If India had transposed the text of Chapter 10.4 of the OIE Terrestrial Code in full in a municipal measure, but, per its reading, applied it to effectuate bans in response to detections of avian influenza, then its measure would still be deemed to be in contradiction with the relevant international standard.

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

- a. What, if any, are the relevant provisions in the Terrestrial Code pertaining to the procedure for recognizing disease free status established under Paragraph 3 of S.O. 2337(E) as amended and the Guidelines submitted by India in Exhibit IND-7?**
- b. Is Article 5.1.2.2 a relevant standard for the purposes of assessing the revised AI measure under Articles 3.1 and 3.2?**
- c. Is post-shipment inspection covered by the OIE Terrestrial Code? If so, is it part of the relevant international standard?**

Response to Chapeaux:

46. The relevant provisions are those contained in:

- Chapter 10.4 of the OIE Terrestrial Code (Avian Influenza);⁴⁵
- Chapter 4.3 (Zoning and Compartmentalization);⁴⁶
- In Chapter 5.1 (General Obligation to Certification): Article 5.1.1 (General), Article 5.1.2 (Responsibilities of the Importing Country), & Article 5.1.4 (Responsibilities in case of an incident related to importation);⁴⁷ and
- In Chapter 5.3 (OIE Procedures Relevant to the Agreement on the Application of Sanitary and Phytosanitary Measures of the World Trade Organization: Article 5.3.7 (Sequence of steps to be taken in establishing a zone or compartment and having it recognized for international trade purposes);⁴⁸

⁴⁵ Exhibit IND-9.

⁴⁶ Exhibit USA-15.

⁴⁷ Exhibit USA-12

⁴⁸ Exhibit USA-28.

Response to Part (a):

47. The relevant provisions are Articles 10.4.2, 10.4.3, 10.4.4, Chapter 4.3, and Article 5.3.7 of the OIE Terrestrial Code.

Response to Part (b):

48. Yes. Article 5.1.2.2 concerning the responsibilities of importing countries is part of the Chapter concerning “general obligations relating to certification,” which would mean it applies to certification requirements set forth in Chapter 10.4. The obligations in the horizontal chapters in Volume 1 of the OIE Terrestrial Code are applicable to individual disease chapters in Volume 2.

49. The United States notes that India argued in the original dispute that this provision meant that India was entitled to demand freedom from avian influenza from its trading partners if a disease was not present domestically or subject to an official control program.⁴⁹ The OIE’s Responses to the Panel’s Question noted the OIE disagreed and affirmed its plain meaning that countries should not impose health conditions for a disease if a disease is present domestically and not subject to control:

The meaning of Article 5.1.2.2 is that a country that is not free of a specified disease and that has no control programme for the disease is not justified in requiring health conditions on animals or products in relation to this disease. This does not mean at all that a country that declares itself as being free from a given type of avian influenza is justified in accepting imports only from countries that are free from the same type of avian influenza. The risk mitigation measures recommended in the Terrestrial Code disease chapters are designed so that a product can be imported safely, regardless of the status of the importing country.⁵⁰

Accordingly, the OIE has also confirmed the U.S. interpretation that Article 5.1.2.2 is applicable to the OIE’s recommendations for the control of avian influenza.

Response to Part (c):

50. No, the OIE Terrestrial Code does not have a recommendation for post-import testing with respect to avian influenza. Accordingly, India would need to ensure that such a measure is based upon a risk assessment appropriate to the circumstances per Article 5.1 of the SPS Agreement.

⁴⁹ India’s Response to Panel Question 45 in the Original Proceeding, pp. 39-40.

⁵⁰ OIE Responses to Panel Questions, Answer to Question 7 b, p. 16 (Exhibit USA-13).

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

Response:

51. Yes. The horizontal recommendations are cross-cutting standards that are relevant for the application for the disease specific recommendations in Volume 2, such as Chapter 10.4. For example, the admonition in Article 5.1.2.2 that a veterinary certification “should not include requirements” for pathogens that are present domestically and not subject to control serves as a prerequisite for the product specific recommendations in Chapter 10.4. Unless the importing country satisfies the basic obligation of controlling any disease that is present domestically, it should not impose the corresponding control measures for the disease as set forth in Volume 2. If a Member applies those controls anyway, then it is acting in contradiction with a basic structural principle of the OIE Terrestrial Code.

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

Response

52. No, while the OIE Terrestrial Code speaks of disease prevalence broadly at certain points (such as a veterinary authority's evaluation of whether the disease is becoming more or less prevalent), there is no specific concept of low disease prevalence. The concept of low prevalence is typically associated with international standards concerning plant pests. For example, IPSP 20 reflects requirements for the establishment of areas of low pest prevalence.

Question 3.8: In paragraph 75 of its first written submission, the United States submits that "India is still maintaining a ban on agricultural products on account of avian influenza, which encompasses LPAI as well". Please clarify this statement. Does the "ban" result from requiring ex ante recognition of disease free status before allowing importation; or does the bans consist in allegedly not allowing trade unless the country, zone or department is free from avian influenza, including LPAI? In paragraph 78 of its first written submission, the United States submits that "if no exporting Member can access and make use of a veterinary certificate, then the importing Member is simply imposing a ban". The United States makes this argument in the context of Articles 3.1 and 3.2. Please clarify what the United States means by the phrase "access [to] a veterinary certificate". In the United States' view, what form of "access" to veterinary certificates would be necessary in order for India to conform to the OIE standard?

Response:

53. With respect to the ban, the United States believes it results on account of both conditions. First, as the United States noted in its first written submission, the text of the

measure requires *ex ante* recognition of disease free areas in addition to satisfying whatever India deems to be the correct interpretation of the OIE Terrestrial Code.⁵¹ Second, it appears India’s interpretation of the OIE Terrestrial Code, even after recognition takes place, would still require a particular zone to be free from avian influenza, including LPAI.⁵²

54. By access, the United States means ability to use. If a trader cannot obtain a veterinary certificate because of practical impediments such as a government’s refusal to share them – and a veterinary certificate is required for importation⁵³ – then the importer cannot trade. The U.S. position is that this is a *de facto* ban. The U.S. view is that access is a prerequisite to conforming to the international standard since the international standard calls for an importing country to accept the presentation of a veterinary certificate that contains certain specified attestations. The United States does not believe that a particular form of access needs to be maintained long as the access is functional and effective. For example, India could provide access by: (1) providing certificates directly to the United States so its authorities could fill them out, (2) delivering them to traders upon request, or (3) maintain a website where traders can obtain them and forward them on to competent authorities. However, when India eliminates the only mechanism traders have to obtain veterinary certificates – DADF’s website – and fails to create any alternative mechanism, then India is simply imposing a *de facto* ban on imports. In other words, India is precluding the use of veterinary certificates to mitigate the risk from avian influenza – and that is inconsistent with the OIE Terrestrial Code.

Question 3.9: In the United States' view, does the OIE Terrestrial Code allow a country to establish a process for recognizing disease free areas, zones or compartments that must be satisfied before allowing imports from AI-affected countries in accordance with the product-specific standards in Chapter 10.4?

Response:

55. No, the OIE Terrestrial Code does not allow a country to *a priori* mandate recognition of regionalization prior to allowing imports. Indeed, the fact that the recommendations in Chapter 10.4 provide for importation from a country free from HPAI or avian influenza indicates that such an *ex ante* condition is not necessary. Specifically, if regionalization was a predicate, then

⁵¹ United States’ First Written Submission, para. 46.

⁵² United States’ First Written Submission, paras. 73-75; United States’ Opening Oral Statement, paras. 9-13.

⁵³ India’s First Written Submission, para. 33 (“In fact, notification S.O. 2666(E) just requires an importer to apply for a SIP before any exports can be sent to India from the country of origin for which a SIP has been issued. It further requires that each export consignment must be accompanied by a veterinary health certificate which includes information on the disease status of the exporting country that must be certified by the official veterinarian. This information is provided for background purposes only. India recalls that the Panel in the original proceedings had found that the SIP and the health certificates were not measures at issue in the dispute as they were not related to, nor implemented, the import prohibition provided in notification S.O. 1663(E).”).

one would presume that the recommendations would simply reflect a zone or compartment rather than have the option of a country free from avian influenza.

56. Moreover, the United States notes the responses of the OIE in the original dispute also noted that measures can be applied to an entire country if the country in question does not applying zoning:

Trade requirements of the importing countries should take into consideration the zoning and compartmentalisation principles applied according to the relevant chapters in the Terrestrial Code. If the affected country does not apply zoning to reduce the size of the affected population, then the measures recommended in the Code for a particular product should be applied for the entire country.⁵⁴

This statement recognizes that the OIE Terrestrial Code’s recommendations are applicable even the exporting country does not engage in zoning or compartmentalization. Thus, the recommendations in the OIE Terrestrial Code for avian influenza do not require that a process for recognizing disease free areas, zones or compartments must be satisfied prior to allowing trade in accordance with the product specific standards.

5 ARTICLE 2.3

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

Response:

57. No, the differential treatment can be found on the face of the measure. However, where a party raises an issue that there is differential treatment in relation to conditions of competition, the panel may take this into account.

Question 5.2: Should the Panel consult with experts to determine whether India's domestic surveillance system under NAP 2015 is capable of detecting LPAI? If so, should the Panel consult the same experts who were consulted in the original proceedings? Would a consultation in writing suffice or is a hearing necessary?

Response:

Consultation with Experts is Unnecessary

58. The United States does not believe a consultation with experts to evaluate NAP 2015 is necessary. As an initial matter, India has not provided any evidence concerning the actual application of NAP 2015, such as testing data and other relevant information such as the specific

⁵⁴ Responses of the OIE to the Panel’s Questions from the Original Proceeding, Response to Question 19(b) (Exhibit USA-13).

facilities that are being examined. In the original dispute, India at least submitted exhibits that purported to represent how India’s surveillance operated in practice. In the absence of any such evidence here, India has failed to provide the requisite evidence to establish that it had indeed adopted a program that controls for LPAI domestically. In the clear absence of such evidence necessary to make out a *prima facie* case, the United States submits there is no reason to use the resources of experts or to delay these proceedings further.

If Experts are Consulted, the Original Experts Would be Appropriate

59. If the Panel does consult with experts, the United States believes the same experts should serve.⁵⁵ The United States notes that the experts in the original dispute served well, and thus there is a basis to believe they would serve effectively if their assistance was solicited again. Moreover, these individuals are already familiar with the issues and could thus work more effectively and expeditiously than new individuals who were unfamiliar with the issues present in this dispute.

Written Consultation Would be Appropriate

60. The United States believes a written consultation could efficiently provide any assistance the Panel might need.⁵⁶ Because the evidence concerning India’s domestic surveillance system is limited to NAP2015, the United States believe the Panel could provide that document and ask the experts variations of two particular questions that were posed in the original proceeding. The United States has edited those questions to make them appropriate for this dispute per below. Language in red strikeout is deleted text while text in blue underline is added:

Original Question 4(b): Please express your professional opinion as to how effective the surveillance methodology prescribed by India's NAP ~~2012~~ 2015 are likely to be in detecting HPAI, and LPAI ~~and LPNAI~~. ~~Please comment whether the NAP 2012 provides for the appropriate methodology (targeted/comprehensive/passive/active) particularly as HPNAI has been detected and in light of the scientific report by Dr. Pawar et al (see question 3 above) and taking into account the different types of productions systems (backyard and commercial production) in India.~~

Original Question 6: ~~In light of the above statements, how does India's domestic AI surveillance regime as described in the NAP 2012 and as actually applied in practice (see, for instance, India's first written submission, paras. 41-51 and Exhibits US-89, US-90, Exhibits IND-9, IND-15, IND-46, IND-49, IND-50-56,~~

⁵⁵ It would not be the first time that utilizing the same experts in a compliance proceeding was contemplated. The United States notes that in the *Japan – Apples* compliance proceeding, the parties agreed that if experts were necessary, the same experts from the original proceeding should serve. WT/DS245/10.

⁵⁶ The United States notes that if the Panel does decide that a hearing is preferable, it stands ready to participate.

~~IND-115, IND-117 and IND-123) compare with the Terrestrial Code's AI surveillance related recommendations? In particular, please comment on the suitability of India's domestic AI surveillance regime to reliably detect HPAI and LPNAI in light of the Terrestrial Code's AI surveillance-related recommendations.~~

61. The questions without the markup would thus read as follows:

Please express your professional opinion as to how effective the surveillance methodology prescribed by India’s NAP 2015 are likely to be in detecting HPAI; and LPAI.

Please comment on the suitability of India's domestic AI surveillance regime to reliably detect HPAI and LPNAI in light of the Terrestrial Code's AI surveillance-related recommendations.

Responses from the experts to these precise questions should assist the Panel in assessing India’s arguments concerning whether NAP 2015 actually demonstrates that India maintains a domestic surveillance system that controls for LPAI.

Question 5.3: If the Panel were to find that the revised AI measure "conforms to" the relevant international standard, would the presumption of consistency in Article 3.2 of the SPS Agreement give rise to a presumption that the revised AI measure is consistent with Article 2.3?

62. No. Article 3.2 of the SPS Agreement provides that measures that conforms to the relevant international standard are entitled to a rebuttal presumption of consistency with the *relevant* provisions of the SPS Agreement and of GATT 1994:

Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994.⁵⁷

The use of the qualifying term “relevant” in Article 3.2 confirms that the rebuttal presumption does not flow necessarily to all obligations, but those where it is “relevant.” To that end, there must be an assessment of the type of obligation at issue in the SPS Agreement before determining whether the presumption of consistency would logically extend to it.

63. For example, consider the obligation to base a measure on a risk assessment under Article 5.1 of the SPS Agreement. When considering a measure that conforms to an international standard and the requirement to base an SPS measure on a risk assessment, one can see why extending the rebuttable presumption of conformity is logically applicable to the risk assessment

⁵⁷ SPS Agreement, Article 3.2.

requirement. Specifically, if a Member has made the decision to conform its measure to the international standard that is the result of international harmonization efforts, why then would it also have to undertake the exercise of conducting a risk assessment for that measure?

Conducting a risk assessment would normally not result in the adoption of a more trade facilitative measure or otherwise ensure the measure is being applied in a non-discriminatory manner. Accordingly, the United States believes the presumption of conformity under Article 3.2 of the SPS Agreement is appropriately afforded to an obligation such as that imposed by Article 5.1 of the SPS Agreement.

64. In contrast, the type of obligations at issue in Article 2.3 of the SPS Agreement are not the type that should warrant a rebuttable presumption:

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. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.

The first sentence of Article 2.3 concerns disciplining unjustifiable or arbitrary discrimination while the second precludes measures from applied in a manner that is a disguised restrictions on trade. These provisions by disciplining discrimination and disguised restrictions on trade would have impact even whether the measure conforms to the international standard. For example, consider the situation where a Member applies a residue limit for a growth promotant that is set forth in an international standard, but imposes no limitation domestically. Domestic producers as a result could use greater amounts of the promotant and thus obtain greater yields, and be in a better competitive position than foreign producers. The disciplines in Article 2.3 to ensure non-discriminatory treatment are thus not rendered any less relevant simply because the measure conforms to an international standard. Accordingly, the United States submits that the presumption of consistency afforded to a measure that conforms to an international standard under Article 3.2 of the SPS Agreement does not extend to the obligations in Article 2.3.

Question 5.4: In paragraph 142 of the United States' first written submission, the United States argues that "even applying the limited controls of the OIE Terrestrial Code with respect to products originating from territories with LPAI outbreaks would constitute a form of unjustifiable discrimination".

- a. **Could the United States please expand on this argument? What are the "limited controls" to which the question refers? Why would applying controls foreseen in the OIE standards result in discrimination?**
- b. **Is this argument compatible with the United States' claim in the original proceedings that compliance with the OIE standards would be a less-trade restrictive alternative under Article 5.6 of the SPS Agreement?**

- c. **With reference to paragraph 113 of the United States' second written submission, please further explain the United States' view that "India would require its trading partners to be subject to [the OIE Terrestrial Code] regime, but excuse its own domestic industry".**

Response to Part (a):

65. As an initial matter, the United States notes the its argument concerns an *arguendo* situation: that it is accepted that India in fact applies the OIE Terrestrial Code to imports. Thus, the United States is arguing about a situation where India would allow U.S. imports despite LPAI outbreaks if they were accompanied with veterinary certificates that contained OIE consistent attestations.

66. The U.S. position is that this situation still results in the measure arbitrarily and unjustifiably discriminating if India does not have corresponding controls for LPAI domestically. For example, consider the case of egg producers. In the case of a foreign producer, if there is an LPAI outbreak in a Member, the producer may still be able to ship eggs to India if it provides a veterinary certificate that contains the attestations recommended in Article 10.4.14 of the OIE Terrestrial Code. In that instance, the attestation would include confirm that the surface of the eggs has been sanitized. The foreign producer may be able to trade, but it does have to ensure certain steps have been complied with as a condition of doing so. Because India does not survey for LPAI, however, the Indian producer of eggs does not even to have consider undertaking any additional actions even if LPAI is present. Applying the OIE recommendations on foreign producers without any domestic controls would unjustifiably put the Indian producer in a better position that the U.S. producer.⁵⁸

Response to Part (b):

67. Yes, the answer is compatible with the U.S. arguments made concerning Article 5.6 in the original proceeding. A breach of Article 2.3 does not require a breach of Article 5.6 to be established. It is conceivable that there may not be a less trade restrictive measure for foreign producers available, but that discriminatory treatment in breach of Article 2.3 persists. As the United States explained in its first written submissions, there are three approaches a Member can take to resolve a breach of Article 2.3:

- it could seek to align its treatment of imported products to that afforded domestic products.
- it could align the treatment afforded to domestic products to the treatment accorded to imported products.

⁵⁸ As alluded to in the U.S. response to the prior question, this type of scenario is precisely why the presumption of conformity under Article 3.2 should not be extended to the obligations in Article 2.3.

- it could align the treatment of both imported products and domestic products to a new standard.⁵⁹

In the scenario where the measure applied to foreign producers is the least trade restrictive – but still discriminatory compared to domestic producers – (and the Member wishes to maintain its treatment of foreign producers) a cure for the discrimination would be to align the treatment of domestic producers with foreign producers.

Response to Part (c):

68. Paragraph 113 assumes *arguendo* that India is applying the OIE’s recommendations with respect to trade from foreign producers. In the event that such trade was occurring, paragraph 113 notes that even though such controls may not be “onerous,” they can still be discriminatory if India does not impose controls for LPAI domestically, as explained above.

Question 5.5: If the Panel finds that the revised AI measure does allow the importation into India of poultry and poultry products from areas reporting LPAI, would the United States still consider that the measure results in discrimination under Article 2.3?

Response:

69. Yes, because India does not control for LPAI domestically. The United States refers back to its answer to the prior question.

Question 5.6: Please explain whether the imposition by India of import conditions consistent with the OIE Terrestrial Code would impose any costs or burden on the United States in such a way as to affect the conditions of competition. Given that international trade often involves costs not associated with domestic trade (e.g. customs controls), and given further that the United States stated during the meeting that it would control for HPAI and LPAI even in the absence of India’s revised AI measure, please explain whether any additional costs or other burdens are caused by the revised AI measure.

70. For the purposes of this question, the United States assumes *arguendo* that India’s import conditions are consistent with the OIE Terrestrial Code. Yes, there would be some additional costs and burdens associated with complying with the Revised Avian Influenza Measure even if the requirements comported with the OIE Terrestrial Code, such as the costs for paying for government veterinarians to certify export certificates. And more to the point, these burdens would be imposed only on U.S. producers, not Indian producers, thus affecting the conditions of competition.

6 ARTICLE 6

Question 6.1: If the Panel were to find that India’s revised AI measure “conforms to” the relevant international standard, would the presumption of SPS-consistency extend to a

⁵⁹ United States’ First Written Submission, para. 135.

presumption of consistency with Article 6 of the SPS Agreement? In other words, would the Panel need to conduct a separate analysis under Article 6 even if the measure conforms to the OIE standard?

Response:

71. Yes. As discussed in the U.S. response to Question 5.3, a measure that conforms to international standards is entitled to a presumption of consistency with the “relevant” provisions of the SPS Agreement and GATT. The obligations that flow from the provisions in Article 6 suggest that they should not be subject to the presumption of consistency afforded under Article 3.2.

72. Specifically, Article 6 concerns regionalization: a process that adapts measures to take into account conditions in other Members. In other words, even if a Member’s measure conforms to the international standard, another Member could seek under Article 6 to have that measure revised even further to facilitate trade. Accordingly, the nature of the obligations in Article 6 indicates that a Member cannot claim that its measure should be presumed consistent with Article 6 simply because the measure conforms to the international standard.

73. Furthermore, the language in the provisions also highlights obligations that would seem to operate independently of any international standard. The United States begins with Article 6.2:

Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.

The language in Article 6.2 provides that the determination of pest- or disease-free areas and areas of low pest or disease prevalence “shall be based” on certain factors, including the effectiveness of SPS controls maintained by other Members. Thus, a Member may need to recognize an area on an assortment of factors that may not be contemplated by international standards.

74. Article 6.1 provides:

Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area - whether all of a country, part of a country, or all or parts of several countries - from which the product originated and to which the product is destined. In assessing the sanitary or phytosanitary characteristics of a region, Members shall take into account, inter alia, the level of prevalence of specific diseases or pests, the existence of eradication or control programmes, and appropriate criteria or guidelines which may be developed by the relevant international organizations

Again, in assessing the characteristics of a region in order to ensure the measure is adapted, the provision provides that certain specific factors need to be taken into account – irrespective of what an international standard might provide. Accordingly, because of the nature of the obligations in Article 6 – they could further facilitate trade even when a measure conforms to an international standard – the United States submits that it is not among the relevant provisions to which the presumption of consistency attached under Article 3.2.

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

Response:

75. The United States submits there is no relationship between the relevant international standard and the obligation to provide an effective opportunity under Article 6.2. If there was an international standard that addresses how a Member grants opportunities to have disease or pest free areas (or low prevalence) recognized, the provision of the SPS Agreement implicated is not Article 6.2, but Article 3.1. Specifically, the obligation for a Member to base its SPS measures on international standards, except as provided for under Article 3.3, would encompass an international standard that governed granting an effective opportunity to have disease or pest free areas (or of low prevalence) recognized. Thus, a Member's failure to base its measure on the international standard might breach Article 3.1, but not Article 6.2.

76. With respect to the scenario posited by the Panel's question – the measure provides for recognition of AI-free areas, but not of HPAI-free areas as envisioned in the OIE Terrestrial Code – the United States submits that it is not impossible that such a measure could conceivably provide an effective opportunity per Article 6.2. If the Member's ALOP cannot be achieved if the Member regionalizes for HPAI, then the failure to regionalize for HPAI would not be deemed a breach of Article 6.2. The SPS Agreement does not provide that a Member needs to every lower its ALOP; rather it imposes disciplines to ensure that the measure is not more restrictive than necessary to achieve it. If the Member's ALOP cannot be achieved if it regionalizes for HPAI free areas, then it does not have to recognize such areas.

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

Response:

77. The United States will provide its response to India's arguments in its comments on India's answer.

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

Response:

78. The United States note that the Guidelines do not add to or diminish Members’ rights and obligations under the SPS Agreement, as they themselves make clear in paragraph 2. Nonetheless, as the panel recognized in the original dispute, the Guidelines can be “informative” in “how to approach Article 6 because they expand on the Members' own understanding of how the provisions of Article 6 are to be implemented.”⁶⁰ In this respect, the United States finds certain aspects to be particularly salient and of relevance here:

- 4. Importing Members should publish the basis for recognition of pest- or disease-free areas and areas of low pest or disease prevalence and a description of the general process used, including the information generally required to evaluate such requests and a contact point responsible for requests for recognition of pest- or disease-free areas or areas of low pest or disease prevalence.;
- 5. Members should proceed with a recognition process without undue delay; and
- 7. Members should endeavour to maintain transparency in all aspects of the recognition process.

Specifically, the United States agrees that these are characteristics that should be considered when determining whether a Member grants an effective opportunity to other Members to have their territory recognized as disease or pest free under Article 6.2.

Question 6.5: With reference to paragraph 76 of India's second written submission, please comment on India's argument that "there is guidance as to what type of information India is seeking. India's questionnaire contains all the details with respect to the type of information required by India".

Response:

79. The United States does not dispute that the questionnaire indicates what information India is seeking. The issue is what does India plan to do with that information it is requesting, *i.e.*, how and against what metrics is the solicited information being assessed? The questionnaire does not resolve that issue. In this respect, the United States notes that in India’s first written submission, India highlights that its questionnaire is based on questionnaire used by other countries. India’s argument, however, is not convincing. This dispute does not concern what other countries do, but what India does under the Revised Avian Influenza Measure. The fact

⁶⁰ *India – Agricultural Products*, para. 7.679, n. 1197

that India has a questionnaire that borrows from other trading partners does not mean it grants an effective opportunity to have areas recognized as disease-free; it means that India has borrowed a questionnaire – and that is precisely the concern. Specifically, rather than have a sincere process, India has simply set forth some window dressing that suggests some process exists without actually ensuring the process can be successfully completed – what an opportunity entails. Providing *what India is looking for or trying to accomplish with the information*, even in general terms would be some indicia that its regionalization process is sincere. The United States submits that if India believes it does not need to provide criteria, can India provide any other evidence to indicate that it actually provides an effective opportunity to grant regionalization? The answer to that question thus far is no.

Question 6.6: With reference to paragraph 78 of India's second written submission, does the United States consider that the fact that "India has engaged ... openly and transparently" with countries seeking recognition of disease-free or low disease prevalence areas could serve as evidence that a genuine opportunity exists?

Response:

80. The United States does agree that transparency in the recognition process can serve as evidence that a genuine opportunity exists. In this respect, the United States notes that Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures provide that Member shall endeavor to provide transparency throughout the regionalization process.

81. The United States, however, disagrees that it is fact that India has done so. India has not presented any evidence indication that it “has engaged ... openly and transparently” with particular *countries*. Besides the United States, India has only referenced a regionalization process underway with France.⁶¹ The documentation India has provided from the process with France does not reflect any actual work is being done on achieving regionalization, let alone a regionalization process characterized by open and transparent engagement. The documentation consists simply of a request from France’s Ambassador for regionalization and a letter from India six weeks later noting that France should fill out India’s questionnaire. That limited correspondence does not substantiate the assertions India makes concerning the transparency of its process..⁶²

Question 6.7: With reference to paragraph 97 of the United States' second written submission, please elaborate on the legal basis for the United States' assertion that India must show "concrete actions that reflect the operationalization of [the] text" of S.O. 2337(E) (emphasis added). Is this view consistent with the Appellate Body's statement that the provision of an "effective opportunity" could be established by reference to "a provision in the regulatory framework" or "the very SPS measure at issue"?

⁶¹ India’s Second Written Submission, para. 780

⁶² Exhibit IND-47.

Response:

82. The legal basis for the assertion is the burden of proof India must discharge. India as the party bringing this dispute must establish through evidence and argumentation that it in fact grants an effective opportunity for Members to have their territory recognized as disease or pest free or of low disease and pest prevalence. On this point, the United States reiterates its disagreement with India’s position in its first written submission that the questionnaire itself reflected that it had implemented its obligations under SPS Agreement Article 6: “[t]hrough this questionnaire, India operationalizes the regionalization obligations contained in Article 6 of the SPS Agreement.⁶³ The obligation under Article 6.2 is not to have forms; it is to grant an effective opportunity. Accordingly, there must be evidence to establish that the opportunity exists – that it can be successfully utilized. While the evidence that might be utilized could vary, it would have to show that the measure is indeed operational considering the nature of the obligation.

83. The Appellate Body’s analysis provides that a Member may achieve its obligation through the various instruments referenced. The Appellate Body did not suggest that in the context of a dispute, a panel must find the Member meets its obligation to provide an effective opportunity simply because one of the listed instruments exists. To the contrary, the Appellate Body found that a panel will need to have a particularized analysis that depends on the specifics of the case, and that consideration of these instruments is part of the panel’s assessment. To confirm that is indeed the Appellate Body’s analysis, the United States provides a more fulsome excerpt of the Appellate Body analysis containing the quoted language:

In particular, we have found that the importing Member must provide an effective opportunity for the exporting Member to make such a claim and thus render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. This may be achieved through, individually or jointly: a provision in the regulatory framework; the very SPS measure at issue; and a practice of recognizing pest- or disease-free areas or areas of low pest or disease prevalence. All these elements may be relevant in an assessment of a Member’s compliance with the obligation under Article 6.2 of the SPS Agreement. As each element may contribute to a different degree to the overall compliance by that Member with its obligation to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, the focus of a panel’s analysis will depend on the circumstances of the case and the particular instruments at issue.⁶⁴

⁶³ India’s First Written Submission, para.

⁶⁴ *Russia – Pigs (AB)*, para. 5.129.

Question 6.8: With reference to paragraph 97 of the United States' second written submission, what kind of evidence would, in the United States' view, be capable of showing that a Member "will ensure that the Member who submits the request and evidence will have an opportunity to have its territory recognized as being disease free or low disease prevalence"? Could the existence of an "effective opportunity" be shown even if the importing Member ultimately decides not to recognize another Member's disease free or low disease prevalence areas?

Response:

84. The type of evidence that can be utilized can vary. The United States believes the scope could be quite broad, although certain evidence would clearly be probative. The United States provides 7 examples of relevant evidence:

1. the importing country's criteria for making a regionalization decision;
2. the importing country undertaking a risk assessment for a regionalization determination, since such activity would show that the importing country is undertaking significant efforts and evaluation in order to make the determination;
3. the importing country constructively engages in meetings, such as a preliminary meeting, to discuss the precise process for the determination and provide feedback;
4. the importing country has put in place well-developed guidance concerning the conduct or rendering of the regionalization determination;
5. timely communications from the importing country that indicate the regionalization determination is moving forward without undue delay;
6. inspection reports from site visits; and
7. past instances of granting recognition.

89. With respect to the Panel's question as to whether an effective opportunity can be shown if the importing Member ultimately decides not to regionalize another Member's disease free or low disease prevalence areas, the answer is yes. As the list of evidence just referenced indicates, effective evidence does not necessarily need to be instances of granting recognition, although such instances could be relevant. Any evidence that indicates that the process is sincere with respect to providing a genuine opportunity is probative. Indeed, even a decision denying the recognition can serve as probative evidence that the Member does in fact provide an effective opportunity. For example, if the importing Member shares the decision with the exporting Member, and the decision sets forth in reasonable detail the basis for the decision, that would signify that the importing Member is in fact willing to grant regionalization provided its concerns are met. Indeed, the Guidelines to Further the Practical Implementation of Article 6 of the

Agreement on the Application of Sanitary and Phytosanitary Measures explicitly recommend that such a decision be provided to the exporting country:

Where its evaluation of the evidence provided by the exporting Member results in a decision by the importing Member not to recognize the pest- or disease-free area or area of low pest or disease prevalence, the importing Member provides to the exporting Member the technical grounds for the determination, so that, if appropriate, the exporting Member may modify and adapt its system with a view to future requests for recognition of pest- or disease-free areas or areas of low pest or disease prevalence. does only⁶⁵

Question 6.9: In the United States' view, were there any early warning signs that the revised AI measure did not provide an "effective opportunity" to request regionalization?

Response:

90. Yes, there were two specific signs. First, India did not act without undue delay. After the United States submitted the questionnaire maintained by India on March 20, 2017, India did not even acknowledge the submission for nearly 2 months when on May 15, 2017, India noted it would provide a preliminary assessment in 4-8 weeks.⁶⁶ (However, the United States acknowledges that after dispute settlement began in earnest, India appeared to find the matter to be a higher priority.)

91. Second, India did not share its findings and analysis from the preliminary evaluation report.⁶⁷ Instead, India simply noted it “was broadly in agreement with the United States proposal...” Although the United States appreciates the outcome in that determination, the lack of any analysis or formal evaluation calls into question whether the process was indeed a genuine technical exercise.

7 ARTICLE 7 AND ANNEX B

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

Response:

92. If India was simply withdrawing the original measure, the United States would agree that India would have no implementation obligation. However, because India adopted a new measure, it needed to ensure that the measure was fully consistent with Article 7 and Annex B. This would entail: (1) publishing a notice at an early stage to enable interested Member to

⁶⁵ G/SPS/48.

⁶⁶ Exhibit IND-16.

⁶⁷ Exhibit IND-18.

become acquainted with the measure; (2) ensuring the proposed measure was properly notified to the WTO SPS Committee at an early stage where amendments could still be introduced and comments taken into account; (3) allow Members 60 days to comment on the notified measure; and (4) allow a reasonable interval before entry.

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

Response:

93. The circumstances that would be available under Annex B(2) would be narrower than the ground set forth in Article 2.10 of the TBT Agreement. Article 2.10 of the TBT Agreement provides that an urgent problem can encompass matters of safety, health, environmental protection or national security. The broad scope is not surprising because TBT measures, as reflected in Article 2.2 of the TBT Agreement, can be applied for a number of legitimate objectives.

94. SPS measures by definition are narrower in scope. They are measures that per Annex A, paragraph 1 are being applied to only a subset of specific issues such as protecting animal or plant life or health from entry, establishment, or spread of pests, diseases, disease-carrying organisms, or disease-causing organisms.⁶⁸ Thus unless the urgent circumstance concerns one of the four grounds listed in paragraph 1 of Annex A, then the measure being applied is not an SPS measure – and thus paragraph 2 of Annex B becomes inapplicable.

Question 7.3: In the context of the United States' claim under Annex B(5)(b) of the SPS Agreement, what legal relevance, if any, do the SPS Committee's Recommended Transparency Procedures (G/SPS/7/Rev.3) have?

Response:

95. As with the Guidelines, the Committee's Recommended Transparency Procedures do not add to or diminish Members' rights and obligations under the SPS Agreement, but could be informative in considering how Members view the obligations.

Question 7.7: With respect to Annex B(5)(b) of the SPS Agreement, could the United States comment on India's argument in paragraph 145 of its second written submission that the notification form does not constitute treaty language. If the United States agrees, on what legal basis would the Panel consider that India had an obligation to indicate tariff lines?

Response:

⁶⁸ SPS Agreement, Annex A, para. 1(a).

96. The United States agrees that the notification form is not treaty language, and that India is not necessarily required to identify the products by tariff lines, but it does not need to identify the products per the terms of Annex B(5)(b). India’s reference to “animal products” does not comport with the requirement to identify products as provided for Annex B(5)(b) Paragraph 5(b) provides Members are entitled to know the “products” covered by the measure, not the class or type of products at issue

Question 7.8: With reference to paragraph 127 of the United States' second written submission, if India's characterization of the measure as benefitting traders were correct, would the United States agree that the Panel should not read the requirement in Annex B(2) of the SPS Agreement "strictly"?

Response:

97. No, because India did not claim that the measure was trade facilitative at the time it was notified. On this point, the United States notes that India had complete control over how it wanted to characterize the measure in the notification form. There is no reason to allow India to re-characterize the measure *post-hoc*.

8 JUDICIAL ECONOMY

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

Response:

98. The United States believes judicial economy would be appropriate,