

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

(DS430)

**FIRST WRITTEN SUBMISSION OF
THE UNITED STATES OF AMERICA**

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<i>Australia – Salmon (Panel)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R
<i>Australia – Salmon (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000
<i>China – Raw Materials (AB)</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
<i>Dominican Republic – Import and Sale of Cigarettes (Panel)</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R
<i>EC – Biotech (Panel)</i>	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R / WT/DS292/R / WT/DS293/R / Add.1 to Add.9 and Corr.1, adopted 21 November 2006
<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, and Corr.1

<i>EC – IT Products (Panel)</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010
<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
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<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 – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014
<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 – Poultry (Panel)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010
<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, adopted 20 December 2005, DSR 2005
<i>US – Softwood Lumber VI (Article 21.5 – Canada) (AB)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 200
<i>US – Wool Shirts and Blouses (Panel)</i>	Panel Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R
<i>US – Wool Shirts and 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 and Corr.1, adopted 23 May 1997,

TABLE OF ABBREVIATIONS

ABBREVIATION	FULL FORM
ALOP	Appropriate Level of Protection
DADF	Department of Animal Husbandry, Dairying & Fisheries, Ministry of Agriculture, Government of India
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
LPAI	Low Pathogenic Avian Influenza
HPAI	Highly Pathogenic Avian Influenza
NAP 2012	India's National Action Plan 2012
NAP 2015	India's National Action Plan 2015
OIE	World Organisation for Animal Health
OIE Terrestrial Code	The Terrestrial Animal Health Code of the OIE
SIP	Sanitary Import Permit
SPS Agreement	WTO Agreement on the Application of Sanitary and Phytosanitary Measures
USDA	United States Department of Agriculture
WTO	World Trade Organization

TABLE OF EXHIBITS

Exhibit	Document
USA-1	Notification, G/SPS/N/IND/143
USA-2	Letter from J. Doherty to Dr. Prasad, dated June 10, 2016
USA-3	Status Report, WT/DS430/15
USA-4	Notification, G/SPS/N/IND/150
USA-5	Communication from India, WT/DS430/18
USA-6	Notification, G/SPS/N/IND/160
USA-7	Communication from India, WT/DS430/19
USA-8	Minutes of Meeting, Dispute Settlement Body (26 October 2016) WT/DSB/M/387
USA-9	Minutes of Meeting, Dispute Settlement Body (23 November 2016) WT/DSB/M/389
USA-10	Screenshot from https://web.archive.org/web/*/http://dahd.nic.in/ depicting DADF's website as of June 23, 2017.
USA-11	Correspondence from USDA to DADF dated September 15, 2017
USA-12	OIE Terrestrial Code Chapter 5.1
USA-13	Responses of the OIE to the Panel's Questions from the Original Proceeding
USA-14	India's National Action Plan, 2015
USA-15	OIE Terrestrial Code Chapter 4.3
USA-16	India's National Action Plan, 2012
USA-17	The New Shorter Oxford English Dictionary

I. INTRODUCTION

1. The United States would welcome India’s compliance in this dispute. For many years, U.S. farmers have sought to obtain the market access to which they are entitled to under WTO rules. India’s submission, however, further confirms that more than two years after the Dispute Settlement Body (DSB) adopted its recommendations in this dispute – and more than five years since the United States initiated this dispute – India has yet to render its avian influenza measures consistent with its WTO obligations.

2. India’s first written submission spends very little effort engaging in the text of its current measures and how any particular aspect of the text is made operative by India. Nonetheless, India states that it “strongly believes” that its current avian influenza measures conform to the OIE Terrestrial Animal Health Code (OIE Terrestrial Code) – and should thus be construed as WTO consistent.¹ India’s position, however, is not substantiated with evidence. And from its inception, WTO dispute settlement has recognized that no system of “judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof.”² Here, India’s failure to provide evidence in support of its claim is telling.

3. There is simply no evidence from India to establish that it has responded to each of the original panel’s findings by making the necessary changes.

- India does not provide any evidence that it has instructed its authorities that its prior ban has ended and that the OIE’s³ reporting system should not be used to impose import prohibitions.
- India did not issue veterinary certificates that actually reflect that the relevant recommendations in the OIE Terrestrial Code have been operationalized, including the application of import conditions that reflect the differences between low pathogenic avian influenza (LPAI) and highly pathogenic avian influenza (HPAI).
- India also does not provide any evidence that it has actually adapted its measure to reflect disease prevalence in particular areas.

¹ India’s First Written Submission, para. 43

² *US – Wool Shirts and Blouses (AB)*, p. 14.

³ OIE refers to the World Animal Health Organisation.

- India does not provide any evidence about its own domestic controls for avian influenza that would support a finding that India has addressed the Panel’s findings concerning arbitrary discrimination.
- India does not explain whether the measure it has taken complies with the procedural requirements of Article 7 and Annex B of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement), which, as shown below, it does not.
- And critically, India does not – because it cannot – provide any evidence that any trade in the relevant commodities has occurred from countries or territories reporting outbreaks of avian influenza.

4. India’s failure to provide evidence in support of its contentions is consistent with the fact that India’s supposed compliance rests simply on excising certain text in its measure that openly contradicted the OIE Terrestrial Code. In other words, rather than argue that its measure in fact conforms to the OIE Terrestrial Code, India has simply eliminated the most obvious textual inconsistency. India’s actual conduct though, such as removing veterinary certificates from the website of its Department of Animal Husbandry, Dairying, and Fisheries (DADF), and its acknowledgement that it grants sanitary imports only after checking on the OIE website that the exporting country is free from avian influenza before granting a sanitary import permit (SIP), confirms that India acts in a manner that contradicts the OIE Terrestrial Code.

5. In short, India simply offers a conclusory assertion that its revised measure conforms to the OIE Terrestrial Code. The panel in the original proceeding rejected a similarly conclusory assertion, and scrutinized the evidence before it. This Panel should do the same and find that India failed to implement the recommendations of the DSB to bring its measures into conformity with its obligations under the SPS Agreement.

II. SCOPE OF AN ARTICLE 21.5 PROCEEDING

6. Article 21.5 of the DSU⁴ provides in relevant part that:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement proceedings, including whenever possible resort to the original panel.

⁴ *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

The Appellate Body has explained that Article 21.5 applies to “measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB.”⁵

7. The Appellate Body’s analysis on the scope of measures subject to an Article 21.5 proceeding is instructive:

While the DSB’s recommendations and rulings are a relevant starting point for identifying the “measures taken to comply” in an Article 21.5 proceeding, they are not dispositive as to the scope of such measures. Where alternative means of implementation are available, a WTO Member enjoys some discretion in deciding what measures to take to comply with the DSB’s recommendations and rulings. A WTO Member may choose to take measures that are broader than strictly required to comply with the DSB’s recommendations and rulings. The identification of the “measure taken to comply” is determined by reference to what a Member has actually done, and not to what a Member might have done, to ensure compliance with the DSB’s recommendations and rulings. Therefore, when the measures actually “taken” by the implementing Member are broader than the DSB’s recommendations and rulings, we do not see why the scope of the DSB’s recommendations and rulings should necessarily limit the scope of the “measures taken to comply” for purposes of the Article 21.5 proceedings.⁶

Thus, under Article 21.5 of the DSU, measures that negate or undermine compliance with the DSB’s recommendations and rulings and any measures taken to comply that are inconsistent with a covered agreement may come within the scope of an Article 21.5 proceeding.

8. In reviewing the existence or consistency with a covered agreement of a measure taken to comply with the recommendations and rulings of the DSB, the Appellate Body has found that “this task cannot be done in abstraction from the measure that was the subject of the original proceedings.”⁷ Moreover, the Appellate Body has also noted that in examining the measure taken to comply, a panel is not constrained to simply accept the respondent’s characterization of whether an action was taken to comply:

⁵ *Canada – Aircraft (Article 21.5 - Brazil) (AB)*, para. 36.

⁶ *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 202.

⁷ *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 102.

[A] panel’s mandate under Article 21.5 of the DSU is not necessarily limited to an examination of an implementing Member’s measure declared to be “taken to comply”. Such a declaration will always be relevant, but there are additional criteria, identified above, that should be applied by a panel to determine whether or not it may also examine other measures. 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. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared “measure taken to comply” is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one “taken to comply” and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding.⁸

In other words, the scope of measures that may fall within an Article 21.5 proceeding is not limited to only what needed to be done or what the implementing Member declared it has done to comply, but what actually was done – even if undeclared.

III. THE RELEVANT INTERNATIONAL STANDARD

9. The United States and India both agree that the relevant international standard for avian influenza continues to be set forth in Chapter 10.4 of the OIE Terrestrial Code.⁹ In the original proceeding, the panel found that the relevant edition of the OIE Terrestrial Code for examining the consistency of India’s measures against the SPS Agreement was the “edition of the Terrestrial Code in force at the time of the establishment of the panel.”¹⁰ In this dispute, India’s submission refers to the 26th edition of the OIE Terrestrial Code.¹¹ The 26th edition of the OIE Terrestrial Code was adopted at the 85th General Session of the OIE, which was held from May 21-26, 2017. As the adoption of that edition is contemporaneous with the establishment of the Panel on May 22, 2017, the United States believes its use is consistent with the panel’s prior finding – and thus has no objection to its use in this proceeding.

⁸ *US – Softwood Lumber IV (Article 21.5 — Canada) (AB)*, para. 77.

⁹ India’s First Written Submission, para. 25, footnote 37.

¹⁰ *India – Agricultural Products (Panel)*, para. 7.212.




¹¹ Exhibit IND-7.

10. Of course, and as addressed below in Section V, the United States does not agree with India’s assertions that the Revised Avian Influenza Measure conforms to various recommendations in the OIE Terrestrial Code. Specifically, India fails to explain how the measure actually transposes the conditions in any of the OIE’s product specific recommendations. Indeed, India’s submission omits any examination of the pertinent text from the OIE Terrestrial Code. On this basis alone, India has not demonstrated that its revised measure is based on the relevant international standard.

11. However, to assist the Panel in considering this matter, the United States has compiled below in Section III.C a table that provides the text of the product specific recommendations for avian influenza from both the 21st and 26th editions of the OIE Code. The United States briefly notes first the differences and, more critically, the commonalities between the editions.

A. The Differences Between the Editions

12. There are three differences between the 21st and 26th editions of the OIE Terrestrial Code, none of which should affect the Panel’s analysis with respect to India’s claims of consistency. First, the 26th edition uses slightly different terminology with respect to referencing the different types of avian influenza subject to the Chapter. In particular, the current edition no longer utilizes the descriptor “notifiable,” such as in notifiable avian influenza. The specific terms that have changed are summarized per the following chart.

OIE Terrestrial Code 21 st Edition		OIE Terrestrial Code 26 th Edition
notifiable avian influenza (which was highly pathogenic notifiable avian influenza + low pathogenicity notifiable avian influenza virus)		avian influenza
highly pathogenic notifiable avian influenza		high pathogenicity avian influenza viruses
low pathogenicity notifiable avian influenza		low pathogenicity avian influenza

The substantive meaning behind the terms remains consistent though. Specifically, the relevant definition behind them is the same in both editions of the OIE Terrestrial Code.

OIE Terrestrial Code 21 st Edition	OIE Terrestrial Code 26 th Edition
<p>Article 10.4.1. General provisions ...</p> <p>2) For the purposes of the <i>Terrestrial Code</i>, notifiable avian influenza (NAI) is defined as an <i>infection of poultry</i> caused by any influenza A virus of the H5 or H7 subtypes or by any AI virus with an intravenous pathogenicity index (IVPI) greater than 1.2 (or as an alternative at least 75 percent mortality) as described below. NAI viruses can be divided into highly pathogenic notifiable avian influenza (HPNAI) and low pathogenicity notifiable avian influenza (LPNAI):</p> <p>a) HPNAI viruses have an IVPI in six-week-old chickens greater than 1.2 or, as an alternative, cause at least 75 percent mortality in four-to eight-week-old chickens infected intravenously. H5 and H7 viruses which do not have an IVPI of greater than 1.2 or cause less than 75 percent mortality in an intravenous lethality test should be sequenced to determine whether multiple basic amino acids are present at the cleavage site of the haemagglutinin molecule (HA0); if the amino acid motif is similar to that observed for other HPNAI isolates, the isolate being tested should be considered as HPNAI;</p> <p>b) LPNAI are all influenza A viruses of H5 and H7 subtype that are not HPNAI viruses.</p>	<p>Article 10.4.1. General provisions</p> <p>1) For the purposes of the <i>Terrestrial Code</i>, avian influenza is defined as an <i>infection of poultry</i> caused by any influenza A virus of the H5 or H7 subtypes or by any influenza A virus with an intravenous pathogenicity index (IVPI) greater than 1.2 (or as an alternative at least 75% mortality) as described below. These viruses are divided into high pathogenicity avian influenza viruses and low pathogenicity avian influenza viruses:</p> <p>a) high pathogenicity avian influenza viruses have an IVPI in six-week-old chickens greater than 1.2 or, as an alternative, cause at least 75% mortality in four-to eight-week-old chickens infected intravenously. H5 and H7 viruses which do not have an IVPI of greater than 1.2 or cause less than 75% mortality in an intravenous lethality test should be sequenced to determine whether multiple basic amino acids are present at the cleavage site of the haemagglutinin molecule (HA0); if the amino acid motif is similar to that observed for other high pathogenicity avian influenza isolates, the isolate being tested should be considered as high pathogenicity avian influenza virus;</p> <p>b) low pathogenicity avian influenza viruses are all influenza A viruses of H5 and H7 subtypes that are not high pathogenicity avian influenza viruses.</p>

In short, the slightly different nomenclature in referring to avian influenza has no implications with respect to what precisely is being referred to.

13. Second, there are some formatting changes. In particular, the 21st edition often enumerated any statement concerning the use of vaccination. The current edition avoids enumerating this condition and simply breaks off such statements as a separate sentence near the end of the recommendation.

14. Finally, with respect to Articles 10.4.22 and 10.4.23, which respectively concern feathers and down from poultry and non-poultry, the recommendations now provide the specific treatments that are to be applied to destroy avian influenza virus. In short, none of these changes have any significant implications for the interpretation of Chapter 10.4.

B. The Commonalities Between the Editions

15. Although the recommendations are substantively the same in both editions, the United States emphasizes three points of continuity in particular. First, there is a common predicate that is found in each of the recommendations listed in the table: “Veterinary Authorities should require the presentation of an international veterinary certificate attesting that ...” Thus, the *sin qua non* of each product specific recommendation is that it is fulfilled by a *veterinary certificate that contains certain attestations*. The nature of the attestations vary depending on the product and the avian influenza status of the exporting territory, but they are the common tools for all of the product specific recommendations contained in Chapter 10.4.

16. Second, the 26th edition of the OIE Terrestrial Code continues to maintain product specific recommendations. In particular, it provides for the use of particular attestations in veterinary certificates to facilitate safe trade. The language in each of these recommendations referring to the avian influenza status of the exporting country is part of ensuring the proper sanitary conditions are applied; it is not an authorization for an import ban.

17. Finally, each of the recommendations provides either that the recommendation is applicable “regardless of the avian influenza status of the country”¹² or can be applied on the basis of a “country, zone, or compartment.” The precise recommendations may vary depending on the avian influenza status of the exporting territory, but they all provide for safe trade to occur. Thus, the OIE Terrestrial Code does not prohibit trade on account of the avian influenza status of the exporting territory and can also be administered on a regionalized basis.

C. The Text of the Relevant Product Recommendations

18. The table set forth below is modeled on the one found in paragraph 7.230 of the Panel Report. Specifically, the order of the recommendations and the references to the specific products are drawn directly from the table in the Panel Report.

¹² See e.g., Article 10.4.6 (Exhibit IND-9).

19. The United States is providing this table here, in part, because it highlights the very specific content of the various recommendations, and illustrates the manner in which the OIE Terrestrial Code is intended to facilitate safe trade rather than promote unreasonable bans on account of avian influenza. As noted in the following section concerning India’s measures, the difference in the level of detail between the recommendation and the measure at issue in this dispute is stark. A review of the OIE Terrestrial Code provides an understanding of what authorities are actually requiring in order to trade safely a given product. As shown in Section IV, India’s measure does not.

OIE Terrestrial Code 21 st Edition	OIE Terrestrial Code 26 th Edition
domestic and wild birds (including poultry and captive birds)	
<p>Article 10.4.5 Recommendations for importation from a NAI-free country, zone or compartment</p> <p><u>For live poultry (other than day-old poultry)</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the poultry showed no clinical sign of NAI on the day of shipment; 2) the poultry were kept in a NAI-free country, zone or compartment since they were hatched or for at least the past 21 days; 3) the poultry are transported in new or appropriately sanitized containers; 4) if the poultry have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate. 	<p>Article 10.4.5. Recommendations for importation from a country, zone or compartment free from avian influenza</p> <p><u>For live poultry (other than day-old poultry)</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the poultry showed no clinical sign of avian influenza on the day of shipment; 2) the poultry were kept in an avian influenza free country, zone or compartment since they were hatched or for at least the past 21 days; 3) the poultry are transported in new or appropriately sanitized containers. <p>If the poultry have been vaccinated against avian influenza, the nature of the vaccine used and the date of vaccination should be attached to the certificate.</p>
<p>Article 10.4.6 Recommendations for the importation of live birds other than poultry</p> <p>Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) on the day of shipment, the birds showed no clinical sign of infection with a virus which would be considered NAI in poultry; 2) the birds were kept in isolation approved by the Veterinary Services since they were hatched or for at least the 21 days prior to shipment and showed no clinical sign of infection with a virus which would be 	<p>Article 10.4.6 Recommendations for the importation of live birds other than poultry</p> <p>Regardless of the avian influenza status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) on the day of shipment, the birds showed no clinical sign of infection with a virus which would be considered avian influenza in poultry; 2) the birds were kept in isolation approved by the Veterinary Services since they were hatched or for at least 21 days prior to shipment and showed no clinical

OIE Terrestrial Code 21 st Edition	OIE Terrestrial Code 26 th Edition
<p>considered NAI in poultry during the isolation period;</p> <p>3) a statistically valid sample of the birds, selected in accordance with the provisions of Article 10.4.29., was subjected to a diagnostic test within 14 days prior to shipment to demonstrate freedom from infection with a virus which would be considered NAI in poultry;</p> <p>4) the birds are transported in new or appropriately sanitized containers;</p> <p>5) if the birds have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.</p>	<p>sign of infection with a virus which would be considered avian influenza in poultry during the isolation period;</p> <p>3) a statistically valid sample of the birds, selected in accordance with Article 10.4.29., was subjected to a diagnostic test within 14 days prior to shipment to demonstrate freedom from infection with a virus which would be considered avian influenza in poultry;</p> <p>4) the birds are transported in new or appropriately sanitized containers.</p> <p>If the birds have been vaccinated against avian influenza, the nature of the vaccine used and the date of vaccination should be attached to the certificate.</p>
day old chicks, ducks, turkey, and other newly hatched avian species	
<p>Article 10.4.7 Recommendations for importation from a NAI-free country, zone or compartment <u>For day-old live poultry</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) the poultry were kept in a NAI-free country, zone or compartment since they were hatched; 2) the poultry were derived from parent flocks which had been kept in a NAI-free country, zone or compartment for at least 21 days prior to and at the time of the collection of the eggs;</p> <p>3) the poultry are transported in new or appropriately sanitized containers;</p> <p>4) if the poultry or the parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.</p>	<p>Article 10.4.7. Recommendations for importation from a country, zone or compartment free from avian influenza <u>For day-old live poultry</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) the poultry were kept in an avian influenza free country, zone or compartment since they were hatched;</p> <p>2) the poultry were derived from parent flocks which had been kept in an avian influenza free country, zone or compartment for at least 21 days prior to and at the time of the collection of the eggs;</p> <p>3) the poultry are transported in new or appropriately sanitized containers.</p> <p>If the poultry or the parent flocks have been vaccinated against avian influenza, the nature of the vaccine used and the date of vaccination should be attached to the certificate.</p>
<p>Article 10.4.8 Recommendations for importation from a HPNAI-free country, zone or compartment</p> <p><u>For day-old live poultry</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p>	<p>Article 10.4.8. Recommendations for importation from a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry</p> <p><u>For day-old live poultry</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) the poultry were kept in a country, zone or compartment free from infection with high pathogenicity</p>

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<p>1) the poultry were kept in a HPNAI-free country, zone or compartment since they were hatched; 2) the poultry were derived from parent flocks which had been kept in a NAI-free establishment for at least 21 days prior to and at the time of the collection of the eggs; 3) the poultry are transported in new or appropriately sanitized containers; 4) if the poultry or the parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.</p>	<p>avian influenza viruses in poultry since they were hatched; 2) the poultry were derived from parent flocks which had been kept in an avian influenza free establishment for at least 21 days prior to and at the time of the collection of the eggs; 3) the poultry are transported in new or appropriately sanitized containers.</p> <p>If the poultry or the parent flocks have been vaccinated against avian influenza, the nature of the vaccine used and the date of vaccination should be attached to the certificate.</p>
<p>Article 10.4.9 Recommendations for the importation of day-old live birds other than poultry</p> <p>Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) on the day of shipment, the birds showed no clinical sign of infection with a virus which would be considered NAI in poultry; 2) the birds were hatched and kept in isolation approved by the Veterinary Services; 3) the parent flock birds were subjected to a diagnostic test at the time of the collection of the eggs to demonstrate freedom from infection with NAIV; 4) the birds are transported in new or appropriately sanitized containers; 5) if the birds or parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate</p>	<p>Article 10.4.9. Recommendations for the importation of day-old live birds other than poultry</p> <p>Regardless of the avian influenza status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) on the day of shipment, the birds showed no clinical sign of infection with a virus which would be considered avian influenza in poultry; 2) the birds were hatched and kept in isolation approved by the Veterinary Services; 3) the parent flock birds were subjected to a diagnostic test at the time of the collection of the eggs to demonstrate freedom from infection with a virus which would be considered avian influenza in poultry; 4) the birds are transported in new or appropriately sanitized containers.</p> <p>If the birds or parent flocks have been vaccinated against avian influenza, the nature of the vaccine used and the date of vaccination should be attached to the certificate.</p>
<p>Article 10.4.19 Recommendations for importation from either a NAI or HPNAI-free country, zone or compartment</p> <p><u>For fresh meat of poultry</u></p>	<p>Article 10.4.19. Recommendations for importation from a country, zone or compartment free from avian influenza or free from infection with high pathogenicity avian influenza viruses in poultry</p> <p><u>For fresh meat of poultry</u></p>

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<p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the entire consignment of fresh meat comes from poultry:</p> <ol style="list-style-type: none"> 1) which have been kept in a country, zone or compartment free from HPNAI since they were hatched or for at least the past 21 days; 2) which have been slaughtered in an approved abattoir in a country, zone or compartment free from HPNAI and have been subjected to ante- and post-mortem inspections in accordance with Chapter 6.2. and have been found free of any signs suggestive of NAI. 	<p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the entire consignment of fresh meat comes from poultry:</p> <ol style="list-style-type: none"> 1) which have been kept in a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry since they were hatched or for at least the past 21 days; 2) which have been slaughtered in an approved abattoir in a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry and have been subjected to ante- and post-mortem inspections
<p>Article 10.4.20 Recommendations for the importation of meat products of poultry</p> <p>Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the commodity is derived from fresh meat which meet the requirements of Article 10.4.19.; or 2) the commodity has been processed to ensure the destruction of NAI virus in accordance with Article 10.4.26.; <p>AND</p> <ol style="list-style-type: none"> 3) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus. 	<p>Article 10.4.20. Recommendations for the importation of meat products of poultry</p> <p>Regardless of the avian influenza status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the commodity is derived from fresh meat which meets the requirements of Article 10.4.19.; or 2) the commodity has been processed to ensure the destruction of avian influenza virus in accordance with Article 10.4.26.; <p>AND</p> <ol style="list-style-type: none"> 3) the necessary precautions were taken to avoid contact of the commodity with any source of avian influenza virus.
<p>Article 10.4.10 Recommendations for importation from a NAI-free country, zone or compartment</p> <p><u>For hatching eggs of poultry</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the eggs came from a NAI-free country, zone or compartment; 2) the eggs were derived from parent flocks which had been kept in a NAI-free country, zone or compartment for at least 21 days prior to and at the time of the collection of the eggs; 3) the eggs are transported in new or appropriately sanitized packaging materials; 	<p>Article 10.4.10 Recommendations for importation from a country, zone or compartment free from avian influenza</p> <p><u>For hatching eggs of poultry</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the eggs came from an avian influenza free country, zone or compartment; 2) the eggs were derived from parent flocks which had been kept in an avian influenza free country, zone or compartment for at least 21 days prior to and at the time of the collection of the eggs; 3) the eggs are transported in new or appropriately sanitized packaging materials.

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<p>4) if the parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate.</p>	<p>If the parent flocks have been vaccinated against avian influenza, the nature of the vaccine used and the date of vaccination should be attached to the certificate.</p>
<p>Article 10.4.11 Recommendations for importation from a HPNAI-free country, zone or compartment</p> <p><u>For hatching eggs of poultry</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the eggs came from a HPNAI-free country, zone or compartment; 2) the eggs were derived from parent flocks which had been kept in a NAI-free establishment for at least 21 days prior to and at the time of the collection of the eggs; 3) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.); 4) the eggs are transported in new or appropriately sanitized packaging materials; 5) if the parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of the vaccine used and the date of vaccination have been attached to the certificate. 	<p>Article 10.4.11. Recommendations for importation from a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry</p> <p><u>For hatching eggs of poultry</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the eggs came from a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry; 2) the eggs were derived from parent flocks which had been kept in an avian influenza free establishment for at least 21 days prior to and at the time of the collection of the eggs; 3) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.); 4) the eggs are transported in new or appropriately sanitized packaging materials. <p>If the parent flocks have been vaccinated against avian influenza, the nature of the vaccine used and the date of vaccination should be attached to the certificate.</p>
<p>Article 10.4.12 Recommendations for the importation of hatching eggs from birds other than poultry</p> <p>Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the parent flock birds were subjected to a diagnostic test seven days prior to and at the time of the collection of the eggs to demonstrate freedom from infection with NAIV; 2) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.); 3) the eggs are transported in new or appropriately sanitized packaging materials; 4) if the parent flocks have been vaccinated against NAI, it has been done in accordance with the provisions of the Terrestrial Manual and the nature of 	<p>Article 10.4.12. Recommendations for the importation of hatching eggs from birds other than poultry</p> <p>Regardless of the avian influenza status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the parent flock birds were subjected to a diagnostic test seven days prior to and at the time of the collection of the eggs to demonstrate freedom from infection with a virus which would be considered avian influenza in poultry; 2) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.); 3) the eggs are transported in new or appropriately sanitized packaging materials.

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<p>the vaccine used and the date of vaccination have been attached to the certificate.</p>	<p>If the parent flocks have been vaccinated against avian influenza, the nature of the vaccine used and the date of vaccination should be attached to the certificate.</p>
<p>Article 10.4.13 Recommendations for importation from a NAI-free country, zone or compartment</p> <p><u>For eggs for human consumption</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the eggs were produced and packed in a NAI-free country, zone or compartment; 2) the eggs are transported in new or appropriately sanitized packaging materials. 	<p>Article 10.4.13. Recommendations for importation from a country, zone or compartment free from avian influenza</p> <p><u>For eggs for human consumption</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the eggs were produced and packed in an avian influenza free country, zone or compartment; 2) the eggs are transported in new or appropriately sanitized packaging materials.
<p>Article 10.4.14 Recommendations for importation from a HPNAI-free country, zone or compartment</p> <p><u>For eggs for human consumption</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the eggs were produced and packed in a HPNAI-free country, zone or compartment; 2) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.); 3) the eggs are transported in new or appropriately sanitized packaging materials. 	<p>Article 10.4.14. Recommendations for importation from a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry</p> <p><u>For eggs for human consumption</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the eggs were produced and packed in a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry; 2) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.); 3) the eggs are transported in new or appropriately sanitized packaging materials.
<p>Article 10.4.15 Recommendations for importation of egg products of poultry</p> <p>Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the commodity is derived from eggs which meet the requirements of Articles 10.4.13. or 10.4.14.; or 2) the commodity has been processed to ensure the destruction of NAI virus in accordance with Article 10.4.25.; <p>AND</p>	<p>Article 10.4.15. Recommendations for importation of egg products of poultry</p> <p>Regardless of the avian influenza status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none"> 1) the commodity is derived from eggs which meet the requirements of Articles 10.4.13. or 10.4.14.; or 2) the commodity has been processed to ensure the destruction of avian influenza virus in accordance with Article 10.4.25.; <p>AND</p>

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<p>3) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus.</p>	<p>3) the necessary precautions were taken to avoid contact of the commodity with any source of avian influenza virus</p>
<p>Article 10.4.22 Recommendations for the importation of feathers and down of poultry</p> <p>Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) these commodities originated from poultry as described in Article 10.4.19. and were processed in a NAI-free country, zone or compartment; or 2) these commodities have been processed to ensure the destruction of NAI virus (under study); AND 3) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus.</p>	<p>Article 10.4.22. Recommendations for the importation of feathers and down of poultry</p> <p>Regardless of the avian influenza status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) these commodities originated from poultry as described in Article 10.4.19. and were processed in an avian influenza free country, zone or compartment; or 2) these commodities have been processed to ensure the destruction of avian influenza virus using one of the following: a) washed and steam-dried at 100°C for 30 minutes; b) fumigation with formalin (10% formaldehyde) for 8 hours; c) irradiation with a dose of 20 kilogray; d) any equivalent treatment which has been demonstrated to inactivate avian influenza virus; AND 3) the necessary precautions were taken to avoid contact of the commodity with any source of avian influenza virus.</p>
<p>Article 10.4.23 Recommendations for the importation of feathers and down of birds other than poultry</p> <p>Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) these commodities have been processed to ensure the destruction of NAI virus (under study); and 2) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus</p>	<p>Article 10.4.23. Recommendations for the importation of feathers and down of birds other than poultry</p> <p>Regardless of the avian influenza status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) these commodities have been processed to ensure the destruction of any virus which would be considered avian influenza in poultry using one of the following: a) washed and steam-dried at 100°C for 30 minutes; b) fumigation with formalin (10% formaldehyde) for 8 hours; c) irradiation with a dose of 20 kilogray; d) any equivalent treatment which has been demonstrated to inactivate avian influenza virus; 2) the necessary precautions were taken to avoid contact of the commodity with any source of viruses which would be considered avian influenza in poultry.</p>

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<p>Article 10.4.24 Recommendations for the importation of feather meal and poultry meal</p> <p>Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) these commodities were processed in a NAI-free country, zone or compartment from poultry which were kept in a NAI-free country, zone or compartment from the time they were hatched until the time of slaughter or for at least the 21 days preceding slaughter; or</p> <p>2) these commodities have been processed either:</p> <p>a) with moist heat at a minimum temperature of 118°C for minimum of 40 minutes; or</p> <p>b) with a continuous hydrolysing process under at least 3.79 bar of pressure with steam at a minimum temperature of 122°C for a minimum of 15 minutes; or</p> <p>c) with an alternative rendering process that ensures that the internal temperature throughout the product reaches at least 74°C; AND</p> <p>3) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus.</p>	<p>Article 10.4.24. Recommendations for the importation of feather meal and poultry meal</p> <p>Regardless of the avian influenza status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) these commodities were processed in an avian influenza free country, zone or compartment from poultry which were kept in an avian influenza free country, zone or compartment from the time they were hatched until the time of slaughter or for at least the 21 days preceding slaughter; or</p> <p>2) these commodities have been processed either:</p> <p>a) with moist heat at a minimum temperature of 118°C for minimum of 40 minutes; or</p> <p>b) with a continuous hydrolysing process under at least 3.79 bar of pressure with steam at a minimum temperature of 122°C for a minimum of 15 minutes; or</p> <p>c) with an alternative rendering process that ensures that the internal temperature throughout the product reaches at least 74°C; AND</p> <p>3) the necessary precautions were taken to avoid contact of the commodity with any source of avian influenza viruses.</p>
<p>Article 10.4.21 Recommendations for the importation of products of poultry origin, other than feather meal and poultry meal, intended for use in animal feeding, or for agricultural or industrial use</p> <p>Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) these commodities were processed in a NAI-free country, zone or compartment from poultry which were kept in a NAI-free country, zone or compartment from the time they were hatched until the time of slaughter or for at least the 21 days preceding slaughter; or</p> <p>2) these commodities have been processed to ensure the destruction of NAI virus (under study); AND</p>	<p>Article 10.4.21. Recommendations for the importation of products of poultry origin, other than feather meal and poultry meal, intended for use in animal feeding, or for agricultural or industrial use</p> <p>Regardless of the avian influenza status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <p>1) these commodities were processed in an avian influenza free country, zone or compartment from poultry which were kept in an avian influenza free country, zone or compartment from the time they were hatched until the time of slaughter or for at least the 21 days preceding slaughter; or</p> <p>2) these commodities have been processed to ensure the destruction of avian influenza virus using:</p> <p>a) moist heat treatment for 30 minutes at 56°C; or</p>

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3) the necessary precautions were taken to avoid contact of the commodity with any source of NAI virus.	b) any equivalent treatment which has been demonstrated to inactivate avian influenza virus; AND 3) the necessary precautions were taken to avoid contact of the commodity with any source of avian influenza virus.
semen of domestic and wild birds including poultry	
<p>Article 10.4.16 Recommendations for importation from a NAI-free country, zone or compartment For poultry semen</p> <p><u>For poultry semen</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the donor poultry:</p> <ol style="list-style-type: none"> 1) showed no clinical sign of NAI on the day of semen collection; 2) were kept in a NAI-free country, zone or compartment for at least the 21 days prior to and at the time of semen collection. 	<p>Article 10.4.16. Recommendations for importation from a country, zone or compartment free from avian influenza</p> <p><u>For poultry semen</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the donor poultry:</p> <ol style="list-style-type: none"> 1) showed no clinical sign of avian influenza on the day of semen collection; 2) were kept in an avian influenza free country, zone or compartment for at least 21 days prior to and at the time of semen collection.
<p>Article 10.4.17 Recommendations for the importation from a HPNAI-free country, zone or compartment</p> <p>For poultry semen Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the donor poultry:</p> <ol style="list-style-type: none"> 1) showed no clinical sign of HPNAI on the day of semen collection; 2) were kept in a HPNAI-free country, zone or compartment for at least the 21 days prior to and at the time of semen collection. 	<p>Article 10.4.17. Recommendations for the importation from a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry</p> <p>For poultry semen Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the donor poultry:</p> <ol style="list-style-type: none"> 1) showed no clinical sign of infection with high pathogenicity avian influenza viruses in poultry on the day of semen collection; 2) were kept in a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry for at least 21 days prior to and at the time of semen collection.
<p>Article 10.4.18 Recommendations for the importation of semen of birds other than poultry</p> <p>Regardless of the NAI status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the donor birds:</p>	<p>Article 10.4.18. Recommendations for the importation of semen of birds other than poultry</p> <p>Regardless of the avian influenza status of the country of origin, Veterinary Authorities should require the presentation of an international veterinary certificate attesting that the donor birds:</p>

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1) were kept in isolation approved by the Veterinary Services for at least the 21 days prior to semen collection; 2) showed no clinical sign of infection with a virus which would be considered NAI in poultry during the isolation period; 3) were tested within 14 days prior to semen collection and shown to be free of NAI infection.	1) were kept in isolation approved by the Veterinary Services for at least 21 days prior to semen collection; 2) showed no clinical sign of infection with a virus which would be considered avian influenza in poultry during the isolation period; 3) were tested within 14 days prior to semen collection and shown to be free from infection with a virus which would be considered avian influenza in poultry.

IV. THE MEASURES TAKEN TO COMPLY

20. In its Panel Request¹³ and its first written submission,¹⁴ India asserts that the following instruments constitute its measure taken to comply:

- S.O. 2337(E), dated July 8, 2016;¹⁵
- S.O. 2998(E), dated September 19, 2016,¹⁶ which amends S.O. 2337(E);
- S.O. 510(E), dated February 17, 2017,¹⁷ which further amends S.O. 2337(E);
- Guidelines for recognition of disease free areas, zones and compartments¹⁸; and the
- Questionnaire.¹⁹

Collectively, India refers to these instruments as the Revised Avian Influenza Measure.²⁰ The United States briefly recounts India's claims of compliance in the context of India's adoption of

¹³ WT/DS430/21, p. 2.

¹⁴ India's First Written Submission, para. 24.

¹⁵ Exhibit IND-3.

¹⁶ Exhibit IND-4.

¹⁷ Exhibit IND-5.

¹⁸ Exhibit IND-7.

¹⁹ Exhibit IND-8.

²⁰ The United States has capitalized the terms in India's description to facilitate clarity with respect to the reference.

these instruments. Thereafter, the United States will proceed to address the content of the instruments in the Revised Avian Influenza Measure.

A. History of India’s Claims of Compliance

21. As set forth below, India has claimed compliance in this dispute at least four times. Each of those times, India based its claim of compliance on a different set of instruments. Specifically, India began by asserting compliance with no instruments in place, and then proceeded to make a new claim of compliance whenever it adopted a new or additional instrument. To assist the Panel in understanding this sequence, the United States presents a chronology of India’s compliance claims and the relevant developments surrounding them. As demonstrated below, India’s various claims of compliance have a common feature: at no time did India indicate that India had abandoned its interpretation that the OIE Terrestrial Code allowed it to require a territory to be free from avian influenza as a condition of import. The panel in the original proceeding firmly rejected this interpretation; that rejection was fully upheld on appeal.²¹

1. The First Claim of Compliance

22. The United States and India agreed that India could have one year after the date of adoption of the Panel and Appellate Body Reports, *i.e.*, until June 19, 2016, to implement the recommendations and rulings of the DSB.²² On April 20, 2016, India notified a proposed new measure to the WTO SPS Committee titled S.O. 2337(E).²³ The notification noted, *inter alia*, that with respect to the proposed measure:

²¹ *India – Agricultural Products*, para. 7.271 (“In particular, S.O. 1663(E) prohibits the importation of the relevant products from countries reporting NAI, thus not allowing importation from NAI or HPNAI-free zones or compartments, in contradiction with the product-specific recommendations of Chapter 10.4 of the Terrestrial Code. Also in contradiction with Chapter 10.4, S.O. 1663(E) prohibits the importation of the relevant products from non-NAI-free countries, zones or compartments. We thus agree with the United States that India’s AI measures amount to a “fundamental departure” from the Terrestrial Code.”); *India – Agricultural Products (AB)*, para. 5.110 (“We have rejected India’s claims that the Panel failed to conduct an objective assessment under Article 11 of the DSU by: (i) failing to conduct its own assessment of the meaning of the OIE Code, including by failing to apply customary rules of treaty interpretation; (ii) disregarding arguments and evidence provided by India pertaining to the meaning of the OIE Code; and (iii) reaching findings regarding the meaning of the OIE Code that lack support in the evidence on the record. We therefore find that India has not established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU in its assessment of the meaning of the OIE Code.”)

²² WT/DS/DS430/14.

²³ SPS/N/IND/143 (Exhibit USA-1).

- the final date for comments would be 60 days from the circulation of the notification, *i.e.*, June 19, 2016.
- its proposed date of adoption of the proposed measure was also June 19, 2016;
- the products covered were “animal products”; and
- there was no relevant international standard.²⁴

23. On June 10, 2016, the United States transmitted comments to India concerning its notification.²⁵ The U.S. comments noted, *inter alia*, the following concerns with India’s proposed measure and the notification:

- “[T]he OIE Code does not call for simply banning poultry trade and trade in poultry products following AI detections, while India’s proposed measure appears to do so.”
- “India’s proposed measure does not distinguish between low pathogenicity avian influenza (LPAI) and high pathogenicity avian influenza (HPAI) when determining the effect of an ongoing avian influenza incident on the ability to export to India, while the OIE Code carefully distinguishes between the two when making recommendations for trade in different products”
- “India’s proposed measure does not make product-by-product distinctions in the impact of disease detections on trade while the OIE Code, by contrast, makes carefully-individualized product-by-product recommendations.”
- “India’s identification of the products covered by the measure – ‘Animal products’ – is unreasonably vague.” “The description is also more vague than what India has provided in its prior notification of avian influenza measures.”
- “That the date for the close of the comment period and the proposed date of adoption are the same unfortunately suggests that India will not be

²⁴ The United States notes that the notification provided that the proposed measure could be found at <http://dahd.nic.in/trade>. The United States believes that the text of the measure was not available on the website for some time well into the comment period.

²⁵ Letter from J. Doherty to Dr. Prasad, dated June 10, 2016 (Exhibit USA-2).

taking any comments into account or entertaining any possibility for the regulation to be revised. The United States asks India to ensure that these comments and any others received by India are in fact taken into account in the formulation of the final measure.”²⁶

The United States did not receive a reply to these comments, nor did India publish any document addressing how it responded to any concerns raised by the United States or any other interested persons or parties concerning India’s proposal before India adopted this measure.

24. On June 10, 2016, the same day that the United States submitted comments and six days before the comment period was to close per India’s notification, India made its first claim of compliance. Specifically, India circulated a status report to the DSB that noted the following:

The draft notification circulated to the WTO Members takes into account the OIE guidelines on Avian Influenza. The notification provides the member countries to export poultry and poultry products originating *from the region and compartment free from Avian Influenza*. In this regard, the provisions of the SPS Agreement have been fully complied with and accordingly, India considers that the recommendations and rulings of the DSB will be complied with fully through the notification.

India is awaiting comments from WTO members on its new draft notification. Taking the comments, if any, into consideration, India would be issuing the final notification, which would come into force when issued and published.

India has taken all steps required to comply with the findings and recommendations of the DSB in this dispute. The new notification would bring India into full compliance with the recommendations and rulings of the DSB.²⁷

India thus asserted it had “taken all steps required to comply”²⁸ in this dispute even though it had not even issued a replacement measure yet – and explicitly noted that its proposed measure allowed import only from areas that are *free from avian influenza*. India’s status report did not say that the new measure would distinguish between LPAI or HPAI, nor did the status report say that India would allow import from areas reporting avian influenza but apply product specific recommendations to facilitate safe trade.

²⁶ Exhibit USA-2.

²⁷ WT/DS430/15 (emphasis added) (Exhibit USA-3).

²⁸ WT/DS430/15 (Exhibit USA-3).

2. India's Second Claim of Compliance

25. On July 8, 2016, India promulgated S.O. 2337(E).²⁹ S.O. 2337(E) was not notified, however, until July 26, 2016.³⁰ India's notification for S.O. 2337(E) did not provide for a comment period.³¹ On July 18, 2016, India asserted compliance for the second time in a communication circulated to the DSB concerning this dispute. In its communication, India noted the following:

The notification takes into account, the findings of the WTO Panel and the WTO Appellate Body in WT/DS430 and provides that import of poultry and poultry products *shall be allowed from country, zones/compartments free from avian influenza virus* in accordance with the relevant international standard, i.e. the OIE Terrestrial Code. The notification further provides for the process to be followed for recognition of such country, zones/ compartments in conformity with the OIE Terrestrial Code and the SPS Agreement. Further, India has also framed the relevant guidelines referred in the notification as well as the questionnaire for recognizing part of a country, zone/compartment as free from Avian Influenza which can be accessed at <http://www.dahd.nic.in>.

With the publication of the new notification superseding the earlier notification S.O. 1663(E), India considers that it has fully complied with the rulings and recommendations of the Dispute Settlement Body in this dispute.³²

Accordingly, India asserted again it had achieved compliance on the basis of a measure that specified importation would be permitted only from territories free from avian influenza. India's claim of compliance made no reference to its measures appropriately distinguishing between LPAI and HPAI.

3. India's Third Claim of Compliance

26. On July 20, 2016, India, at the request of the United States, participated in a digital video conference with U.S. officials. U.S. officials expressed several concerns with India concerning

²⁹ Exhibit IND-3.

³⁰ G/SPS/N/IND/150 (Exhibit USA-4). India issued what is known as a regular notification for S.O. 2337(E), meaning that the notification had a separate WTO document number. Typically, Members issue an addenda to an existing notification to indicate that a final measure has been adopted in response to a proposed measure that was previously notified. The notification specified the products covered were "poultry and poultry products." India did not provide the relevant tariff lines for the affected products.

³¹ G/SPS/N/IND/150, field 12. (Exhibit USA-4).

³² WT/DS430/18 (Exhibit USA-5).

its avian influenza measure and its consistency with the OIE Terrestrial Code, including that it required the exporting territory to be free from avian influenza as a condition of import.

27. On September 19, 2016, India promulgated S.O. 2998(E), which amended S.O. 2337(E). On September 21, 2016, India notified S.O. 2998(E) to the WTO SPS Committee noting it entered into force on September 19, 2016 and was an amendment to S.O. 2337(E).³³ India did not provide a comment period in its notification.

28. On September 23, 2016, India circulated a communication to the DSB asserting compliance for the third time.³⁴ India's communication noted that "[p]ursuant to such bilateral discussions, India has further amended notification S.O. 2337(E) vide notification S.O. 2998(E) dated 19 September 2016, *clarifying* the concerns of the US."³⁵ India did not indicate in its communication what, if any, changes that S.O. 2337(E) would effectuate.

29. At the October 26, 2016, DSB meeting, the United States raised concerns with respect to India's third claim of compliance. In particular, the DSB Meeting minutes record the United States' view as the following:

Under the September 2016 version of India's measure, however, the United States continued to have concerns that India's measure could be substantially more trade restrictive than a measure based on OIE recommendations. For example, the content of the veterinary certificates that India would require upon the importation of agricultural products was an essential element in understanding India's revised measure. India's Department of Animal Husbandry, however, had removed from its website the veterinary certificates that would be required for the products covered by this dispute.³⁶

30. At the November 23, 2016, DSB meeting, the United States again raised concerns that India's actions had made it impracticable for trade. The DSB Meeting minutes state in pertinent part that:

³³ G/SPS/N/IND/160 (Exhibit USA-6). Again, India's notification was in the format of a regular notification rather than as an addendum or revision to an existing notification.

³⁴ WT/DS430/19 (Exhibit USA-7).

³⁵ WT/DS430/19 (Exhibit USA-7) (emphasis added).

³⁶ WT/DSB/M/387, para. 6.2 (Exhibit USA-8).

[T]he United States also noted that India required a sanitary import permit before any poultry products could enter India. India had stated that it had stopped accepting paper applications for these permits in favour of online applications. However, the online portal India directed applicants to was non-functional, meaning no importer could even attempt to obtain approval to enter poultry products.³⁷

4. India's Fourth Claim of Compliance

31. On February 17, 2017, India issued S.O. 510(E) further amending S.O. 2337(E). India notified this measure on February 22, 2017, as an addendum to the proposed measure notified on April 20, 2016. On March 2, 2017, India circulated another notification to the DSB, noting in part:

In India's opinion, it had complied with the recommendations of the DSB by promulgating S.O. 2337(E); the Guidelines and the Questionnaire. However, in good faith, and *to clarify its measure, India has amended S.O. 2337(E) vide S.O. 2998(E) and S.O. 510(E)*. Thus, India has made all efforts to bilaterally resolve this dispute.³⁸

India thus again described its amendments, S.O. 2998(E) and S.O. 510(E), as a type of clarification of S.O. 2337(E) rather than identify any substantive change that had been effectuated through its enactment.

32. On March 20, 2017, the U.S. Department of Agriculture requested that DADF recognize the U.S. avian influenza control system and allow the trade of poultry and poultry products from unaffected zones in the event of an HPAI occurrence. The United States included in this request its response to India's questionnaire providing information on the U.S. Veterinary infrastructure, human resources, and avian influenza related laws, regulations, and programs. In particular, the U.S. submission described the U.S. approach to disease eradication activities, including establishing control zones, in the event of outbreaks of HPAI in the United States.³⁹ The next day, USDA also proposed to DADF model veterinary health certificates that provide for regionalization of poultry and poultry products from unaffected zones during occurrences of HPAI.

33. Despite these ongoing, bilateral interactions, on March 23, 2017, India notified the United States it would seek the establishment of a compliance panel. On April 6, 2017, India

³⁷ WT/DSB/M/389, para. 6.2 (Exhibit USA-9).


³⁸ WT/DS430/20 (emphasis added).

³⁹ Exhibit IND-18.

submitted a request for the establishment of a panel in this dispute. On May 22, 2017, the Panel was established. At least as of June 23, 2017, DADF's website did not have veterinary certificates for poultry products posted and stated that it had last been updated on March 2, 2017.⁴⁰ With respect to that point, the United States has pasted a screenshot below (and attached as an exhibit) from an internet web archive site. The website tracks the history of other website pages.

⁴⁰ See Screenshot taken from https://web.archive.org/web/*/http://dahd.nic.in/ (Exhibit USA-10).

9190017 Sanitary Requirement (veterinary health certificate) for import of various livestock products | Department of Animal Husbandry, Dairying & Fisheries

पशुपालन, डेयरी और मत्स्यपालन विभाग DEPARTMENT OF

ANIMAL HUSBANDRY, DAIRYING & FISHERIES



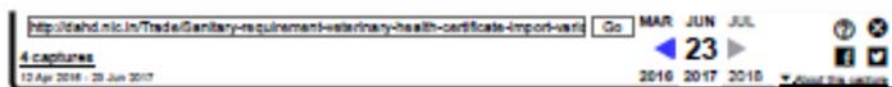
various livestock products

- Veterinary Certificate for import of porcine semen into India [\(159.8 KB\)](#)
- Protocol for import of Live Breeding Pig into India [\(113.12 KB\)](#)
- Crushed bones [\(153.8 KB\)](#)
- Equine Serum [\(62.07 KB\)](#)
- Lamb Meat [\(59.8 KB\)](#)
- Ovine Embryo [\(76.3 KB\)](#)
- Ox Bile [\(71.77 KB\)](#)
- Pig Semen [\(102.83 KB\)](#)
- Pork Meat [\(2.8 MB\)](#)
- Processed Lamb Meat [\(51.08 KB\)](#)
- Bovine semen [\(427.44 KB\)](#)
- Standard Conditions for Import of Fish & Fishery Product [\(266.91 KB\)](#)
- Horns / Hooves [\(38 KB\)](#)
- Bovine serum [\(136.74 KB\)](#)
- Canine Semen [\(25.47 KB\)](#)
- Equine Semen [\(82.27 KB\)](#)
- Ovine / Caprine Semen [\(39.71 KB\)](#)
- Porcine Semen [\(20.79 KB\)](#)
- Milk and milk products [\(85.65 KB\)](#)
- Skin/hides [\(2.66 MB\)](#)
- Pet Food [\(748.68 KB\)](#)



<https://web.archive.org/web/201702260805/http://dahd.nic.in/Trade/Sanitary-requirement-veterinary-health-certificate-import-various-livestock-products> 1/2

9190017 Sanitary Requirement (veterinary health certificate) for import of various livestock products | Department of Animal Husbandry, Dairying & Fisheries
Website Content Managed by **Department of Animal Husbandry, Dairying & Fisheries**
Designed, Developed and Hosted by **National Informatics Centre(NIC)** Last Updated:
02 Mar 2017



Thus, at the time of the Panel’s establishment on May 22, 2017, there is no evidence that India had any veterinary certificates for poultry products available to permit imports to achieve market access.

34. The United States notes that India’s first written submission refers to actions taken by India following the Panel’s establishment and discusses India’s views on cooperative resolution.⁴¹ Suffice it to say, the United States does not accept India’s characterization of those actions.⁴² More importantly, any measures adopted after the time of the establishment of the panel are not within the terms of reference of this proceeding, and thus are not relevant for the purposes of resolving whether India has brought itself into compliance.

35. A panel’s terms of reference are set out in Articles 7.1 and 6.2 of the DSU. Specifically, when the DSB establishes a panel, the panel’s terms of reference under Article 7.1 are “[t]o examine . . . the matter referred to the DSB” by the complainant in its panel request.⁴³ Under DSU Article 6.2, the “matter” the panel examines consists of “the specific measures at issue” and “a brief summary of the legal basis of the complaint.”⁴⁴ 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.”⁴⁵

36. Further, Article 11 of the DSU requires that the panel should make an objective assessment of the “matter”, including an objective examination of the facts and the applicability of and conformity with the covered agreements.⁴⁶ The panel also must issue a report under

⁴¹ See India’s First Written Submission, paras. 2, 3, 39, 40. The United States certainly considers that it has been seeking to reach a cooperative resolution with India, including by deferring arbitration on its request for authorization to take countermeasures for many months and by providing information to India and exchanging technical views. Such cooperative efforts though are not the subject of this dispute.

⁴² For example, India claims that the United States has not responded to India about its request to visit to conduct an audit of U.S. veterinary infrastructure. India’s First Written Submission, para. 40. The United States sent a response on September 19, 2017 to India noting that it was trying to find dates to accommodate India’s request. See Correspondence from USDA to DADF dated September 15, 2017. (Exhibit USA-11) Although the letter is dated September 15, 2017, the United States believes it was delivered on September 19, 2017.

⁴³ DSU Art. 7.1.

⁴⁴ DSU Art. 6.2; see *US – Carbon Steel (AB)*, para. 125; *Guatemala – Cement I (AB)*, para. 72.

⁴⁵ *EC – Chicken Cuts (AB)*, para. 156.

⁴⁶ DSU Art. 11 (“The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the

Article 12.7 setting out its “findings of fact, the applicability of relevant provisions and the basic rationale” for those findings.⁴⁷ Therefore, a WTO panel is authorized and charged by the DSU to make a finding with respect to the measures within its terms of reference found to be WTO-inconsistent, *i.e.*, the challenged measures, as they existed at the time of the panel’s establishment.

37. Defining the scope of a dispute based on the measures as they existed at the time of panel establishment – and requiring a recommendation to be made thereon – is not only part of the requirements of the DSU, it also benefits the parties by balancing the interests of complainants and respondents. Just as a complainant may not obtain findings on substantively new measures introduced after the establishment of a panel,⁴⁸ so too the respondent may not avoid findings and recommendations by altering or revoking its measures after the date of panel establishment.⁴⁹ A complainant therefore may obtain a recommendation that is prospective, and can be invoked both with respect to unchanged measures and with respect to any later-in-time measures a responding party may impose – whether they are imposed after the adoption of panel and Appellate Body reports, or simply after the establishment of a panel.

5. Visual Timelines

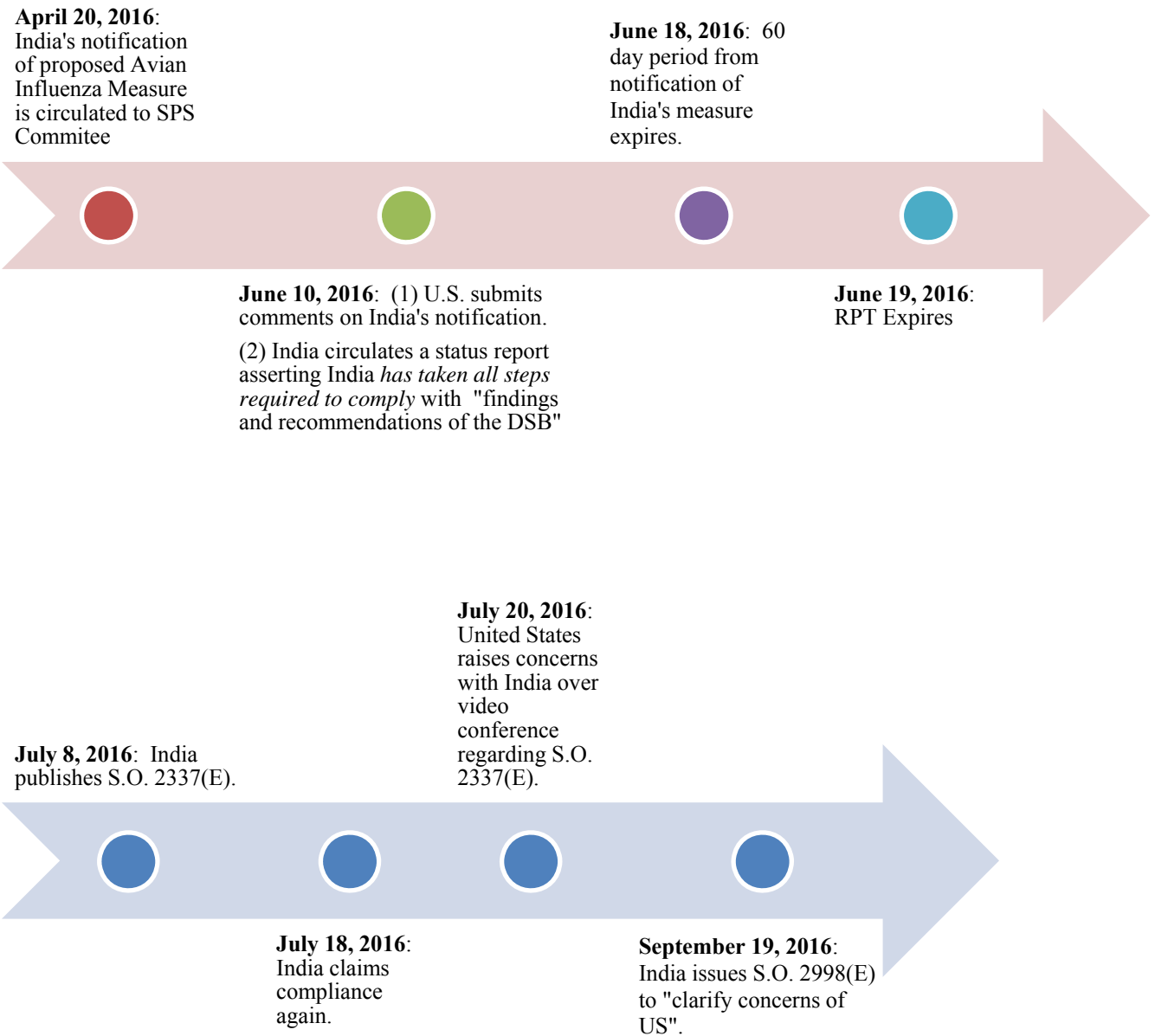
38. To distill the foregoing chronology even further and facilitate review, the United States highlights some of the foregoing key events visually by providing graphic timelines.

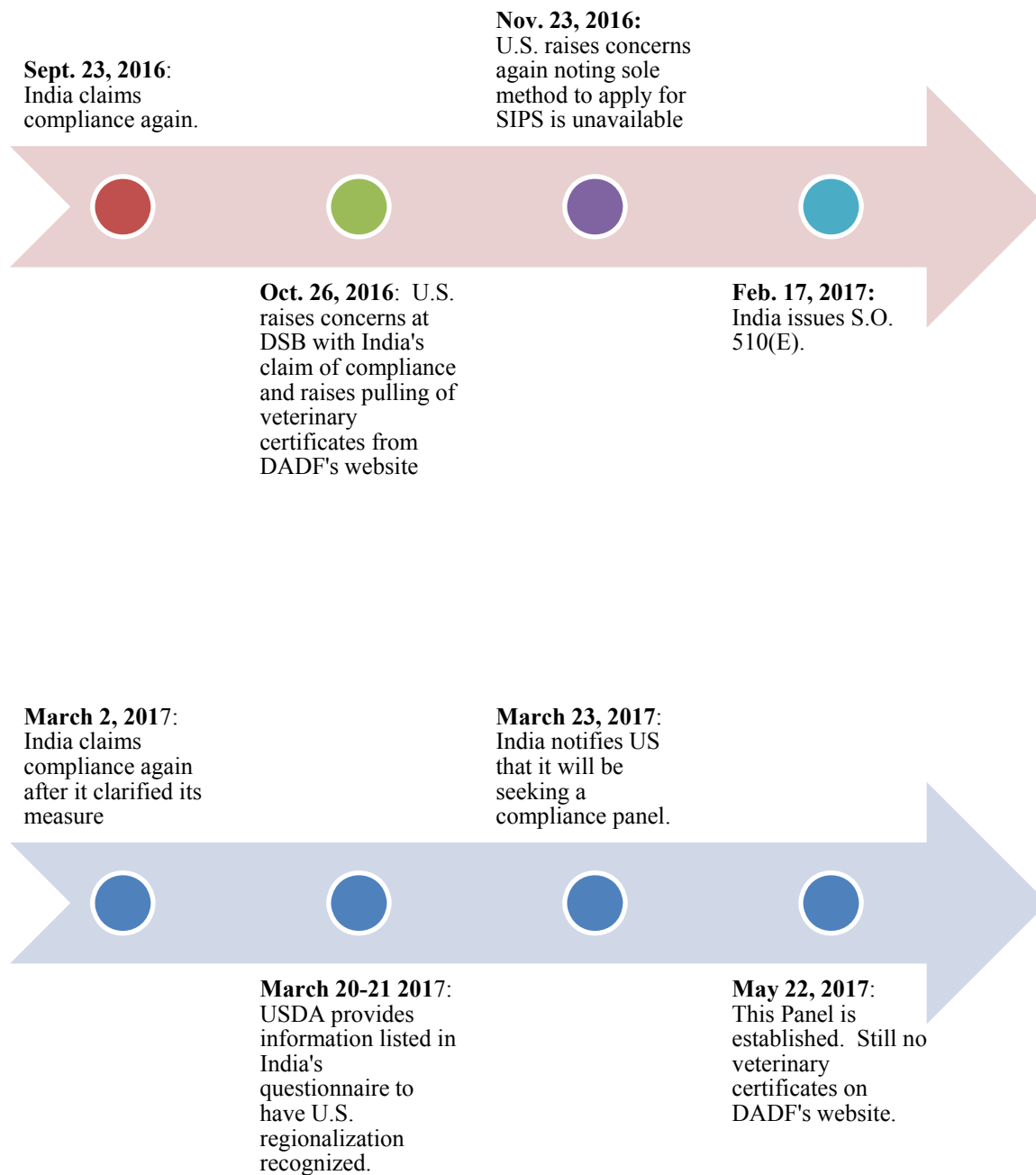
applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.”).

⁴⁷ DSU Art. 12.7 (“Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.”)

⁴⁸ See, *e.g.*, *EC – Chicken Cuts (AB)*, paras. 155-162.

⁴⁹ See, *e.g.*, *EC – IT Products (Panel)*, para. 7.167; *US – Wool Shirts and Blouses (Panel)*, para. 6.2; *Indonesia – Autos (Panel)*, para. 14.9; *Dominican Republic – Imports and Sale of Cigarettes (Panel)*, para. 7.344; *EC – Biotech (Panel)*, para. 7.456; *China – Raw Materials (AB)*, para. 260.





B. Content and Application of the Revised Avian Influenza Measure

39. The United States notes that India’s description of the Revised Avian Measure is incomplete in significant respects, including an analysis of how the relevant text appears following the various amendments. Below, the United States makes three overarching points concerning the content of the Revised Avian Influenza Measure.

1. S.O. 2998(E), as Amended, Still Requires the Exporting Territory to be Free from Avian Influenza

40. India has failed to address the precise text of S.O. 2998(E), including as amended by other S.O.s. The text and its evolution are important to understanding that India has still not changed its position that territories need to be free from avian influenza as a condition of import. Accordingly, the United States is providing a markup that will illustrate key language that reflect India’s views on the operation of its measure.

a. The Text of S.O. 2337(E), As Amended

41. The following markup reflects S.O. 2337(E), with the amendments from S.O. 2998(E) and S.O. 510(E) incorporated. Changes on account of S.O. 2998(E) are reflected in red. Strikeout indicates text that was deleted, while underline reflects text that was added. Blue underlined text reflects the text added to S.O. 2337 on account of S.O. 510(E). S.O. 2337(E), with the amendments integrated, reads as follows.

S.O. 2337(E).—In exercise of the power conferred by sub-section (1) of section 3 and Section 3A of the Livestock Importation Act, 1898 (9 of 1898) and in supersession of the notification of the Government of India in the Ministry of Agriculture (Department of Animal Husbandry, Dairying and Fisheries) published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (ii), vide number S.O. 1663(E), dated the 19th July, 2011, except of respect things done or omitted to be done before such supersession, the Central Government taking into consideration the requirements under the World Trade Organization Agreement on Sanitary and Phytosanitary Measures and the Terrestrial Animal Health Code of World Organization for Animal Health, hereby makes the following provisions to regulate the import of poultry and poultry products ;
namely,-

1. Definitions- In this notification, unless the context otherwise regulates-

- (a) “avian influenza” means avian influenza as defined in the Terrestrial Animal Health Code of World Organization for Animal Health.
- (b) “country, zones and compartment” means the country, zones and compartments as defined in the Terrestrial Animal Health Code of World Organization for Animal Health.
- (c) ‘notifiable avian influenza’ means avian influenza as defined in the Terrestrial Animal Health Code of World Organization for Animal Health.
- (d) “pest- or disease-free areas and areas of low pest or disease prevalence” means the pest or disease free areas and areas of low pest or disease prevalence as defined in the World Trade Organization Agreement on Agreement on Sanitary and Phytosanitary Measures;
- (e) “poultry” means all domesticated birds, including backyard poultry, used for the production of meat or eggs for consumption, for the production of other commercial products, for restocking supplies of game, or for breeding these categories of birds, as well as fighting cocks used for any purposes.
- (f) “poultry products” means the produce of the poultry as defined in clause (e) and includes hatching eggs, eggs for human consumption, egg products, poultry semen, meat and meat products of poultry, feathers and down of poultry, except processed poultry and poultry products in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health.

2. Import of poultry and poultry products upon occurrence of avian influenza-

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

- (2) The avian influenza status of a country, zone or compartment shall be determined on the basis of most recent status of the exporting country, zone or compartment as reported by the country to the World Organization for Animal Health in accordance with the requirements in Terrestrial Animal Health Code of World Organization for animal health. ~~of the following criteria, namely:-~~
- ~~(a) — Avian influenza is notifiable in the whole country; an ongoing avian influenza awareness programme is in place; and all notified suspect occurrences of avian influenza are subjected to field and, where applicable, laboratory investigations;~~
 - ~~(b) — appropriate surveillance is in place to demonstrate the presence of infection in the absence of clinical signs in poultry, and the risk posed by birds other than poultry; which may be achieved through an avian influenza surveillance programme maintained in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health; and~~
 - ~~(c) — considering all epidemiological factors for avian influenza occurrence and their historical perspective.~~
 - ~~(d) — most recent status of the exporting country/ zone/ compartment as reported in World Organization for Animal Health.~~
- (3) A country, zone or compartment may be considered free from avian influenza when it has been shown that infection with avian influenza viruses in poultry has not been present in the country, zone or compartment for the past twelve months, based on surveillance in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health.
- (4) If infection has occurred in poultry in a previously free country, zone or compartment, avian influenza free status can be regained,-
- (a) In the case of infections with high pathogenicity avian influenza viruses, three months after a stamping-out policy (including disinfection of all affected establishments) is applied, provided that surveillance in accordance with the provisions of the Terrestrial Code of World Organization of Animal Health has been carried out during that three-month period.
 - (b) In the case of infections with low pathogenicity avian influenza viruses, poultry may be kept for slaughter for human consumption subject to conditions specified in the Terrestrial Code of World Organization of Animal Health or a stamping-out policy may be applied and in either case, three months after the disinfection of all affected establishments, providing that surveillance in accordance with the Terrestrial Code has been carried out during that three-month period.

3. Recognition of Pest or Disease-Free Areas and Areas of Low Pest or Disease Prevalence-

- (i) The adaptation to the sanitary and phytosanitary characteristics of the area of the exporting country and the determination of pest or disease free areas and areas of low pest or disease prevalence shall be made in accordance with the requirements of the World Trade Organization Agreement on Sanitary and Phytosanitary Measures and the guidelines issued by the Central Government.
- (ii) For recognition of pest or disease free areas and areas of low pest or disease prevalence, the appropriate authority of the exporting country shall make a written request along with necessary evidence to the Department of Animal Husbandry, Dairying and Fisheries, Ministry of Agriculture and Farmers Welfare in the Government of India.

4. This notification shall come into effect from the date of its publication in the Official Gazette.

42. India cannot establish through this text that it no longer requires the exporting territory to be free from avian influenza as a condition of entry. The text of paragraph 2(1) of S.O. 2337(E), as issued prior to amendment, was explicit that complete freedom from AI was required as a condition for export. In particular, it provided that importation was allowed only from a country, zone, or compartment “*free from avian influenza* in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health and subject to fulfilment of requirements in paragraph 3 of this notification.”⁵⁰ In other words, the measure adopted by India following the expiration of the RPT explicitly stated that a prerequisite for trade is that the exporting territory had to be free from avian influenza.

43. The inclusion of this text – “free from avian influenza” – in the measure as originally published is consistent with India’s position from the original proceeding: Under the OIE Terrestrial Code, an exporting territory needs to be free from avian influenza in order to export poultry products.⁵¹ This position is inconsistent, however, with the panel’s findings from the original proceeding, which found that the OIE Terrestrial Code maintains product specific recommendations that allow products to be safely imported, even from territories reporting avian influenza outbreaks.⁵²

44. After the United States raised concerns with India on this very point, India promulgated S.O. 2998(E), which amended S.O. 2337(E) by deleting certain text including the phrase “free

⁵⁰ Exhibit IND-3 (emphasis added).

⁵¹ See e.g., *India – Agricultural Products (Panel)*, para. 7.244-7.248.

⁵² *India – Agricultural Products (Panel)*, para. 7.251-7.253.

from avian influenza.” India also deleted in paragraph 2(2) all of the text other than what was originally in subparagraph (d). That subparagraph provides that the status of the exporting country, zone or compartment is that reported by the country to the World Organization for Animal Health.⁵³

45. It is notable what language remains in S.O. 2337(E), even after the subsequent amendments. The United States draws the Panel’s attention to the fact that paragraph 2(1) provides paragraph 3 needs to be “fulfilled” to allow import of “poultry and poultry products” into India. The use of “and” in paragraph 2(1) as in “allowing trade in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health *and* subject to fulfilment of requirements in paragraph 3 ...” indicates that paragraph 3 is an additional condition for importation into India.

46. Paragraph 3 of S.O. 2337(3) is the section titled “Recognition of Pest or Disease-Free Areas and Areas of Low Pest or Disease Prevalence.” Read together, India’s text would provide that India allows importation provided (1) the import is consistent with India’s interpretation of the OIE Terrestrial Code and (2) the exporting country has fulfilled India’s requirements for disease free areas. The latter condition, recognizing disease free areas, indicates that India still requires the exporting territory to be free of avian influenza. In other words, India will apply what it views as OIE conditions from territories that are already free from avian influenza.

47. This reading is not the result of trying to resolve the meaning of poor draftsmanship, but actually reflects the meaning India intended. Indeed, India’s first written submission confirms this reading:

Once the DADF receives the application for a SIP, it checks the OIE website to determine whether there is (or has been within the last three months) an outbreak of AI in that country. If there has not been an outbreak of AI anywhere in the exporting country, the DADF will accept the SIP application and allow imports. If there has been an outbreak of AI in the exporting country, the DADF will check whether it has recognised pest or disease-free areas in the exporting country. If it has so recognized such areas, India may accept imports of poultry and poultry products from unaffected zones or compartments in that country even though there is an outbreak of AI in other parts of the country. A veterinary health certificate will be required, in any event, for every shipment.⁵⁴

⁵³ The United States notes that India’s acceptance of how a country proclaims the avian influenza of its territory status does not matter if India still requires the territory to be free of avian influenza. Indeed, the United States notes that India noted in the original proceeding that it accepted a country’s designation of its avian influenza status to the OIE.

⁵⁴ India’s First Written Submission, para. 38.

India’s submission thus acknowledges that the territory needs to be free from avian influenza before even a sanitary import permit (SIP) will be granted. India states that it recognizes zones and compartments to see if they are free from avian influenza – not that they are free from HPAI, in which case a different set of product specific recommendations may apply. This excerpt from India’s submission also reflects that India is not making any distinction between an outbreak of LPAI and HPAI in a territory, including applying a different set of import conditions. India simply checks if the territory is free of avian influenza.

b. Evidence on Application of the Revised Avian Influenza Measure

48. To the extent India claims S.O. 2998(E)’s textual deletions result in a measure that no longer limits market access to exports from AI-free Members, India’s claim is belied by the evidence. The deletion is merely cosmetic.

49. First, India has failed to provide any evidence that India has renounced its prior – and long held – interpretation and instructions concerning the application of the OIE Terrestrial Code as envisaging import prohibitions on account of avian influenza.⁵⁵ In the original proceeding, India asserted that following the promulgation of a notification by DADF, it informs other government departments of the notification through office memoranda.⁵⁶ India provided Office Memorandum No. 109-21/2007 as an example, which provided that DADF had decided to continue the ban on products from countries reporting avian influenza. Considering that India’s long held position was that a country needed to be free from avian influenza as a condition of trade, the omission of any type of instruction to government departments indicating that its position had been reversed or changed is striking. The absence of such an instruction is also probative in showing that the edits from S.O. 2998(E) to S.O. 2337(E) are substantively empty. India has simply adduced no evidence to indicate that it has done anything to inform its relative authorities that the ban has in fact ended.

50. Indeed, the sanitary imports and trade data that India submits are indicative that India’s evidence does not establish that the avian influenza restrictions have actually been lifted. India notes that it has received applications from Indian importers for sanitary import permits to import poultry and poultry products from various countries.⁵⁷ Putting aside for the moment that a sanitary import permit, even if granted, does not establish that trade has actually taken place, it is telling what India says about these countries: “These countries have not applied for the

⁵⁵ Indeed, the very fact that this language was placed in S.O. 2337(E) at all suggests that India, even following the adoption of the Panel and Appellate Body Reports, has not revised its position on how to apply the OIE Terrestrial Code.

⁵⁶ *India – Agricultural Products (Panel)*, para. 2.29.

⁵⁷ India, First Written Submission, para. 41.

recognitions of pest or disease-free areas as they have not had any outbreaks of avian influenza.” If the countries are not reporting avian influenza, then whether there have been SIPs issued to exporters from them or even trade is irrelevant to whether India has actually lifted its restrictions from countries reporting avian influenza.

51. The United States recalls that in the original proceeding, the United States did not take issue with India’s contention that there has been some negligible trade of poultry products into India.⁵⁸ Rather, the United States explained that the trade did not establish that India has actually allowed imports from countries reporting avian influenza outbreaks to the OIE. The sanitary import permits and purported trade data⁵⁹ that India submits now is simply another attempt to make an argument that was rejected in the original proceeding. It fails for the same reason here: they do not indicate trade flowing from territories reporting avian influenza.

2. S.O. 2337(E), as Amended, the Guidelines, and the Questionnaire Do Not Establish that India Will Actually Apply its Measures on a Regionalized Basis with Respect to Avian Influenza

52. The content of the Revised Avian Influenza Measure also does not establish how India provides an effective opportunity to have regionalization claims accepted or how India will ensure its measures are adapted to reflect disease free areas or areas of low disease prevalence. This is true with respect to each of the instruments in the Revised Avian Influenza Measure.

a. S.O. 2337(E), As Amended

53. Paragraph 3 of S.O. 2337(E) does not establish that India recognizes the concept of disease-free areas or ensure that the measure is adapted to the sanitary characteristics of the area from which the product originated. Paragraph 3(1) provides that India will make the requisite “determinations in accordance with the requirements of the World Trade Organization Agreement on Sanitary and Phytosanitary Measures and the guidelines issued by the Central Government.” All WTO Members, however, are obliged to make determinations consistent with their WTO obligations. S.O. 2337(E) thus on its face does not address how India intends to fulfill its obligations under Articles 6.1 and 6.2 of the SPS Agreement. There is no further clarity on this issue in either the Guidelines or the questionnaire.

⁵⁸ *India – Agricultural Products (Panel)*, paras. 7.71-7.72.

⁵⁹ The United States notes India has not provide the source for the trade data it has presented in Exhibit IND-39. At this juncture, the United States has not been able to confirm India’s figures as the databases it has reviewed have not yet been updated to reflect 2017 figures.

b. The Guidelines

54. The Guidelines consist of four points.
1. A country can submit a request to DADF to recognize avian influenza free areas.⁶⁰ Any request needs to include responses to DADF’s questionnaire.
 2. DADF will look at the application and questionnaire and may ask for more information.⁶¹
 3. DADF may request an inspection and verify information submitted in the responses to the questionnaire, including through a post verification questionnaire. DADF asserts its request will be expeditious.⁶²
 4. DADF will provide a written decision to the country and reasons for why it did not accept the application.⁶³

Notably, the guidelines are silent as to what conditions would actually result in India accepting a proposal, such as the fulfillment of any particular criteria that India might maintain.

c. The Questionnaire

55. The questionnaire requests various information about the veterinary infrastructure of the exporting country. The United States agrees that much of the information requested by India would be relevant in determining whether to recognize the exporting country’s claim of

⁶⁰ Exhibit IND-7, para. a (“An exporting country may approach the Department with an application to recognize their Avian Influenza free areas including parts of country, zones/ compartment for trade in poultry and poultry products. The application is required to be accompanied with a response to the Questionnaire, a copy of which can be accessed at <http://dahd.nic.in/>.”).

⁶¹ Exhibit IND-7, para. b (“The Department will examine and evaluate the application and the questionnaire response. If further information and/or necessary evidence is required, the Department may promptly issue a supplementary questionnaire.”).

⁶² Exhibit IND-7, para. c.

⁶³ Exhibit IND-7, para. d (“The final decision with respect to the application shall be communicated to the exporting country in writing along with the reasons in case of non acceptance of the application. The entire process of evaluation will be completed expeditiously.”).

regionalization.⁶⁴ However, India points to no instrument indicating how the information will be used and evaluated.

56. On this point, the United States notes that the Panel may wish to consider the relevant guidance from the OIE. Specifically, OIE Terrestrial Code 4.3.2 places corresponding obligations on exporting and importing countries:

The exporting country should be able to demonstrate, through detailed documentation provided to the importing country, that it has implemented the recommendations in the Terrestrial Code for establishing and maintaining such a zone or compartment.

An importing country should recognise the existence of this zone or compartment when the appropriate measures recommended in the Terrestrial Code are applied and the Veterinary Authority of the exporting country certifies that this is the case.⁶⁵

In other words, while the United States agrees that international standards call for the production of evidence by exporting countries that seek to demonstrate its zones or compartments meet OIE recommendations, the importing country also has a concomitant responsibility to recognize such zones and compartments. India does not explain how it will satisfy its responsibility as the importing country.

3. The Revised Avian Influenza Measure Does Not Reflect the Product Specific Recommendations of the OIE Terrestrial Code

57. With respect to the content of the Revised Avian Influenza Measure, the United States notes a critical omission: there is nothing within the measure that actually confirms that India will apply the product specific recommendations of the OIE Terrestrial Code. As explained above, there is already a fundamental problem in that India continues to require the exporting territory to be free from avian influenza as condition for import by only granting SIPs to areas free from avian influenza. Putting that aside, the only text in S.O. 2337(E), even after amendment, that arguably implicates the OIE Terrestrial Code's recommendations is paragraph 2(1), which simply notes:

⁶⁴ Exhibit IND-8.

⁶⁵ Exhibit USA-15.

The import of poultry and poultry products into India shall be allowed from the country, zone or compartment in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health and subject to fulfilment of requirements in paragraph 3 of this notification.

This text, however, says nothing about how India actually operationalizes the relevant recommendations in the OIE Terrestrial Code. India strenuously argued in the original proceeding that its measure conformed to the OIE Terrestrial Code – and the panel found that was not so. India’s attempt to use a circular statement – its measure applies the OIE Terrestrial Code because it says it applies the OIE Terrestrial Code – is unavailing and insufficient.

a. The Chart India has Attached to S.O. 2337(E) Does Not Establish Application of OIE Product Specific Recommendations

58. The United States notes the exhibit that contains S.O. 2337 (E) includes a chart that lists certain tariff lines and the articles for what India asserts are the corresponding OIE Terrestrial Code recommendations. The United States provides a partial screenshot of the chart below.

<i>ITC(HS) Classification</i>	<i>Tariff lines</i>	<i>Applicable OIE Standards</i>
01051100	Fowl of the species <i>Gallus domesticus</i>	10.4.5
01051200	Turkeys	10.4.5
01051300	Ducks	10.4.5

59. The United States notes this chart was not published with S.O. 2337(E). The United States understands it was prepared separately. The United States first obtained it through discussions with India. Accordingly, under the current record of this proceeding, it not clear what, if any, legal significance it has with respect to the Revised Avian Influenza Measure.

60. Furthermore, the chart is deficient for two reasons. First, it does not actually indicate how India operationalizes the recommendations, such as through the use of veterinary certificates that contain attestations consistent with the relevant OIE Terrestrial Code. In the original proceeding, India also prepared a chart identifying which OIE Terrestrial Code recommendations corresponded to particular products. Specifically, India, in the original proceeding, provided such a table in response to Panel Question 28(a), which asked the parties “which specific sections of Chapter 10.4 of the Terrestrial Code provide international standards for each of the products listed in S.O. 1663(E).”⁶⁶ In other words, the fact that India can identify particular OIE Terrestrial Code recommendations is not a new development. And, as with the original proceeding, India’s awareness that certain OIE Terrestrial Code recommendations are

⁶⁶ The United States notes that India asserted that because the United States had limited its claims to eggs and poultry meat, it would limit its response to those products. The chart India provided in response to the Panel Question thus only identified the recommendations for those products.

applicable does not prevent it from applying a measure that is inconsistent with those recommendations.

61. The second problem with the chart is that it is incomplete. The United States recalls that the panel in the original proceeding found that the products covered by S.O. 1663(E) were the following:

- (a) domestic and wild birds (including poultry and captive birds);
- (b) day old chicks, ducks, turkey, and other newly hatched avian species;
- (c) un-processed meat and meat products from avian species, including domesticated, wild birds and poultry;
- (d) hatching eggs;
- (e) eggs and egg products (except Specific Pathogen Free eggs);
- (f) un-processed feathers;
- (g) live pigs;
- (h) pathological material and biological products from birds;
- (i) products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use; and
- (j) semen of domestic and wild birds including poultry.⁶⁷

Certain products such as poultry semen and live pigs are not on India's chart. Indeed, with respect to live pigs, it is not clear whether S.O. 2337(E) even addresses the removal of the prior restrictions since it appears the products it covers are simply poultry products. In short, India has not explained or substantiated how it operationalizes the OIE Terrestrial Code.

b. The Revised Avian Influenza Measure Does Not Include OIE Consistent Veterinary Certificates

62. What India does need in order to establish that it has operationalized the OIE Terrestrial Code's recommendations are veterinary certificates.⁶⁸ As noted above in Section III, each of the

⁶⁷ *India – Agricultural Products (Panel)*, para. 7.217; S.O. 1663(E) (Exhibit IND-1).

⁶⁸ The United States notes that India asserts that both the sanitary import permit and the veterinary health certificates were not measures at issue in the original dispute. India's First Written Submission, para. 33. To the extent India claims this means the Panel cannot consider the absence of veterinary

product specific recommendations calls for veterinary attestations. As India has not claimed that veterinary certificates are part of its measure taken to comply, or submitted them as exhibits to its first written submission, it is clear that its evidence to prove actual application of the product specific recommendations is deficient. Indeed, the available evidence suggests that India moved in the opposite direction with respect to veterinary certificates. As discussed above, one of the concerns the United States has raised with India, particularly at the DSB, is that India *withdrew* access to veterinary certificates.

63. The hypothetical India provides in its submission about the Revised Avian Influenza Measure is demonstrative on why India’s failure to have veterinary certificates is so important. India asserts in its hypothetical it could import hatching eggs from California, even if California is reporting LPAI provided it is free from HPAI.⁶⁹ India notes this is so because the “veterinary certification requirements for hatching eggs in Article 10.4.11” of the OIE Terrestrial Code allow for such trade. Of course, the OIE Terrestrial Code does provide for safe trade in hatching eggs through the use of veterinary certificates. The issue here, however, is that India did not provide its veterinary certificates for hatching eggs, or for any other products that are at issue in this dispute. Absent such veterinary certificates – and considering that India will not allow importation absent a veterinary certificate – India cannot claim that it has operationalized the OIE Terrestrial Code’s recommendations.

V. LEGAL DISCUSSION

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

64. India asserts that under its Revised Avian Influenza Measure it “allows imports of poultry and poultry products into India in accordance with the relevant international standard, *i.e.* the OIE Terrestrial Animal Health Code.”⁷⁰ India, however, made precisely the same argument

certificates, India’s argument is misplaced. The issue in this dispute is the measure taken to comply. If India asserts that the measure it has taken to comply purportedly conforms to the OIE Terrestrial Code, then the Panel is entitled to examine that measure, including by considering whether India has presented evidence (like veterinary certificates) that supports or contradicts India’s characterization.

⁶⁹ India’s First Written Submission, para. 75. The United States notes that India has not pointed to any risk assessment on which it has based any restrictions it imposes on account of HPAI.

⁷⁰ Specifically, India claims the Revised Avian Influenza Measures “conforms to the recommendations of Chapter 10.4 of the OIE Terrestrial Code, which deals with ‘infection with avian influenza viruses.’” India’s First Written Submission, paras. 25(a) and 26; footnote 39.

regarding the measures at issue in the original proceeding⁷¹ – and the argument remains as untenable now as it did in the original proceeding.

65. The principal difference between the measures at issue in the original proceeding and the present one is optical. Rather than maintain a measure that explicitly states that India will apply import prohibitions – and then claim the prohibitions are consistent with the OIE Terrestrial Code – the Revised Avian Influenza Measure simply proclaims that India acts consistently with the OIE Code – and nothing more. The nothing more is precisely the problem.

66. Evidence, including India’s decision to remove veterinary certificates from public access, demonstrates that India continues to restrict trade on account of avian influenza in a manner that contradicts the OIE Terrestrial Code. To substantiate its claims of compliance with Article 3.1, India needs to provide evidence substantiating that it has actually operationalized the precise recommendations of the OIE Terrestrial Code, such as the use of veterinary certificates that reflect the product specific conditions. For example, India needs to overcome the evidence that indicates it still maintains a requirement that areas be free from avian influenza as a condition of entry. Having failed to do so, India’s claim of compliance must fail.

67. The United States presents its discussion in three parts. First, the United States briefly recounts the relevant legal standards for Articles 3.1 and 3.2 of the SPS Agreement. Second the United States notes why the Revised Avian Influenza Measure still contradicts the OIE Terrestrial Code. Finally, the United States addresses the remaining arguments India has concerning elements of the OIE Terrestrial Code that it has adopted.

1. Articles 3.1 and 3.2 of the SPS Agreement

68. Articles 3.1 of the SPS Agreement provides as follows:

To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

⁷¹ See e.g., India’s Original Second Written Submission, para. 45. (“India submits that India’s measure which is in conformity with the international standard, i.e. OIE Code is also based on the standard.”).

The text of the provision by its plain terms requires Members to base their measures on available international standards, guidelines, or recommendations.⁷²

69. The definition of to “base something on” is to “use as the foundation for”.⁷³ With respect to what constitutes basing a measure on an international standard – or a basis – the panel in the original proceeding reasoned that where an SPS measure and the relevant international standard contradict each other, it cannot properly be concluded that the SPS measure is “based on” that international standard.⁷⁴ Moreover, the panel drew upon the Appellate Body’s analysis in *EC – Sardines* in evaluating the United States’ claim under Article 3.1 of the SPS Agreement. In particular, the panel noted the Appellate Body’s finding in *EC – Sardines* that “‘there must be a very strong and very close relationship between two things in order to be able to say that one is ‘the basis for’ the other’”.⁷⁵

70. In this respect, the United States notes its disagreement with India that Article 3.1 simply “requires adoption of a few elements of the international standard to qualify as being ‘based on’...”⁷⁶ While a measure may not necessarily have to adopt all elements of the international standard to be based upon the standard, a basis (or foundation) cannot be established by simply noting a few commonalities or simply cherry-picking what is deemed suitable. Moreover, the prefatory clause to Article 3.1 is “[t]o harmonize sanitary and phytosanitary measures on as wide a basis as possible.” Suggesting that the obligation could be fulfilled by drawing any aspects from an international standard is inconsistent with the statement in the prefatory text that the provision furthers harmonization. Accordingly, a Member asserting that its measure is based on an international standard bears the burden of demonstrating so by showing how the elements it has adopted establish that its measure’s foundation indeed rests on the international standard.

71. Article 3.2 of the SPS Agreement provides as follows:

⁷² The United States notes that the provision provides that a Party’s obligation to base its measures is qualified by its right under Article 3.3 of the SPS Agreement. India, however, did not invoke Article 3.3 in the original proceeding and is not invoking it now.

⁷³ See New Shorter Oxford English Dictionary, p. 187 (“make or act as a foundation for”) (Exhibit US-17).

⁷⁴ *India – Agricultural Products (Panel)*, para. 7.269.

⁷⁵ *India – Agricultural Products (Panel)*, para. 7.266 quoting *EC – Sardines*, para. 245; see also *Russia – Pigs (Panel)*, para. 7.254, quoting same.

⁷⁶ India’s First Written Submission, para. 51.

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.

The Appellate Body concluded in *EC – Hormones* that anything less than adoption of all of the relevant international standard precludes the Member from obtaining the rebuttable presumption of consistency under Article 3.2:

[A] measure may adopt some, not necessarily all, of the elements of the international standard. The Member imposing this measure does not benefit from the presumption of consistency set up in Article 3.2⁷⁷

Thus, to prevail on its claim of conformity, and obtain a rebuttable presumption that the Revised Avian Influenza Measure is consistent with the SPS Agreement, India must show that it has incorporated the recommendation *in toto*. Because the Revised Avian Influenza Measure contradicts the OIE Terrestrial Code, India cannot claim the Revised Avian Influenza Measure conforms to or is based upon the OIE Terrestrial Code.

2. The Revised Avian Influenza Measure Contradicts the OIE Code

72. In this subsection, the United States will show three ways in which the Revised Avian Influenza Measure contradicts the OIE Terrestrial Code. First, the United States explains how India continues to maintain import restrictions on account of avian influenza. Second, the United States addresses India's failure to allow access to any veterinary certificates, which again results in import restrictions. Finally, the United States explains that the OIE Terrestrial Code provides that countries should only apply its import conditions with respect to animal diseases if it controls for the disease domestically. Since India has failed to provide any evidence that it controls for LPAI at home, its application of any import measures with respect to LPAI would contradict the OIE Terrestrial Code.

a. Requiring Freedom From Avian Influenza To Grant a SIP Contradicts the OIE Terrestrial Code

73. The panel in the original proceeding found that the OIE Terrestrial Code does not envisage import prohibitions on account of avian influenza. In doing so, it explicitly rejected the position of India concerning the application of the OIE Terrestrial Code :

⁷⁷ *EC – Hormones (AB)*, para. 171; *see also US – Continued Suspension (AB)*, para. 694 (“This presumption, however, does not apply where a Member has not adopted a measure that conforms with an international standard.”).

In essence, while the United States interprets the recommendations as providing for the conditions for safe trade according to the NAI status of the exporting country, zone or compartment, India interprets the reference to that status as a "condition of entry" which it is allowed to choose. Thus, if it chooses to impose NAI country freedom as a "condition of entry", the other recommendations applicable, for instance, to a HPNAI free country (region or compartment) or "regardless of the NAI status" of the country, would not apply to India.⁷⁸

We recall that the OIE agreed with the statement of the United States that where the Terrestrial Code recommends prohibitions, it explicitly so provides. Indeed, we do not find any recommendations for import prohibitions in Chapter 10.4 of the Terrestrial Code. We have examined the text of each of the product-specific recommendations in Chapter 10.4 outlined in the table in paragraph 7.230 above and we find no basis for the interpretation of the product-specific recommendations advocated by India.⁷⁹

We have found a number of product-specific recommendations in Chapter 10.4 that envisage allowing the importation of relevant poultry products from countries reporting LPNAI or even regardless of the countries' NAI status, provided that appropriate risk mitigation conditions are fulfilled.⁸⁰

74. While India's first written submission is careful not to use the word ban or restriction, the conduct it attributes as part of the Revised Avian Influenza Measure can only be construed as such. The following excerpts from India's first written submission are indicative:

⁷⁸ *India – Agricultural Products (Panel)*, para. 7.248.

⁷⁹ *India – Agricultural Products (Panel)*, para. 7.251.

⁸⁰ *India – Agricultural Products (Panel)*, para. 7.252.

Once the DADF receives the application for a SIP, it checks the OIE website to determine whether there is (or has been within the last three months) an outbreak of AI in that country. *If there has not been an outbreak of AI anywhere in the exporting country, the DADF will accept the SIP application and allow imports.* If there has been an outbreak of AI in the exporting country, the DADF will check whether it has recognised pest or disease-free areas in the exporting country. If it has so recognized such areas, India may accept imports of poultry and poultry products from unaffected zones or compartments in that country even though there is an outbreak of AI in other parts of the country. A veterinary health certificate will be required, in any event, for every shipment.⁸¹

To summarise, it has always been possible for India to import from countries that have not had any outbreaks of AI, even though those countries did not make an application for recognition of pest and disease-free areas. India now has procedures in place whereby it will recognise pest and disease-free zones and compartments in an exporting country when the required information about that country's veterinary infrastructure, human resources, avian influenza control systems, and the approach to disease eradication activities in the event of an outbreak of HPAI is provided and verified, if necessary. After the DADF has recognised pest and disease-free areas in an exporting country, *even though there may be an outbreak of AI in one zone or compartment in that country, India will be in a position to allow imports of poultry and poultry products from other unaffected zones or compartments in that country. Indian importers can then apply for SIPs in order to be able to import poultry and poultry products from that country.*⁸²

Both paragraphs are significant because they confirm that the consequence of “an outbreak of AI” is a trade restriction. The second paragraph, with its reference to HPAI, also confirms that India’s use of AI is not accidental. Nor should this statement be surprising. It reflects a continuation of the status quo.

75. In the original proceeding, India stated that it used the OIE’s website to determine the avian influenza status of a country and impose its restrictions.⁸³ India has not adduced any

⁸¹ India’s First Written Submission, para. 38 (emphasis added).

⁸² India’s First Written Submission, para. 42.

⁸³ India’s Response to Panel Question 21 in the Original Proceeding (“India uses the OIE’s World Animal Health Information System (WAHID) to ascertain the disease status of the exporting country i.e. whether the country of export is free from NAI. Countries notify disease outbreaks as well as freedom

evidence to indicate that it reversed this long-standing practice. In light of this process, India is still maintaining a ban on agricultural products on account of avian influenza, which encompasses LPAI as well. Such a ban, as found by the panel in the original proceeding, contradicts the OIE Terrestrial Code.⁸⁴ Thus, India cannot claim its measure is based on the OIE Terrestrial Code, let alone conforms to it.

b. Not Allowing Importation Through OIE Consistent Veterinary Certificates Contradicts the OIE Terrestrial Code

76. India has not put forward any evidence that the Revised Avian Influenza Measure actually effectuates the product specific recommendations of the OIE Terrestrial Code. As summarized above in Section III, the product specific recommendations contained in Articles 10.4.5 through 10.4.24 of the OIE Terrestrial Code extend over several pages. They reflect particularized conditions to allow safe import depending on the product at issue and the avian influenza status of the exporting territory.

77. In attempting to assert conformity with these recommendations, India points solely to paragraph 2(1) of S.O. 2337(E).⁸⁵ That paragraph, which consists of a single sentence, provides:

The import of poultry and poultry products into India shall be allowed from the country, zone or compartment in accordance with the Terrestrial Animal Health Code of World Organization for Animal Health and subject to fulfilment of requirements in paragraph 3 of this notification.

From that sentence, India asserts that it is in conformity with the “[p]roduct-specific recommendations covered in Articles 10.4.5 to 10.4.24 of the OIE Terrestrial Code....” On its face, that claim is not tenable. Those recommendations require that veterinary certificates with particularized conditions be utilized – and India has not provided any evidence they exist.

78. Indeed, the United States raised this concern with India months before the Panel was established, and the certificates were still not on DADF’s website when the Panel was established.⁸⁶ Furthermore, if no exporting Member can access and make use of a veterinary

from the outbreak to the OIE and this information is available on WAHID. India relies on a country’s self- notification to the OIE to ascertain if a country is free of NAI.”).

⁸⁴ *India – Agricultural Products (Panel)*, para. 7.271 (“In particular, S.O. 1663(E) prohibits the importation of the relevant products from countries reporting NAI, thus not allowing importation from NAI or HPNAI-free zones or compartments, in contradiction with the product-specific recommendations of Chapter 10.4 of the Terrestrial Code.”).

⁸⁵ India’s First Written Submission, para. 79.

⁸⁶ *See* Sections IV.A.3 and IV.B.3.

certificate, then the importing Member is simply imposing a ban. A hypothetical import certificate held internally by an importing Member, and not available to potential exporters, is irrelevant to issues of compliance with WTO rules.

79. Yet, India in its submission notes that “[a] veterinary health certificate will be required, in any event, for every shipment.”⁸⁷ The absence of such certificates means that in fact trade cannot occur and thus there still is a ban on products from countries reporting avian influenza to the OIE. The existence of import restrictions on this basis is another reason that India’s measure contradicts the OIE Terrestrial Code.

**c. Imposing Restrictions for LPAI When Not Controlling it
Domestically Contradicts the OIE Terrestrial Code**

80. Under the OIE Code, countries should not apply measures with respect to diseases that they do not control for domestically. Specifically, Article 5.1.2.2 of the OIE Terrestrial Code provides:

The international veterinary certificate should not include requirements for the exclusion of pathogens or animal diseases which are present in the importing country and are not subject to any official control programme.⁸⁸

In the original proceeding, the panel consulted with the OIE regarding various questions on how to properly interpret the OIE Terrestrial Code. In response to Question 7(b), the OIE noted the following:

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.⁸⁹

Thus, the OIE Code disclaims imposing import conditions for diseases that are not subject to any control domestically. Yet, the Revised Avian Influenza Measure is imposing a restriction because of LPAI outbreaks even though there is not an effective system for surveillance of LPAI domestically.

81. On this point, the United States notes that the panel in the original proceeding found that India breached its obligations under Article 2.3 of the SPS Agreement because:

⁸⁷ India’s First Written Submission, para. 38 (emphasis added).

⁸⁸ OIE Terrestrial Code Chapter 5.4 (Exhibit USA-15).

⁸⁹ OIE Responses to Panel Questions (Nov. 15, 2013) (Exhibit USA-13).

India prohibits imports of products enumerated in paragraphs (1)(ii)(a) to (1)(ii)(j) of S.O. 1663(E) from WTO Members who notify LPNAI to the OIE. India does not have in place a surveillance system capable of reliably detecting that same risk within its territory, and, therefore, India is not in a position to systematically impose LPNAI-based restrictions on the products covered by S.O. 1663(E) within its territory.

Nothing in India's submission, including its arguments with respect to its claim of compliance under SPS Agreement Article 2.3, indicates that India has made any effort to create a surveillance system capable of reliably detecting avian influenza domestically. Although not proffered by India, the United States notes that India issued a new National Action Plan in 2015.⁹⁰ Like its predecessor, there is nothing in the document to suggest a surveillance system capable of detecting LPAI. The only observation it makes with respect to LPAI are the following:

- Special emphasis should be given on surveillance in Live Bird Markets (LBMs), at border areas, areas with high bird density and the areas inhabited by wild and migratory birds to rule out any possibility of new or low pathogenic virus strains.⁹¹
- The blood samples are required as the targeted surveillance in the areas of high risk. The blood samples are necessary to detect the presence of Low Pathogenic Avian Influenza virus where the birds do not show the disease despite being positive; or they show very mild symptoms.⁹²

These statements do not indicate that India has adopted a surveillance system capable of reliably detecting LPAI. Indeed, the National Action Plan 2015 actually disclaims sampling that does not involve unusual sickness or mortality:

⁹⁰ India, National Action Plan 2015 (Exhibit USA-14).

⁹¹ India, National Action Plan 2015, p. 4 (Exhibit USA-14).

⁹² India, National Action Plan 2015, p. 39 (Exhibit USA-14).

The States/ UTs must distinguish at their level between unusual sickness/ mortality and normal incidences of sickness and mortality in poultry. Only in case of unusual sickness/ mortality raising suspicion of AI, forward the samples immediately either to respective Regional Disease Diagnostic Laboratory or directly to National Institute of High Security Animal Diseases (NIHSAD), Bhopal through special messengers under intimation to the Joint Secretary (Livestock Health), in the Department of Animal Husbandry, Dairying and Fisheries, Government of India.⁹³

Accordingly, the Revised Avian Influenza Measure contradicts the OIE Terrestrial Code by imposing restrictions with respect to LPAI when India has no corresponding controls on LPAI at home.

3. The Remaining Elements of the OIE Terrestrial Code That India Claims to Have Adopted are Insufficient to Claim the Revised Avian Influenza Measure is Based on the OIE Terrestrial Code

82. In paragraph 79 of its first written submission, India also claims it has adopted the OIE Terrestrial Code's recommendations with respect to five elements:

1. The definition of avian influenza (Article 10.4.1);
2. Notification of avian influenza to the OIE (Article 10.4.1(8));
3. Assessing the avian influenza status of a territory (Article 10.4.2);
4. The factors to consider when determining if a territory is free from avian influenza or HPAI (10.4.3 and 10.4.4); and
5. The product specific recommendations for zones and compartments (Article 10.4.5 through Article 10.4.24).

India's argument, however, is conclusory – neither supported by legal argumentation, nor by evidence in the record. Upon examination, India has not established that it has based its measure on these elements of the OIE Terrestrial Code.

83. With respect to (1), the definition of avian influenza, the United States notes that India's prior measure contained that definition. Simply because two measures concern the same disease does not indicate whether they are closely related to the degree that one could say that one is based upon the other.

⁹³ India, National Action Plan 2015, pp. 6-7. (Exhibit USA-14).

84. With respect to (2), notification of avian influenza concerns a country reporting avian influenza to the OIE. In other words, if a country detects the specific strains of avian influenza defined by the OIE in Chapter 10.4, it must notify an outbreak to the OIE. Such a reporting requirement does not apply here. The Revised Avian Influenza Measure is an *import* measure. What India reports to the OIE concerning its own avian influenza status is irrelevant to the issue of what it is allowing for the purposes of importation.

85. With respect to (3), the avian influenza status of a territory, and (4) the factors to determine when a territory is free from avian influenza, or at least HPAI, the United States notes that India's prior measure contained those elements. It used precisely those elements to impose import restrictions. Rather than apply product-based recommendations to facilitate trade when a country was reporting avian influenza, India simply used such a status to impose an import restriction. Accordingly, India is still using the same approach as its original measure to block trade. In other words, simply because India shares an understanding regarding certain concepts in the relevant international standard does not establish basis on or conformity with the international standard when those concepts are used for a purpose directly contrary to that envisioned by the international standard.

86. Finally, (5) concerns the use of product specific recommendations. India has not provided one document reflecting that the actual content of those product specific recommendations is being applied. Indeed, the lack of veterinary certificates establishes that the product specific recommendations are not applied.

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

87. As demonstrated above, the Revised Avian Influenza Measure does not conform to the relevant recommendations in the OIE Terrestrial Code. Because India's claim of compliance rests entirely on its argument that the Revised Avian Influenza Measure is based on or conforms to the OIE Terrestrial Code, India's failure to put forward a risk assessment on which the Revised Avian Influenza Measure is based means that India remains in breach of its obligations under Articles 5.1, 5.2, and 2.2 of the SPS Agreement. The United States briefly recounts the legal obligations in these provisions and then addresses the specific points raised by India.

1. Articles 5.1, 5.2, and 2.2 of the SPS Agreement

88. Article 5.1 of the SPS Agreement provides that:

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

In assessing a claim under Article 5.1, a panel must address two issues: (1) whether there is a “risk assessment” within the meaning of the SPS Agreement and (2) whether the SPS measures at issue are “based on” that risk assessment.⁹⁴ The relevant type of risk assessment that would be at issue here – for a measure applied to protect animal health – is the one specified under the first definition in paragraph 4 of Annex A of the SPS Agreement. This risk assessment is an “evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and economic consequences.”

89. Article 5.2 of the SPS Agreement provides that:

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

This provision thus provides certain factors that must be taken into account as part of the risk assessment.

90. Article 2.2 of the SPS Agreement provides that:

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

The basic obligations provided in Article 2.2 are specifically applied, in part, through the requirement to base a measure on a risk assessment per Article 5.1.⁹⁵ Therefore, panels and the Appellate Body have found that where a Member maintains a measure in breach of Article 5.1 – that is, where the measure is not based on a risk assessment as required under Article 5.1 and Annex A, paragraph 4 – the Member can be presumed as acting “inconsistently with its more general obligation in Article 2.2.”⁹⁶

⁹⁴ *EC – Biotech (Panel)*, para. 7.3019; *see also U.S. – Poultry (Panel)*, para. 7.173

⁹⁵ *EC – Hormones (AB)*, para. 180.

⁹⁶ *Australia – Salmon (Panel)*, para. 8.52 (finding that “in the event a sanitary measure is not based on a risk assessment as required in Articles 5.1 and 5.2, this measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence. We conclude, therefore, that if we find a violation of the more specific Article 5.1 or 5.2 such findings can be presumed to imply a violation of the more general provisions of Article 2.2.”).

91. The Appellate Body found that the panel in the original proceeding in this dispute failed to consider whether the presumption of inconsistency with Article 2.2 was rebutted by the evidence presented by India concerning poultry meat and eggs.⁹⁷ The Appellate Body’s finding was limited to only those two products. The breach of Article 2.2 was upheld with respect to the eight products that were subject to the original dispute.⁹⁸

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

92. India’s submission does not point to any specific risk assessment undertaken by India or relied upon India. Additionally the United States notes that it requested India to identify any risk assessment its measure was based upon as part of an enquiry on India’s notification. India did not provide a response.⁹⁹

93. Instead, India’s claim of compliance with respect to Articles 5.1 and 5.2 rests upon three arguments, each of which is premised on conformity with the OIE Terrestrial Code. First, India claims that the Revised Avian Influenza Measure “conform[s] to the relevant provisions of the Chapter 10.4 of the Terrestrial Code...”¹⁰⁰ Second, India claims incorporating the OIE Code means its measure is based on the latest “the latest scientific evidence.”¹⁰¹ Third, India claims it can rely on risk assessments undertaken by the OIE since its measure conforms to the OIE Terrestrial Code.¹⁰²

94. Each of these arguments fails for the same reason: the Revised Avian Influenza Measure is significantly different and more trade restrictive than the recommendation of the OIE Terrestrial Code – as explained above, India requires that an exporting Member’s territory (or zone or compartment) be free from avian influenza. India has failed to substantiate conformity including through the absence of any veterinary certificates that reflect product specific recommendations. Under these circumstances – an SPS measure that contradicts international

⁹⁷ *India – Agricultural Products (AB)*, para. 5.40.

⁹⁸ *India – Agricultural Products (AB)*, para. 5.40.

⁹⁹ Exhibit USA-2, p. 2 (“India has not indicated whether the proposed measure is based on a risk assessment. The United States requests that when publishing and notifying the final measure, India address whether the measure is based on a risk assessment, and if so, that India identify the risk assessment and indicate how interested parties may obtain a copy of the assessment.”).

¹⁰⁰ India’s First Written Submission, para. 97.

¹⁰¹ India’s First Written Submission, para. 101.

¹⁰² India’s First Written Submission, para. 102.

standards and is not based upon a risk assessment – India remains in breach of Articles 5.1 and 5.2 of the SPS Agreement.

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

95. India asserts that the “Appellate Body found that India’s AI measures to be inconsistent with Articles 5.1 and 5.2 of the SPS Agreement but not with Article 2.2 of the SPS Agreement.”¹⁰³ As explained above, that is inaccurate. There were only two products with which the Panel’s finding under Article 2.2 was reversed: poultry meat and eggs. The findings for the remaining products were not disturbed. Accordingly, since the Revised Avian Influenza Measure breaches Article 5.1 and 5.2 of the SPS Agreement, there is a presumption that India is also in breach of Article 2.2. Here, India has not even attempted to rebut that presumption. Accordingly, the Revised Avian Influenza Measure breaches Article 2.2 of the SPS Agreement as well.

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

96. The only argument India provides with respect to its claim of consistency under Articles 5.6 and 2.2 of the SPS Agreement is that the Revised Avian Influenza Measure “fully conforms to Chapter 10.4 of the OIE Terrestrial Code.”¹⁰⁴ As explained above, that argument is incorrect. Accordingly, the United States will briefly summarize the obligations in Article 5.6 and then address why India’s Revised Avian Influenza Measure continues to breach this obligation as well as the obligation in Article 2.2 of the SPS Agreement.

1. Article 5.6 of the SPS Agreement

97. Article 5.6 of the SPS Agreement provides as follows:

Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.

The footnote to Article 5.6 clarifies:

¹⁰³ India’s First Written Submission, para. 89.

¹⁰⁴ India’s First Written Submission, para. 116.

For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.

98. To establish a breach under this provision, three elements need to be established. First, there must be an alternative measure that “is reasonably available taking into account technical and economic feasibility.” Second, the measure must achieve “the Member’s appropriate level of sanitary or phytosanitary protection” (ALOP). Finally, the measure must be “significantly less restrictive to trade than the SPS measure contested.”¹⁰⁵ As demonstrated below, there is a measure that meets all of these elements: Chapter 10.4 of the OIE Terrestrial Code.¹⁰⁶

2. The OIE Terrestrial Code is a Technically and Economically Feasible Alternative to the Revised Avian Influenza Measure that Would Achieve India’s ALOP

99. Despite India’s claims of conformity, the Revised Avian Influenza Measure is a fundamental departure from Chapter 10.4 of the OIE Terrestrial Code. In particular, its operation contains restrictions that effectively preclude trade from being initiated or completed from territories reporting avian influenza. With respect to the initiation side, India requires that the exporting territory be free from avian influenza before DADF will issue a sanitary permit. On the completion side, India requires a veterinary certificate to allow importation. There are no veterinary certificates that permit trade from territories reporting avian influenza.¹⁰⁷ Accordingly, there is effectively a ban on importation from countries reporting outbreaks of avian influenza, including outbreaks of LPAI.

100. In comparison to the Revised Avian Influenza Measure, Chapter 10.4 of the OIE Terrestrial Code is a significantly less trade restrictive alternative that can achieve India’s ALOP and is technically and economically feasible. In the following chart, the United States references the relevant OIE Terrestrial Code recommendations.

¹⁰⁵ *Australia – Salmon (AB)*, para. 194; *see Australia – Salmon (Panel)*, para. 8.167; *see also Russia – Pigs (Panel)*, para. 7.807.

¹⁰⁶ The United States notes that the alternative measure that a complainant identifies is an analytical tool to determine whether there is breach of Article 5.6. A defending Member does not have to adopt the alternative measure in order to achieve compliance; it simply must ensure that that whatever measure it adopts satisfy the requirements of Article 5.6.

¹⁰⁷ *See* Sections IV.B.3 & V.A.2.

Revised Avian Influenza Measure	Alternative OIE Code Recommendation
domestic and wild birds (including poultry and captive birds); (Including ITC Classification 01051100, 01051200, 01051300, 01051900)	Articles 10.4.5 and 10.4.6
day old chicks, ducks, turkey, and other newly hatched avian species; (Including ITC Classification 01059400)	Articles 10.4.7 and 10.4.8
un-processed meat and meat products from Avian species, including domesticated, wild birds and poultry; (Including ITC Classification 0207)	Articles 10.4.19 and 10.4.20
hatching eggs; (Including ITC Classification 040711100, 04071910)	Articles 10.4.10, 10.4.11, and 10.4.12
eggs and egg products (except Specific Pathogen Free eggs); (Including ITC Classification 04072100, 04072900, 04079000)	Articles 10.4.13, 10.4.14, and 10.4.15
un-processed feathers;	Article 10.4.22 and Article 10.4.23
products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use; and	Articles 10.4.21

Revised Avian Influenza Measure	Alternative OIE Code Recommendation
semen of domestic and wild birds including poultry.	Articles 10.4.17 and 10.4.18

a. The OIE Terrestrial Code is Reasonably Available, Taking into Account Technical and Economic Feasibility.

101. The Panel has already found that the OIE Terrestrial Code is technically and economically feasible.¹⁰⁸ In particular, the United States notes that the Panel recognized that at least with respect to the measure that was at issue in the original dispute, India permitted attestation to satisfy its import requirements.¹⁰⁹

b. The OIE Terrestrial Code Would Achieve India’s ALOP

102. India’s submission does not indicate that India’s ALOP has changed from the time the Panel issued its findings. Accordingly, per the panel’s findings in the original dispute, measures based on the OIE Terrestrial Code would achieve India’s ALOP of very high or very conservative.¹¹⁰

c. The OIE Terrestrial Code Would Be Significantly Less Trade Restrictive

103. The OIE Terrestrial Code allows safe trade to occur from territories reporting avian influenza outbreaks. Through attestations on veterinary certificates, the commodities for which there are OIE Terrestrial Code recommendations can be safely traded even if the exporting territory is reporting outbreaks of avian influenza. By contrast, the Revised Avian Influenza Measure does not allow trade to occur in those scenarios. Because any measure that allows trade is less trade restrictive than an import prohibition, the OIE Terrestrial Code is less trade restrictive than the Revised Avian Influenza Measure. Accordingly, the United States has demonstrated that the Revised Avian Influenza Measure is more trade restrictive than required and accordingly breaches Article 5.6 of the SPS Agreement.

¹⁰⁸ *India – Agricultural Products (Panel)*, paras. 7.542-7.546.

¹⁰⁹ *India – Agricultural Products (Panel)*, paras. 7.541-7.542.

¹¹⁰ *India – Agricultural Products (Panel)*, paras. 7.570-7.571.

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

104. The Panel found in the original dispute:

that a finding that a measure is inconsistent with Article 5.6 may lead to a presumption that the same measure is inconsistent with the obligation in Article 2.2 to ensure that an SPS measure is applied only to the extent necessary to protect human, animal or plant life or health.¹¹¹

Here, that presumption of inconsistency is just as warranted as in the original dispute. The OIE Terrestrial Code is a reasonably available alternative measure to the Revised Avian Influenza Measure that achieves India's ALOP. Accordingly, India is not ensuring that its SPS measure is applied only to the extent necessary to protect animal health. India has not presented any reason to rebut this presumption. Thus, the Revised Avian Influenza Measure breaches Article 2.2 of the SPS Agreement.

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

105. The measure in the original proceeding was clear on its face that it applied import prohibitions to an entire country.¹¹² Nonetheless, India argued that it was consistent with its WTO obligations under Article 6 of the SPS Agreement because India had discretion under its legislative framework to recognize zones and compartments.¹¹³ The Panel rejected India's argument finding that "although the Livestock Act may empower India's authorities to recognize the concepts of these areas, it is neutral on the subject and there is no evidence that this has ever been done."¹¹⁴

106. The Revised Avian Influenza Measure no longer explicitly states that it applies import prohibitions to an entire country. The measure also contains references to zones and compartments. However, the fact that the Revised Avian Influenza Measure no longer openly disregards the concepts of regionalization does not render it WTO consistent. As demonstrated below, there is no evidence that India actually implements the obligations in Articles 6.1 and 6.2 of the SPS Agreement through the Revised Avian Influenza Measure – such as by actually allowing trade to occur on a regionalized basis. The Revised Avian Influenza Measure at most

¹¹¹ *India – Agricultural Products (Panel)*, para. 7.614.

¹¹² Exhibit IND-1.

¹¹³ *India – Agricultural Products (Panel)*, para. 7.639.

¹¹⁴ *India – Agricultural Products (Panel)*, para. 7.706.

reflects the discretion that India said it already had with respect to original measure – and that the panel found insufficient to constitute consistency with the SPS Agreement.

107. The United States below recounts the specific obligations in Articles 6.1 and 6.2 of the SPS Agreement. Thereafter, the United States demonstrates that India has not brought itself into consistency with either provision. However, the United States begins its analysis with Article 6.2 rather than Article 6.1. The reason for that order is that India’s submission appears to make arguments that are relevant, if at all, under Article 6.2.

108. With respect to Article 6.2 of the SPS Agreement, the United States will demonstrate that the provision requires a meaningful opportunity to have a regionalization proposal accepted – not simply maintain forms by which a Member can submit a proposal. Because India’s evidence does not establish the existence of a meaningful opportunity, India has yet to bring itself into compliance with Article 6.2 of the SPS Agreement.

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

1. Articles 6.1 and 6.2 of the SPS Agreement

110. Article 6.1 of the SPS Agreement 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.

The panel in the original dispute found that “the obligation to ensure that SPS measures are “adapted” in Article 6.1, first sentence, denotes that a Member must make certain of its measures’ suitability (in this case, suitable for the SPS characteristics of the area)...”¹¹⁵

111. Article 6.2 of the SPS Agreement provides:

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.

In *Russia – Pigs*, the Appellate Body found that:

Article 6.2 requires the importing Member to provide an *effective opportunity* for the exporting Member to make the claim, addressed to the importing Member, that areas within its territory are pest- or disease-free or of low pest or disease prevalence, by maintaining a practice of, or a process for, receiving such claims from an exporting Member affected by a specific SPS measure, and thus render operational the concept of regionalization. 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.¹¹⁶

A proper analysis of Article 6.2, thus reflects, that the provision obliges a Member to ensure that it provides other Members an “effective opportunity” to establish areas in its territory are disease free or have low disease prevalence. Whatever discretion a Member has with respect to the instruments used to provide the effective opportunity cannot extend to undermining the opportunity itself.

¹¹⁵ *India – Agricultural Products (Panel)*, para. 7.669.

¹¹⁶ *Russia – Pigs (AB)*, para. 5.135 (emphasis added).

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

112. As an initial matter, the United States notes that there is some difficulty ascertaining which arguments in India’s first written submission relate to Article 6.1, Article 6.2, or both.¹¹⁷ India does not demarcate which argument relates to which provision. This may be the case because India mistakenly conflates what Article 6.2 requires as being a requirement of Article 6.1 or that the obligations in the provisions are the same.¹¹⁸ The following sentence in India’s submission is indicative of the confusion:

In other words, India not only recognizes the concept of regionalization, but also renders it operational though its regulatory system, which provides exporting countries with the opportunity, and the mechanism, to make regionalization claims.¹¹⁹

Thus, in that sentence, India appears to distinguish between what constitutes recognizing the concept of regionalization as being separate from providing an opportunity to other WTO Members to make regionalization claims. But, as recognized by the Appellate Body, it is from the text of Article 6.2 itself that Members must afford an “effective opportunity.”¹²⁰ Recognizing the concept of regionalization requires showing that the opportunity exists. Here, the relevant evidence put forward by India does not indicate that an opportunity actually exists.

113. First, India points to paragraphs 1(b) and paragraph 1(d) of S.O. 2337(E) because they incorporate the definitions of “zones and compartments” and “pest- or disease-free areas and areas or low pest or disease prevalence.” To recall, the relevant text states the following:

1. Definitions- In this notification, unless the context otherwise regulates-

¹¹⁷ India’s First Written Submission, paras. 127-133.

¹¹⁸ As the panel found in the original proceedings, the obligations are not the same. *See India – Agricultural Products (Panel)*, para. 7.669 (“we make the preliminary observation that the use of different wording in these subparagraphs suggests that the paragraphs are intended to have distinctive effects. Whereas the obligation to ensure that SPS measures are “adapted” in Article 6.1, first sentence, denotes that a Member must make certain of its measures’ suitability (in this case, suitable for the SPS characteristics of the area), Article 6.2, first sentence, requires that a Member make a particular acknowledgement (in this case, of the concepts of “pest- or disease-free areas” and “areas of low pest or disease prevalence”).

¹¹⁹ India’s First Written Submission, para. 131.

¹²⁰ *Russia – Pigs (AB)*, para. 5.135.

...

(b) “country, zones and compartment” means the country, zones and compartments as defined in the Terrestrial Animal Health Code of World Organization for Animal Health.

...

(d) “pest- or disease-free areas and areas of low pest or disease prevalence” means the pest or disease free areas and areas of low pest or disease prevalence as defined in the World Trade Organization Agreement on Agreement on Sanitary and Phytosanitary Measures;¹²¹

Assuming *arguendo* that India did incorporate the definitions correctly – and there is no evidence that India has done so – such incorporation does not mean India recognizes the relevant concepts because the terms do not afford an opportunity. The Appellate Body considered this very question in *Russia – Pigs* and found the following:

With respect to the definition of the term "regionalization" contained in Customs Union Decision No. 317, we note that it reflects the fact that a pest or disease may be limited to a certain area. In particular, it refers to "republic, region, district, land, county, state, and province". The definition itself, however, provides no effective opportunity for the European Union to make the claim, addressed to Russia, that areas within the European Union are pest- or disease-free or of low pest or disease prevalence. Thus it does not render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.¹²²

Accordingly, India’s assertion that the Revised Avian Influenza Measure utilizes definitions found in the OIE Terrestrial Code is not sufficient to support India’s claim of consistency with Article 6.2 of the SPS Agreement.

114. Second, India points to paragraph 3 of S.O. 2337(E), as amended.¹²³ According to India, the following text operationalizes the concept of regionalization:

3. Recognition of Pest or Disease-Free Areas and Areas of Low Pest or Disease Prevalence-

¹²¹ Exhibit IND-3. Text in blue reflects amendment from Exhibit IND-5.

¹²² *Russia – Pigs (AB)*, para. 5.144.

¹²³ India’s First Written Submission, para. 128.

(i) The adaptation to the sanitary and phytosanitary characteristics of the area of the exporting country and the determination of pest or disease free areas and areas of low pest or disease prevalence shall be made in accordance with the requirements of the World Trade Organization Agreement on Sanitary and Phytosanitary Measures and the guidelines issued by the Central Government.

(ii) For recognition of pest or disease free areas and areas of low pest or disease prevalence, the appropriate authority of the exporting country shall make a written request along with necessary evidence to the Department of Animal Husbandry, Dairying and Fisheries, Ministry of Agriculture and Farmers Welfare in the Government of India.

Neither subparagraph indicates that another WTO Member has a meaningful opportunity to have its disease free areas recognized.

115. The first subparagraph is a circularity. India asserts that it will follow the SPS Agreement obligation in Article 6.1. India does not explain what that means or how it will be accomplished. All WTO Members, by virtue of being WTO Members, have an obligation to act consistently with their WTO obligations. A Member simply providing a declaration in its domestic legal framework that it will follow WTO obligations does not make it so.

116. The second subparagraph notes that an exporting country will provide a written request and necessary evidence for recognition. In other words, India is indicating a Member may make

a proposal to India.¹²⁴ India made that same claim in the original dispute.¹²⁵ India’s argument is not bolstered by its pointing to either the guidelines it has promulgated¹²⁶ or its questionnaire.¹²⁷

117. With respect to the guidelines, as noted *infra* in Section IV.B.2.b, the guidelines do not contain any guidance on when India will actually accept a proposal, or indication otherwise what India is seeking to assure itself regarding. Moreover, there is no historical practice provided by India to demonstrate that it actually will accept a proposal.¹²⁸ Accordingly, the Guidelines do not demonstrate that an opportunity actually exists. At most, they simply indicate that India has stated that at some unspecified time, it will provide a reply to the applicant. With this level of vagueness, the Guidelines cannot be construed as establishing an effective opportunity for other WTO Members seeking recognition of their disease free areas.

118. The questionnaire simply reflects that the proposal must come in a certain form and contain certain information. The existence of the questionnaire does not demonstrate that the proposal will be considered and acted upon in a fashion that demonstrates a genuine opportunity exists. In this respect, India’s assertion that other countries use questionnaires similar to the one

¹²⁴ The United States has requested regionalization. As noted above, on March 21, 2017, the U.S. Department of Agriculture requested that DADF recognize the U.S. avian influenza control system and allow the trade of poultry and poultry products from unaffected zones in the event of an HPAI occurrence and noted that it would provide a response. The United States’ request included a response to India’s questionnaire providing information on the U.S. Veterinary infrastructure, human resources, and avian influenza related laws, regulations, and programs. Exhibit IND-15. In particular, the U.S. submission described the U.S. approach to disease eradication activities, including establishing control zones, in the event of outbreaks of HPAI in the United States. By May 22, 2017 when the panel was established, India had only provided only an acknowledgement of the receipt of the U.S. request for regionalization, and an indication that a response to the U.S. request would be forthcoming in four to eight weeks. (Exhibit IND-16).

¹²⁵ *India – Agricultural Products (Panel)*, para. 7.639 (“Should a country make a proposal, “the same would be considered by the Central Government and if approved such zones or compartments would be recognized by the issuance of a notification under [S]ection 3 or 3A as the case may be”).

¹²⁶ Exhibit IND-7.

¹²⁷ Exhibit IND-8.

¹²⁸ *Russia – Pigs (AB)*, para. 5.128 (“Accordingly, specific instances of recognition or non-recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence may be relevant for assessing a Member’s compliance with Article 6.2. In this vein, we can also conceive of the situation where recognition of the relevant concepts is not contained in the regulatory framework, but manifests itself in a Member’s practice of giving an effective opportunity to an exporting Member to make the claim that areas within its territory are pest- or disease-free or of low pest or disease prevalence.”)

it has issued is of no moment.¹²⁹ India does not prove that it recognizes concepts of disease free areas by simply maintaining similar paperwork. Indeed, the Appellate Body's analysis in *Russia – Pigs* was clear that consistency with Article 6.2 could be done in different ways.¹³⁰ What India must show is the creation of an opportunity – and simply imposing information requirements does not do so.

119. Third, India invokes the conformity of its measures with the OIE Terrestrial Code as establishing its consistency with Article 6 of the SPS Agreement.¹³¹ As demonstrated above though in Section V.A., India's measure do not conform to the OIE Terrestrial Code and India cannot obtain the rebuttable presumption of consistency.

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

120. India's first written submission fails to explain how it has ensured the Revised Avian Influenza Measure is adapted per the requirements of Article 6.1 of the SPS Agreement. India's arguments with respect to Article 6.1 appears to consist of the following:

India strongly believes that the compliance Panel under Article 21.5 of the DSU cannot (as the original Panel did) make a consequential finding of non-compliance with Article 6.1 of the SPS Agreement. In any event, India effectively adapts its AI import measures to the sanitary characteristics of areas within the exporting Member's territory when all conditions are met, in a manner consistent with Article 6.1 of the SPS Agreement.¹³²

121. With respect to the first point, India, its strong feeling notwithstanding, is incorrect. As the Appellate Body found in this dispute:

¹²⁹ India's First Written Submission, para 130.

¹³⁰ *Russia – Pigs (AB)*, para. 5.127.

¹³¹ India's First Written Submission, para. 133.

¹³² India's First Written Submission, para. 132.

[E]ven in the absence of such objective demonstration by an exporting Member, a Member may still be found to have failed to ensure that an SPS measure is adapted to regional conditions within the meaning of Article 6.1." One such situation is, for instance, where "the concept of pest- and disease free areas is relevant, but a Member's regulatory regime precludes the recognition of such concept."¹³³

As demonstrated above, because there is no evidence that India provides an effective opportunity for recognition of disease free areas, the Panel would be entitled to find likewise that India's measures are not appropriately adapted per Article 6.1 of the SPS Agreement.

122. With respect to the second point made by India – its assertion that it effectively adapts measures when conditions are met – the United States recalls again that India has not specified what those conditions are. In any event, two pieces of evidence confirms that such adaptation is not feasible.

123. First, the United States notes India's earlier assertion in its submission that the DADF – if it has recognized regionalization – would grant a sanitary import for a zone free from avian influenza, even if another part of the exporting country were reporting avian influenza. Requiring freedom from avian influenza altogether is not consistent with having appropriately adapted a measure. For example, suppose a territory is reporting low pathogenic avian influenza, but not high pathogenic avian influenza. Even though the OIE Terrestrial Code recognizes that the export of commodities can safely take place in this scenario because the disease outbreak is LPAI, India per its submission would prohibit it.¹³⁴

124. The OIE Terrestrial Code recommendation for hatching eggs is instructive. Under the relevant OIE Terrestrial Code recommendations, hatching eggs can be safely traded if the territory is free from HPAI, even though it has LPAI. In the latter case, the surface of the eggs needs to be sanitized. Thus, under the OIE Terrestrial Code, India should not preclude importation of this product even if there is an LPAI outbreak.

¹³³ *India – Agricultural Products (Panel)*, para. 5.157.

¹³⁴ India's First Written Submission, para. 38 ("If there has been an outbreak of AI in the exporting country, the DADF will check whether it has recognised pest or disease-free areas in the exporting country. If it has so recognized such areas, India may accept imports of poultry and poultry products from unaffected zones or compartments in that country even though there is an outbreak of AI in other parts of the country.").

<p>Article 10.4.10 Recommendations for importation from a country, zone or compartment free from avian influenza</p> <p><u>For hatching eggs of poultry</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none">1) the eggs came from an avian influenza free country, zone or compartment;2) the eggs were derived from parent flocks which had been kept in an avian influenza free country, zone or compartment for at least 21 days prior to and at the time of the collection of the eggs;3) the eggs are transported in new or appropriately sanitized packaging materials. <p>If the parent flocks have been vaccinated against avian influenza, the nature of the vaccine used and the date of vaccination should be attached to the certificate.</p>	<p>Article 10.4.11. Recommendations for importation from a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry</p> <p><u>For hatching eggs of poultry</u></p> <p>Veterinary Authorities should require the presentation of an international veterinary certificate attesting that:</p> <ol style="list-style-type: none">1) the eggs came from a country, zone or compartment free from infection with high pathogenicity avian influenza viruses in poultry;2) the eggs were derived from parent flocks which had been kept in an avian influenza free establishment for at least 21 days prior to and at the time of the collection of the eggs;3) the eggs have had their surfaces sanitized (in accordance with Chapter 6.4.);4) the eggs are transported in new or appropriately sanitized packaging materials. <p>If the parent flocks have been vaccinated against avian influenza, the nature of the vaccine used and the date of vaccination should be attached to the certificate.</p>
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125. On this point, the United States notes that the second sentence of Article 6.1 is relevant: “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.” By simply looking to the avian influenza status of the territory – and nothing more – India is not considering the prevalence of specific diseases (LPAI or HPAI), control programmes, and the relevant recommendations from the OIE Terrestrial Code, as it is required to under Article 6.1.

126. The second piece of evidence is the lack of veterinary certificates. Absent such certificates, India acknowledges there is no trade.¹³⁵ India cannot claim that it allows trade from areas of disease freedom when trade is precluded altogether. Thus, the Revised Avian Influenza Measure remains inconsistent with Article 6.1 of the SPS Agreement as well.

¹³⁵ India’s First Written Submission, para. 38.

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

127. In the original proceeding, the panel found India breached Article 2.3 of the SPS on account of two forms of discrimination: (1) India restricts products from its trading partners outright if there is a detection of avian influenza while only imposing a 10km restriction when it has an outbreak of avian influenza and (2) India prohibits the importation of the affected products if LPAI is detected in its trading partners, even though India does not maintain surveillance sufficient to detect LPAI in India's domestic poultry.¹³⁶ Those forms of discrimination continue to exist under the Revised Avian Influenza measure. Therefore, India cannot claim the Revised Avian Influenza Measure is consistent with Article 2.3 of the SPS Agreement.

128. The United States briefly recounts the relevant legal analysis for a claim under Article 2.3. Thereafter, the United States addresses the factual circumstances concerning imported products under the Revised Avian Influenza Measure and domestic products under India's current controls. Finally, the United States proceeds to demonstrate why the Revised Avian Influenza Measure continues to result in the two forms of discrimination that the United States raised in the original proceeding.

1. Article 2.3 of the SPS Agreement

129. Article 2.3 of the SPS Agreement provides that:

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.

130. The first sentence of Article 2.3 prohibits measures that arbitrarily and unjustifiably discriminate between different Members, whether between two different exporting Members that ship the same product to the Member imposing the measure, or between the Member imposing the measure and another Member. A breach of the first sentence of Article 2.3 can be established if the following elements are established.

- (1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;

¹³⁶ *India – Agricultural Products (Panel)*, para. 7.392.

- (2) the discrimination is arbitrary or unjustifiable; and
- (3) identical or similar conditions prevail in the territory of the Members compared.¹³⁷

131. With respect to the discrimination element in Article 2.3, the United States notes that the panel in the original proceeding found that:

that discrimination may result not only (i) when Members in which the same conditions prevail (including between the territory of the Member imposing the measure, and that of other Members) are treated differently, but also (ii) where the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory programme for the conditions prevailing in the exporting country.¹³⁸

132. With respect to whether the discrimination is arbitrary or unjustifiable, the United States recalls the panel's finding from the original proceeding "that there must be a "rational connection" between the reasons given for the discriminatory application of the measure and the objective of the measure."¹³⁹

133. Finally, with respect to the third element, identical conditions, the United States notes that India does not suggest that the Panel's finding concerning its existence has changed.¹⁴⁰ Accordingly, the United States submits the Panel can presume that those conditions do continue to remain the same.

134. The second sentence of Article 2.3 prohibits application of measures that constitutes a disguised restriction on international trade whether or not the measures embody arbitrary or unjustifiable discrimination. The panel in the original proceeding found that a "disguised restriction on international trade" may similarly be read to encompass measures that constitute arbitrary or unjustifiable discrimination."¹⁴¹

¹³⁷ See *India – Agricultural Products (Panel)*, para. 7.389; *Australia – Salmon (21.5)*, para. 7.111.

¹³⁸ *India – Agricultural Products (Panel)*, para. 7.400.

¹³⁹ *India – Agricultural Products (Panel)*, para. 7.457.

¹⁴⁰ *India – Agricultural Products (Panel)*, para. 7.463.

¹⁴¹ *India – Agricultural Products (Panel)*, para. 7.476.

2. The Revised Avian Influenza Measure and NAP 2015

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

136. India focuses its claim of consistency with respect to its revised treatment of imported products through the Revised Avian Influenza Measure. As discussed above, the United States disagrees with how India characterizes the Revised Avian Influenza Measure. For example, in the section of its submission concerning the consistency of the Revised Avian Influenza Measure with Article 3.2, India asserts that “poultry and poultry products from territories with LPAI can now be imported into India, as long as they are free from HPAI.”¹⁴² India provides no support for that assertion. The United States has explained above that India has not provided any instrument such as a veterinary certificate that would allow for trade on such terms. Moreover, India’s acknowledged requirement that it grants SIPs only if the exporting territory is not reporting avian influenza undercuts such a claim. In other words, India is still not allowing trade from countries reporting LPAI. Thus, India has not changed its treatment of imported products.

137. India, despite the silence in its submission, has not changed its treatment of domestic products either. In the original proceeding, the panel considered an instrument called “National Action Plan 2012” (NAP 2012) to evaluate India’s treatment of domestic products.¹⁴³ In particular, the panel’s findings in the original proceeding examined how under NAP 2012, restrictions applied to limited geographic areas such infected zones and surveillance zones.¹⁴⁴

138. India continues to maintain controls identical to those in the original dispute through an instrument known as the National Action Plan 2015 (NAP 2015). To confirm the identity, the United States has prepared a chart below juxtaposing the text of NAP 2012 against NAP 2015. Although India may have changed some abbreviations,¹⁴⁵ the following chart shows that the relevant controls at issue are identical. In particular, the United States notes that India continues to have (1) requirements that relating to only reporting unusual sickness and mortality (which

¹⁴² India’s First Written Submission, para. 155.

¹⁴³ See e.g., *India – Agricultural Products (Panel)*, paras. 7.406-7.411, 7.414-7.417.

¹⁴⁴ *Id.*

¹⁴⁵ For example, HSADL, Bhopal became National Institute of High Security Animal Diseases (NIHSAD), Bhopal (Section I.3) and lab became laboratory (Section II.8).

could exclude LPAI detections) and (2) limited geographic controls in the event of an outbreak. Following the table, the United States proceeds to address the two forms of discrimination.

NAP 2012	NAP 2015.
Chapter: 1. General Preparedness against Avian influenza	
<p>I.3 Guidelines for Collection, Packing and Transportation of Samples</p> <p>The following guidelines are extremely important. States should adhere to these guidelines:</p> <p>(i) The States/ UTs must distinguish at their level between unusual sickness/ mortality and normal incidences of sickness and mortality in poultry. Only in case of unusual sickness/ mortality raising suspicion of AI, forward the samples immediately either to respective Regional Disease Diagnostic Laboratory or directly to HSADL, Bhopal through special messengers <u>under intimation to the Joint Secretary (Livestock Health)</u>, in the Department of ADF, Government of India.¹⁴⁶</p>	<p>I.3 Guidelines for Collection, Packing and Transportation of Samples</p> <p>The following guidelines are extremely important. States should adhere to these guidelines:</p> <p>(i) The States/ UTs must distinguish at their level between unusual sickness/ mortality and normal incidences of sickness and mortality in poultry. Only in case of unusual sickness/ mortality raising suspicion of AI, forward the samples immediately either to respective Regional Disease Diagnostic Laboratory or directly to National Institute of High Security Animal Diseases (NIHSAD), Bhopal through special messengers <u>under intimation to the Joint Secretary (Livestock Health)</u>, in the Department of Animal Husbandry, Dairying and Fisheries, Government of India.¹⁴⁷</p>
Chapter: II Steps to be undertaken in Case of Suspicion of Avian influenza Outbreak	
<p>II.6 Identification of “alert-zone”</p> <p>All villages and habitations within 10 km radius from the affected place are identified as “Alert-Zone”. The Panchayat/ Municipal Authorities, Civil, Veterinary and Health Officials in those areas should be alerted about</p>	<p>II.6 Identification of “alert-zone”</p> <p>All villages and habitations within 10 km radius from the affected place are identified as “Alert-Zone”. The Panchayat/ Municipal Authorities, Civil, Veterinary and Health Officials in those areas should be alerted about the possibility of</p>

¹⁴⁶ NAP 2012, Section I.3, p. 4 (Exhibit USA-16).

¹⁴⁷ NAP 2015, Section I.3, pp. 6-7 (Exhibit USA-14).

NAP 2012	NAP 2015.
the possibility of AI outbreak and requested to enforce the restrictions mentioned below. ¹⁴⁸	AI outbreak and requested to enforce the restrictions mentioned below. ¹⁴⁹
<p>Restrictions and Activities within an “Alert-Zone”</p> <p>Pending receipt of the test results, the entire suspected farm or site should be cordoned off and the following restrictions should be immediately brought into effect in the alert zone, by the district administration with the assistance of the Animal Husbandry Department etc:</p> <p>(i) No vehicles should be allowed to ply in and out of the affected farm/ site. Personal vehicles should be left outside the farm premises.</p> <p>(ii) No movement of poultry, eggs, dead carcasses, manure, used litter, farm machinery, equipment or any such material should be allowed to and from the alert zone</p> <p>(iii) The personnel working inside the farm should wear protective clothing all the time inside the farm, including face-masks and gloves, gumboots (or shoes with disposable covers) etc. While leaving the farm, leave the protective clothing etc at the farm and clean themselves thoroughly with suitable disinfectants.</p> <p>(iv) Movement of people to and from the suspected farm should be restricted to the barest minimum. No other animals and birds should be allowed in the farm.</p>	<p>Restrictions and Activities within an “Alert-Zone”</p> <p>Pending receipt of the test results, the entire suspected farm or site should be cordoned off and the following restrictions should be immediately brought into effect in the alert zone, by the district administration with the assistance of the Animal Husbandry Department etc:</p> <p>(i) No vehicles should be allowed to ply in and out of the affected farm/ site. Personal vehicles should be left outside the farm premises.</p> <p>(ii) No movement of poultry, eggs, dead carcasses, manure, used litter, farm machinery, equipment or any such material should be allowed to and from the alert zone</p> <p>(iii) The personnel working inside the farm should wear protective clothing all the time inside the farm, including face-masks and gloves, gumboots (or shoes with disposable covers) etc. While leaving the farm, leave the protective clothing etc at the farm and clean themselves thoroughly with suitable disinfectants.</p> <p>(iv) Movement of people to and from the suspected farm should be restricted to the barest minimum. No other animals and birds should be allowed in the farm.</p>

¹⁴⁸ National Action Plan 2012, Section II.6, p. 9 (Exhibit USA-16)

¹⁴⁹ National Action Plan 2015, Section II.6, p. 11 (Exhibit USA-14).

NAP 2012	NAP 2015.
<p>(v) Inter-sectional movements of farm personnel should be banned. They should not visit any other poultry farm, bird-sanctuary or zoo etc.</p> <p>(vi) Disinfection procedures (e.g. by using 2% NaOH/ KMnO₄) should be strictly applied at the entrance of the premises.</p> <p>(vii) All records of birds present at the farm are to be maintained properly.</p> <p>(viii) Before the test results are received, the possibility of closing the markets and shops in the area may be explored by the District Collector/sub-divisional officer/revenue authorities in consultation with the State Animal Husbandry Department, particularly if more farms become suspect during this period.</p> <p>(ix) Practices of scavenging of poultry in the open backyard should be prevented and marketing of birds/chicks/eggs through basket-wala should be banned.</p> <p>(x) Police force should be deployed for assistance to enforce above measures, if necessary.</p> <p>(xi) Continued Surveillance and collection of Information Pending Receipt of Results: The DAHO should arrange to record mortality or sickness of birds at the suspected site and in the alert-zone. Also he/she should collect information about the total poultry population (with details of age, breed) with individual poultry farmers, both backyard and commercial within a radius of 1 KM and between 1-10 KM from the suspected site. For this purpose, a scale-map has to be drawn indicating all the villages in 0-1 and 1-10 km radius.</p>	<p>(v) Inter-sectional movements of farm personnel should be banned. They should not visit any other poultry farm, bird-sanctuary or zoo etc.</p> <p>(vi) Disinfection procedures (e.g. by using 2% NaOH/ KMnO₄) should be strictly applied at the entrance of the premises.</p> <p>(vii) All records of birds present at the farm are to be maintained properly.</p> <p>(viii) Before the test results are received, the possibility of closing the markets and shops in the area may be explored by the District Collector/sub-divisional officer/revenue authorities in consultation with the State Animal Husbandry Department, particularly if more farms become suspect during this period.</p> <p>(ix) Practices of scavenging of poultry in the open backyard should be prevented and marketing of birds/chicks/eggs through basket-wala should be banned.</p> <p>(x) Police force should be deployed for assistance to enforce above measures, if necessary.</p> <p>(xi) Continued Surveillance and collection of Information Pending Receipt of Results: The DAHO should arrange to record mortality or sickness of birds at the suspected site and in the alert-zone. Also he/she should collect information about the total poultry population (with details of age, breed) with individual poultry farmers, both backyard and commercial within a radius of 0-1 KM (for the purpose of culling) and between 1-10 KM (for the purpose of carrying out movement restrictions and surveillance) from the suspected site. For this purpose, a scale-map</p>

NAP 2012	NAP 2015.
<p>(xii) Action by Forest Department in bird sanctuaries etc.: In case the suspected site happens to be a bird sanctuary, the actions indicated from (i) to (xi) above paragraphs are to be undertaken by the Forest Department with assistance of the Animal Husbandry Department, wherever required. The Department of A.H and of the forests should assign at least one officer each as the Designated officer to co-ordinate necessary procedures.¹⁵⁰</p>	<p>has to be drawn indicating all the villages in 0-1 and 1-10 km radius.</p> <p>(xii) Action by Forest Department in bird sanctuaries etc.: In case the suspected site happens to be a bird sanctuary, the actions indicated from (i) to (xi) above paragraphs are to be undertaken by the Forest Department with assistance of the Animal Husbandry Department, wherever required. The Department of A.H and of the Forests should assign at least one officer each as the Designated officer to co-ordinate necessary procedures.¹⁵¹</p>
<p>II.8 Action to be taken in case laboratory diagnosis is Negative for NAI</p> <p>Lift the restrictions mentioned above. However, if the above average mortality or disease situation continues, the restriction should continue till the mortality subsides. The lab must test for the associated/suspected disorders like Newcastle diseases, Marek’s disease, Infectious bursal disease etc.¹⁵²</p>	<p>II.8 Action to be taken in case laboratory diagnosis is Negative for AI</p> <p>Lift the restrictions mentioned above. However, if the above average mortality or disease situation continues, the restriction should continue till the mortality subsides. The laboratory must test for the associated/suspected diseases like Newcastle disease, Marek’s disease, Infectious bursal disease etc. as differential diagnosis.¹⁵³</p>
<p>Chapter III: Action Plan to deal with Confirmed Outbreak of NAI</p>	
<p>III.5 Absolute Ban on Movement of Poultry</p> <p>Movement of live birds from and to the infected area should be completely banned by the State Government. Restocking of poultry in that area will commence not before one month after the Sanitization Certificate is issued as</p>	<p>III.5 Absolute Ban on Movement of Poultry</p> <p>Movement of live birds from and to the infected area should be completely banned by the State Government. Restocking of poultry in that area will commence not before three month after the Sanitization Certificate is issued as per Para</p>

¹⁵⁰ NAP 2012, Section II.7, pp. 9-10 (Exhibit USA-16).

¹⁵¹ NAP 2015, Section II.7, pp. 12-13 (Exhibit USA-14).

¹⁵² NAP 2012, Section II.8, p. 10 (Exhibit USA-16).

¹⁵³ NAP 2015, Section II.8, p. 13 (Exhibit USA-14).

NAP 2012	NAP 2015.
<p>per Para III.11 subsequent to the approval of the DADF, Government of India. Police, Local bodies, media and representatives of the farm organizations should be involved with this work. Various types of physical restrictions like Nakabandi, drop-gates on all outgoing roads of the infected area may be imposed by engaging police personnel.¹⁵⁴</p>	<p>III.11 subsequent to the approval of the DADF, Government of India. Police, Local bodies, media and representatives of the farm organizations should be involved with this work. Various types of physical restrictions like Nakabandi, drop-gates on all outgoing roads of the infected area may be imposed by engaging police personnel.¹⁵⁷</p>
<p>III.6 Closure of Poultry and Egg Markets/ Shops The States or District administration should immediately announce the closure of all shops and markets dealing with poultry products and eggs within the radius of 10Kms from the infected site. Take the assistance of revenue, municipal and Panchayat authorities. These shall remain closed till completion of culling and sanitization operations. Thereafter, inward trade of eggs and processed poultry / products shall be allowed within the surveillance zone without any outward movement of poultry .¹⁵⁵</p>	<p>III.6 Closure of Poultry and Egg Markets/ Shops The States or District administration should immediately announce the closure of all shops and markets dealing with poultry products and eggs within the radius of 10Kms from the infected site. Take the assistance of revenue, municipal and Panchayat authorities. These shall remain closed till completion of culling and sanitization operations. Thereafter, inward trade of eggs and processed poultry / products shall be allowed within the surveillance zone without any outward movement of poultry.¹⁵⁸</p>
<p>III.8.5 Sealing of the Disinfected Premises and Issue of Sanitization Certificate After the culling and disinfection have been completed, the premises are to be sealed and a sanitization certificate issued by the State Animal Health authorities stating that culling has been carried out and the area has been cleaned and disinfected as per Action Plan and operations have been concluded. Thereafter, Post-operation surveillance will be carried out for three months. The areas where the birds were culled will be repeatedly disinfected by</p>	<p>III.11.5 Sealing of the Disinfected Premises and Issue of Sanitization Certificate After the culling and disinfection have been completed, the premises are to be sealed and a sanitization certificate issued by the State Animal Health authorities stating that culling has been carried out and the area has been cleaned and disinfected as per Action Plan and operations have been concluded. Thereafter, Post-operation surveillance will be carried out for three months. The areas where the birds were culled will be repeatedly disinfected by</p>

¹⁵⁴ NAP 2012, Section III.5, p. 14 (Exhibit USA-14).

¹⁵⁵ NAP 2012, Section III.6, p. 15 (Exhibit USA-16).

¹⁵⁷ NAP 2015, Section III.5, p. 17 (Exhibit USA-14).

¹⁵⁸ NAP 2015 Section III.6, p. 17 (Exhibit USA-14).

NAP 2012	NAP 2015.
fumigation (Indoors) or sprays (open place) at every 15 days during 3 months of surveillance. ¹⁵⁶	fumigation (Indoors) or sprays (open place) at every 15 days during the 3 months of surveillance. ¹⁵⁹
Chapter IV: Post Operation Surveillance and Freedom from Disease	
IV.2 Freedom from Disease In case no other outbreak takes place in the area or no samples collected from the post operations surveillance test positive for the next 3 months after issue of Sanitization Certificate “Disease Free Status can be declared under intimation to the OIE. ¹⁶⁰	IV.2 Freedom from Disease In case no other outbreak takes place in the area or no samples collected from the post operations surveillance test positive for the next 3 months after issue of Sanitization Certificate “Disease Free” Status can be declared under intimation to the OIE. ¹⁶¹

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

a. First Form of Discrimination: Disparate Treatment of Domestic and Imported Products

139. India continues to breach its obligations under Article 2.3 of the SPS Agreement because it arbitrarily discriminates against imported products by requiring they originate wholly outside areas reporting avian influenza, while domestic products are free to move outside a very limited geographic limit. In particular, domestic products are only subject to controls within a 10 kilometer radius of an outbreak. Trade outside that radius is completely unaffected.

140. In considering this distinction, the United States recalls two findings made by the panel in the original dispute that bore upon its decision in finding the distinction to amount to unjustifiable discrimination:

¹⁵⁶ NAP 2012, Section III.8.5, p. 19. (The United States notes there is a numbering error in the NAP 2012 with the headings. After section III.8 (restriction of movement of persons & vehicles), the numbering drops down to III.6 (Depopulation of Birds in the Infected Zone), which explains why the numbering of the headings in Chapter III between the NAP 2012 and NAP 2015 do not perfectly line up. (Exhibit USA-16).

¹⁵⁹ NAP 2015, Section III.11.5, p. 22 (Exhibit USA-14).

¹⁶⁰ NAP 2012, Section IV.2, p. 21 (Exhibit USA-16).

¹⁶¹ NAP 2015, Section IV.2, p. 25 (Exhibit USA-14).

Specifically, India's AI measures do not account for the possibility that an exporting country (be it the United States or otherwise) that notifies NAI may be able to demonstrate that its exports of poultry products do not pose an NAI-related risk.¹⁶²

India's AI measures do not pay any regard to the possibility that an exporting country maintains measures that will contain and/or control the spread of NAI within its territory. In this way, India's measures do not take account of the fact that different conditions may prevail in an exporting country that affect the likelihood that NAI will infect consignments of exported poultry.¹⁶³

The Revised Avian Influenza Measure, like the original measure, raises these exact same concerns. By simply examining the avian influenza status of the exporting territory rather than the products at issue and measure to mitigate risk – and allowing trade in domestic products to be controlled in only a limited fashion – India has engaged in unjustified discrimination even though identical conditions prevail. Accordingly, continuing this form of discrimination breaches Article 2.3.

b. Second Form of Discrimination: Lack of Domestic Surveillance for LPAI

141. India also breaches Article 2.3 of the SPS Agreement because it imposes controls with respect to LPAI, but does not even have a surveillance program capable of detecting LPAI at home, resulting in arbitrary discrimination. India still does not engage in surveillance for LPAI. India does not contend otherwise and the NAP 2015 confirms that is indeed the case. In particular, the United States notes that NAP 2015 only requires reporting unusual sickness or mortality.

The following guidelines are extremely important. States should adhere to these guidelines:

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

¹⁶² *India – Agricultural Products (Panel)*, para. 7.433.

¹⁶³ *India – Agricultural Products (Panel)*, para. 7.434.

(Livestock Health), in the Department of Animal Husbandry, Dairying and Fisheries, Government of India.¹⁶⁴

As the Panel’s findings have noted, because LPAI can have mild symptoms, infections may pass unnoticed.¹⁶⁵ India thus continues a surveillance system that is not designed to detect and control for LPAI.

142. Accordingly, even applying the limited controls of the OIE Terrestrial Code with respect to products originating from territories with LPAI outbreaks would constitute a form of unjustifiable discrimination since India is seeking to control for a disease only with respect to imports. Here though, India is applying broad restrictions from countries reporting LPAI. Thus, India has not brought itself into compliance with respect to the findings made under Article 2.3 of the SPS Agreement.

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

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

1. it arbitrarily discriminates;
2. it contradicts the OIE Terrestrial Code; and
3. it lacks a risk assessment.¹⁶⁶

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

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

144. India has made no claim that it has brought itself into compliance with respect to the findings adopted under Article 7 and Annex B of the SPS Agreement. This would be sufficient for the Panel to conclude that India has not demonstrated that its measure taken to comply in fact

¹⁶⁴ NAP 2015, Section I.3, pp. 6-7.

¹⁶⁵ *India – Agricultural Products (Panel)*, para. 2.12.

¹⁶⁶ *India – Agricultural Products (Panel)*, para. 7.478.

achieves compliance with WTO rules. Despite that India has not even addressed how it has brought itself into compliance with respect to the findings adopted with respect to Article 7 and Annex B of the SPS Agreement, , the United States, in the interests of completeness, demonstrates that the Revised Avian Influenza Measure is inconsistent with India’s obligations under these provisions.

145. Article 7 of the SPS Agreement provides that “Members shall notify changes in their sanitary or phytosanitary measures and shall provide information on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.”

146. Paragraph 5 of Annex B applies where:

- (a) a relevant international standard does not exist or the content of the proposed measure is not substantially the same as the content of an international standard, guideline or recommendation, and
- (b) if the regulation may have a significant effect on trade of other Members.

The content of the Revised Avian Influenza Measure is not the same as international standard, guideline, or recommendation. Moreover, it has a significant impact on trade since it effectively continues effectively to foreclose trade in the affected products. Accordingly, the requirements in the subparagraphs of Paragraph 5 are applicable.

147. The relevant requirements at issue here are subparagraphs (b) and (d):

- (b) notify other Members, through the Secretariat, of the products to be covered by the regulation together with a brief indication of the objective and rationale of the proposed regulation. Such notifications shall take place at an early stage, when amendments can still be introduced and comments taken into account;
- (d) without discrimination, allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account.

With respect to subparagraph 5(b), the notification made by India for its proposed measure¹⁶⁷ simply provided that the products covered were “animal products” This description is on its face too vague to permit interested Members to know what products will be affected. The United States notes that the relevant notification form in fact asks for detail at the level of the tariff line, which India omitted.

¹⁶⁷ G/SPS/N/IND/143 (Exhibit USA-1).

148. With respect to subparagraph (d), India did not allow a reasonable amount of time for Members to provide comments. With respect to the original notification, the United States notes that India provided a comment period of 60 days, but also declared that the adoption date would be the same as the close of the comment period. This indicates that India did not intend to take the comments submitted towards the end of the comment period into account. The United States notes that the other notifications that India made¹⁶⁸ also did not provide for any comment periods whatsoever. In light of this, India breached Annex B, paragraph 5(b) and (d), and accordingly Article 7 of the SPS Agreement.

149. Moreover, the United States notes that India did not allow a reasonable amount of time before the entry into force of the Revised Avian Influenza Measure from its adoption per paragraph 2 in Annex B. India's notification forms do not identify any urgent circumstances that excuse a reasonable interval. Nor can the Revised Avian Influenza Measure be viewed as a form of trade liberalization since it continues to restrict trade. Accordingly, the United States believes that India has breached Annex B, paragraph 2 as well.

VI. CONCLUSION

150. For the above reasons, the United States respectfully requests that the Panel find that India has failed to establish that the Revised Avian Influenza Measure brings it into consistency with its obligations under the WTO SPS Agreement.

¹⁶⁸ G/SPS/N/IND/150 (Exhibit USA-4) and Notification, G/SPS/N/IND/160 (Exhibit USA-6).