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**INDIA – MEASURES CONCERNING THE IMPORTATION OF CERTAIN  
AGRICULTURAL PRODUCTS**

AB-2015-2

*Report of the Appellate Body*

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### ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AI	avian influenza
ALOP	appropriate level of protection
DAHD	India's Department of Animal Husbandry, Dairying and Fisheries
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
H	haemagglutinin
HPAI	highly pathogenic avian influenza
HPNAI	highly pathogenic notifiable avian influenza
Livestock Act	The Live-Stock Importation Act, 1898 (No. 9 of 1898), published on 12 August 1898 (Panel Exhibit US-114), as amended by The Live-Stock Importation (Amendment) Act, 2001 (No. 28 of 2001) (19 July 2001), published in <i>The Gazette of India</i> on 29 August 2001, No. 35, Part II, Section 1, pp. 1-2 (Panel Exhibit US-115)
LPAI	low pathogenicity avian influenza
LPNAI	low pathogenicity notifiable avian influenza
N	neuraminidase
NAI	notifiable avian influenza
NAP 2012	India's National Action Plan for 2012
OIE	World Organisation for Animal Health (formerly, Office International des Epizooties)
OIE Code	OIE Terrestrial Animal Health Code, 21st edition (May 2012)
Panel Report	Panel Report, <i>India – Measures Concerning the Importation of Certain Agricultural Products</i> , WT/DS430/R and Add.1, circulated to WTO Members 14 October 2014
Preliminary Ruling	Preliminary ruling by the Panel of 22 May 2013, circulated as document WT/DS430/5
SIP	sanitary import permit
S.O. 1663(E)	Statutory Order 1663(E), issued by India's Department of Animal Husbandry, Dairying and Fisheries (DAHD) on 19 July 2011 pursuant to the Livestock Act and published in <i>The Gazette of India</i> on 20 July 2011, No. 1390, Part II, Section 3(ii), pp. 1-2 (Panel Exhibit US-80)
SPS	sanitary and phytosanitary
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
Summary Document	"India's Risk Assessment on Avian Influenza for imposing ban on import of poultry and poultry products from Avian Influenza positive countries", document provided to the SPS Committee by India at the October 2010 SPS Committee meeting (Panel Exhibit US-110)
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

**PANEL EXHIBITS CITED IN THIS REPORT**

Exhibit No.	Description
IND-7	Report by FAO and OIE, in collaboration with WHO, "A Global Strategy for the Progressive Control of Highly Pathogenic Avian Influenza (HPAI)" (November 2005)
IND-8	Report by FAO Animal Production and Health Division, "Poultry Sector Country Review – India" (September 2008)
IND-9	Government of India, Ministry of Agriculture, Department of Animal Husbandry, Dairying & Fisheries, <i>Annual Report 2012-13</i>
IND-10	C. Tosh et al., "Emergence of amantadine-resistant avian influenza H5N1 virus in India" (2011) 42 <i>Virus Genes</i> , pp. 10–15
IND-11	C. Tosh et al., "Phylogenetic evidence of multiple introduction of H5N1 virus in Malda district of West Bengal, India in 2008" (2011) 148 <i>Veterinary Microbiology</i> , pp. 132–139
IND-12	S. Nagarajan et al., "Avian influenza (H5N1) virus of clade 2.3.2 in domestic poultry in India" (2012), 7(2):e31844 <i>PLoS ONE</i> ( <a href="http://www.plosone.org">www.plosone.org</a> )
IND-13	OIE, "Devising Import Health Measures for Animal Commodities" (paper, undated)
IND-14	USDA Foreign Agricultural Service, Global Agriculture Information Network (GAIN) Report, "People's Republic of China, Poultry and Products Annual Report 2006", No. CH6075 (5 September 2006)
IND-15	Indian Veterinary Research Institute, <i>Annual Report for 2011-12</i>
IND-47	Letter from R. Gangadharan dated 24 February 2012 to the Chief Secretaries of various State Governments and Union Territories
IND-68	J. Post et al., "Systemic distribution of different low pathogenic avian influenza (LPAI) viruses in chicken" (2013) 10(23) <i>Virology Journal</i>
IND-108	Biosecurity Australia, <i>Generic Import Risk Analysis Report for Chicken Meat</i> , Final Report (October 2008), Parts A-C
IND-109	T. van den Berg, "The role of the legal and illegal trade of live birds and avian products in the spread of avian influenza" (2009) 28(1) <i>Scientific and Technical Review of the Office International des Epizooties</i> , pp. 93-111
IND-110	A.F. Ziegler et al., "Characteristics of H7N2 (nonpathogenic) avian influenza virus infections in commercial layers, in Pennsylvania, 1997-98" (1999) 43(1) <i>Avian Diseases</i> , pp. 142-149
IND-111	S.P. Cobb, "The spread of pathogens through trade in poultry meat: overview and recent developments" (2011) 30(1) <i>Scientific and Technical Review of the Office International des Epizooties</i> , pp. 149-164
IND-115	Government of India, Ministry of Agriculture, Department of Animal Husbandry, Dairying & Fisheries, Report on Notifiable Avian Influenza (H5 and H7) ending 12.05.13 – Surveillance/Testing by HSADL, Bhopal" (20 May 2013)
IND-117	Letter dated 27 August 2012 from R.S. Rana (Joint Secretary to the Government of India, DAHD) to the Principal Secretary/Secretary of Veterinary Services/Animal Resources Development of all the States and Union Territories regarding: "Preparedness of the states to prevent ingress of Avian Influenza"

Exhibit No.	Description
IND-121 [[containing information designated strictly confidential before the Panel]]	Letter dated 28 January 2010 from Assistant Commissioner, DAHD, to US Minister-Counsellor for Agricultural Affairs regarding: "India's comments on US proposed certificates for export of poultry, pork, pet food and feather to India"
US-1	World Organisation for Animal Health, <i>Terrestrial Animal Health Code</i> , 21st edn (May 2012), Vol. II, chapter 10.4 – Infection with Viruses of Notifiable Avian Influenza
US-18	D.E. Swayne and M. Pantin-Jackwood, "Pathobiology of Avian Influenza Virus Infections in Birds and Mammals", in D.E. Swayne (ed.), <i>Avian Influenza</i> (Blackwell Publishing, 2008)
S-19	D.E. Swayne and D.L. Suarez, "Highly pathogenic avian influenza" (2000) 19(2) <i>Scientific and Technical Review of the Office International des Epizooties</i> , pp. 463-482
US-20	Canada Food Inspection Agency, "Fact Sheet – Avian Influenza" (modified 22 December 2012), available at: < <a href="http://www.inspection.gc.ca/animals/terrestrial-animals/diseases/reportable/ai/fact-sheet/eng/1356193731667/1356193918453">www.inspection.gc.ca/animals/terrestrial-animals/diseases/reportable/ai/fact-sheet/eng/1356193731667/1356193918453</a> >
US-23	OIE, General Disease Information Sheets, "What is Avian Influenza (AI)?"
US-24	D.E. Swayne, "Avian Influenza Control Strategies", in D.E. Swayne (ed.), <i>Avian Influenza</i> (Blackwell Publishing, 2008), chapter 12
US-31	D.E. Swayne and C. Thomas, "Trade and Food Safety Aspects for Avian Influenza Viruses", in D.E. Swayne (ed.), <i>Avian Influenza</i> (Blackwell Publishing, 2008), chapter 22
US-48	D.E. Swayne and B.L. Akey, "Avian influenza control strategies in the United States of America", in R.S. Schrijver and G. Koch (eds.), <i>Avian Influenza – Prevention and Control</i> (Springer, 2005), chapter 13
US-80	Statutory Order 1663(E) (19 July 2011) issued by Government of India, Ministry of Agriculture, Department of Animal Husbandry, Dairying & Fisheries, pursuant to the Livestock Act and published in <i>The Gazette of India</i> on 20 July 2011, No. 1390, Part II, Section 3(ii), pp. 1-2
US-89	Government of India, Ministry of Agriculture, Department of Animal Husbandry, Dairying & Fisheries, "Action Plan of Animal Husbandry for Preparedness, Control and Containment of Avian Influenza" (November 2006)
US-90	Government of India, Ministry of Agriculture, Department of Animal Husbandry, Dairying & Fisheries, "Action Plan of Animal Husbandry for Preparedness, Control and Containment of Avian Influenza" (Revised – 2012)
US-92	Expert statement of Emi Kate Saito, attached to United States' first written submission to the Panel
US-97	Expert statement of David E. Swayne, attached to United States' first written submission to the Panel
US-98	A. Das et al., "Detection of H5N1 high-pathogenicity avian influenza virus in meat and tracheal samples from experimentally infected chickens" (2008) 52 <i>Avian Diseases</i> , pp. 40-48
US-99	Y. Kobayashi et al., "Pathological studies of chickens experimentally infected with two highly pathogenic avian influenza viruses" (1996) 25 <i>Avian Pathology</i> , pp. 285-304

Exhibit No.	Description
US-100	Y.K. Kwon and D.E. Swayne, "Different routes of inoculation impact infectivity and pathogenesis of H5N1 high pathogenicity avian influenza virus infection in chickens and domestic ducks" (2010) 54 <i>Avian Diseases</i> , pp. 1260-1269
US-101	L.E.L. Perkins and D.E. Swayne, "Pathobiology of A/Chicken/Hong Kong/220/97 (H5N1) avian influenza virus in seven Gallinaceous species" (2001) 38 <i>Veterinary Pathology</i> , pp. 149-164
US-102	E. Spackman et al., "The pathogenesis of low pathogenicity H7 avian influenza viruses in chickens, ducks and turkeys" (2010) 7 <i>Virology Journal</i> , p. 331
US-103	D.E. Swayne and J.R. Beck, "Heat inactivation of avian influenza and Newcastle disease viruses in egg products" (2004) 33(5) <i>Avian Pathology</i> , pp. 512-518
US-104	D.E. Swayne and J.R. Beck, "Experimental study to determine if low-pathogenicity and high-pathogenicity avian influenza viruses can be present in chicken breast and thigh meat following intranasal virus inoculation" (2005) 49 <i>Avian Diseases</i> , pp. 81-85
US-105	D.E. Swayne et al., "Reduction of high pathogenicity avian influenza virus in eggs from chickens once or twice vaccinated with an oil-emulsified inactivated H5 avian influenza vaccine" (2012) 30 <i>Vaccine</i> , pp. 4964-4970
US-106	Expert statement of Rebecca D. Jones, attached to United States' first written submission to the Panel
US-110	"India's Risk Assessment on Avian Influenza for imposing ban on import of poultry and poultry products from Avian Influenza positive countries", document provided to the SPS Committee by India at the October 2010 SPS Committee meeting
US-114	The Live-Stock Importation Act, 1898 (No. 9 of 1898), published on 12 August 1898
US-115	The Live-Stock Importation (Amendment) Act, 2001 (No. 28 of 2001) (19 July 2001) published in <i>The Gazette of India</i> on 29 August 2001, No. 35, Part II, Section 1, pp. 1-2
US-117	User's Guide to the OIE Terrestrial Animal Health Code (2012)
US-119	Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, Summary of the Meeting of 18-19 October 2007, document G/SPS/R/46
US-122	S.D. Pawar et al., "Avian influenza surveillance reveals presence of low pathogenic avian influenza viruses in poultry during 2009-2011 in the West Bengal State, India" (2012) 9 <i>Virology Journal</i> , p. 151
US-123	OIE, <i>Report of the Meeting of the OIE Terrestrial Animal Health Standards Commission</i> (February 2010)
US-141	Letter dated 20 October 2009 from M. Gilkey (Director, APHIS) to A. Kaushal (Joint Secretary, DAHD), regarding: "S.O. 2208(E) Notification published in the Gazette of India on August 28, 2009"
US-143	Expert statement of David E. Swayne, attached to United States' second written submission to the Panel
US-144	Expert statement of Emi Kate Saito, attached to United States' second written submission to the Panel
US-145	Expert statement of Rebecca D. Jones, attached to United States' second written submission to the Panel

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<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Australia – Apples</i>	Panel Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R, DSR 2010:VI, p. 2371
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Australia – Salmon</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, DSR 1998:VIII, p. 3407
<i>Australia – Salmon (Article 21.5 – Canada)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, p. 2031
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
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<i>EC – Bananas III (Mexico)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico</i> , WT/DS27/R/MEX, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 803



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<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Chicken Cuts</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, DSR 2005:XIX, p. 9157
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<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones</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, DSR 1998:I, p. 135
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<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
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<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>India – Quantitative Restrictions</i>	Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, p. 1763
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
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<i>Japan – Apples (Article 21.5 – US)</i>	Panel Report, <i>Japan – Measures Affecting the Importation of Apples – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS245/RW, adopted 20 July 2005, DSR 2005:XVI, p. 7911
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
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<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
<i>US – Continued Suspension</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, DSR 2008:X, p. 3507
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, p. 815
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**India – Measures Concerning the  
Importation of Certain Agricultural  
Products**

India, *Appellant*  
United States, *Appellee*

Argentina, *Third Participant*  
Australia, *Third Participant*  
Brazil, *Third Participant*  
China, *Third Participant*  
Colombia, *Third Participant*  
Ecuador, *Third Participant*  
European Union, *Third Participant*  
Guatemala, *Third Participant*  
Japan, *Third Participant*  
Viet Nam, *Third Participant*

AB-2015-2

Appellate Body Division:

Zhang, Presiding Member  
Chang, Member  
Servansing, Member

## 1 INTRODUCTION

1.1. India appeals certain issues of law and legal interpretations developed in the Panel Report, *India – Measures Concerning the Importation of Certain Agricultural Products*<sup>1</sup> (Panel Report). The Panel was established to consider a complaint by the United States<sup>2</sup> with respect to measures taken by India concerning the importation of certain agricultural products.

1.2. This dispute concerns measures consisting of prohibitions that India imposes on the importation of various agricultural products, primarily poultry products, because of concerns related to avian influenza (AI).<sup>3</sup> India maintains its AI measures through two legal instruments – The Live-Stock Importation Act, as amended<sup>4</sup> (Livestock Act), and Statutory Order 1663(E)<sup>5</sup> (S.O. 1663(E)).<sup>6</sup>

1.3. AI, also commonly known as "avian flu" or "bird flu", is "an infectious viral disease of birds (especially wild water fowl such as ducks and geese), often causing no apparent signs of illness".<sup>7</sup> AI can sometimes spread to domestic poultry and cause large-scale outbreaks of serious disease, and some AI viruses have also been reported to cause disease or subclinical infections in humans and other animals. AI has a variety of subtypes that are classified according to the two components that make up the virus – haemagglutinin (H) and neuraminidase (N). Consequently, the various subtypes of AI that have been identified are labelled as some form of the "HxNy" combination.<sup>8</sup>

<sup>1</sup> WT/DS430/R, 14 October 2014.

<sup>2</sup> Request for the Establishment of a Panel by the United States, WT/DS430/3. The Panel was established by the Dispute Settlement Body at its meeting of 25 June 2012. (Panel Report, paras. 1.3-1.4)

<sup>3</sup> Panel Report, para. 2.1.

<sup>4</sup> The Live-Stock Importation Act, 1898 (No. 9 of 1898), published on 12 August 1898 (Panel Exhibit US-114), as amended by The Live-Stock Importation (Amendment) Act, 2001 (No. 28 of 2001) (19 July 2001), published in *The Gazette of India* on 29 August 2001, No. 35, Part II, Section 1, pp. 1-2 (Panel Exhibit US-115).

<sup>5</sup> Statutory Order 1663(E), issued by India's Department of Animal Husbandry, Dairying and Fisheries (DAHD) on 19 July 2011 pursuant to the Livestock Act and published in *The Gazette of India* on 20 July 2011, No. 1390, Part II, Section 3(ii), pp. 1-2 (Panel Exhibit US-80).

<sup>6</sup> Panel Report, para. 2.22 (referring to the Livestock Act and S.O. 1663(E)).

<sup>7</sup> Panel Report, para. 2.6 (referring to World Health Organization, "Avian Influenza", accessed 17 January 2014, <[http://www.who.int/mediacentre/factsheets/avian\\_influenza/en/index.html](http://www.who.int/mediacentre/factsheets/avian_influenza/en/index.html)>).

<sup>8</sup> The Panel explained that sixteen H and nine N subtypes of AI have been identified to date and that new influenza viruses are constantly emerging as a result of genetic mutation and re-assortment. (Panel Report, para. 2.7)

1.4. All AI subtypes are classified into one of two groups according to their ability to cause disease, or "pathogenicity", in birds: (i) highly pathogenic avian influenza (HPAI); and (ii) low pathogenicity avian influenza (LPAI).<sup>9</sup> HPAI is an extremely infectious, systemic viral disease of poultry that produces high mortality and various types of lesions in multiple visceral organs, the brain, and skin.<sup>10</sup> By contrast, infection with LPAI may be asymptomatic or have very mild symptoms, consisting of ruffled feathers, reduced egg production, or mild effects on the respiratory system.<sup>11</sup>

1.5. The World Organisation for Animal Health (formerly, Office International des Epizooties) (OIE) is the international organization responsible for establishing health standards for international trade in animals and animal products, including standards relating to AI.<sup>12</sup> The members of the OIE annually adopt the OIE Terrestrial Animal Health Code (OIE Code<sup>13</sup>), which contains recommendations that, when correctly applied, provide for safe trade in animals and animal products while avoiding unjustified sanitary barriers to trade.<sup>14</sup> OIE members are required to notify the OIE of any occurrence of HPAI and of certain types of LPAI in their territories.<sup>15</sup> To this end, the OIE Code definition of "notifiable avian influenza" (NAI) covers both highly pathogenic notifiable avian influenza (HPNAI) and low pathogenicity notifiable avian influenza (LPNAI).<sup>16</sup> Chapter 10.4 of the OIE Code<sup>17</sup> contains recommendations specifically addressing infection with NAI viruses.<sup>18</sup>

1.6. The factual aspects of this dispute are set forth in greater detail in paragraphs 2.1 through 2.59 of the Panel Report, and section 4 of this Report.

1.7. The Panel sought advice from experts in this dispute, consisting of a written consultation with the OIE on the interpretation of the OIE Code, and a written and oral consultation with three independent experts on the AI surveillance regime with particular respect to India's surveillance regime for LPAI and its domestic disease situation.<sup>19</sup> The Panel sent separate written questions to the OIE and to the three individual experts, taking into account suggested questions that the Panel had solicited from the parties to the dispute.<sup>20</sup> The Panel received written responses to its questions from the OIE and all three experts, and afforded the parties an opportunity to comment on the responses.<sup>21</sup> The Panel also held a hearing with the three individual experts and the parties.<sup>22</sup>

1.8. On 4 March 2013, India submitted a request for a preliminary ruling from the Panel concerning the consistency of the United States' panel request with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).<sup>23</sup> India maintained that the United States' panel request was inconsistent with Article 6.2 because it failed to identify the specific measures at issue, and failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the United States' claims under Articles 2.3, 5.5, and 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).<sup>24</sup> For these reasons, India requested the Panel to: (i) limit the United States' challenge of S.O. 1663(E) to the prohibition on importation of the ten categories of

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<sup>9</sup> Panel Report, para. 2.8.

<sup>10</sup> Panel Report, para. 2.9 (referring to Panel Exhibit US-19, p. 463).

<sup>11</sup> Panel Report, para. 2.11 (referring to Panel Exhibit US-23, p. 3).

<sup>12</sup> Panel Report, para. 2.50.

<sup>13</sup> The parties agreed that the relevant international standard for purposes of this dispute was the OIE Code. (Panel Report, para. 7.206) The Panel found that, for the purposes of its examination of the United States' claim, the relevant edition of the OIE Code was the 21st edition, adopted in May 2012, because it was the edition that was in force at the time of Panel establishment. (Panel Report, para. 7.213)

<sup>14</sup> Panel Report, paras. 2.53-2.54 and 2.56 (referring to the Foreword and User's Guide to the OIE Code, and the Rights and Obligations of OIE Members).

<sup>15</sup> Panel Report, para. 2.13.

<sup>16</sup> Panel Report, paras. 2.13-2.15.

<sup>17</sup> World Organisation for Animal Health, Terrestrial Animal Health Code, 21st edn (May 2012), Vol. II, chapter 10.4 – Infection with Viruses of Notifiable Avian Influenza (Panel Exhibit US-1).

<sup>18</sup> Panel Report, para. 2.59.

<sup>19</sup> Panel Report, paras. 1.23-1.30.

<sup>20</sup> Panel Report, paras. 1.32-1.33.

<sup>21</sup> Panel Report, paras. 1.32-1.34.

<sup>22</sup> Panel Report, para. 1.36.

<sup>23</sup> Panel Report, para. 1.14.

<sup>24</sup> WT/DS430/5, para. 1.1.

products expressly listed in paragraph 3 of the panel request from countries reporting HPNAI and LPNAI; (ii) rule that related measures, implementing measures, orders, and expired measures were outside the Panel's terms of reference; and (iii) refrain from considering the substance of the United States' claims under Articles 2.3, 5.5, and 5.6 of the SPS Agreement.<sup>25</sup> The Panel gave the United States and the third parties an opportunity to comment in writing on India's request. After receiving comments from the United States and certain third parties with respect to India's request<sup>26</sup>, the Panel issued a preliminary ruling to the parties on 22 May 2013 (Preliminary Ruling), and requested the Chair of the Dispute Settlement Body (DSB) to circulate this ruling to the DSB.<sup>27</sup>

1.9. In the Preliminary Ruling, the Panel found the United States' panel request to be sufficiently precise in identifying S.O. 1663(E) as a specific measure at issue, "insofar as S.O. 1663(E) prohibits the importation of various agricultural products into India from those countries reporting NAI (both HPNAI and LPNAI)", and that the United States' challenge to such prohibition was not limited to "the listing of the products prohibited by S.O. 1663(E) in paragraph 3 of the panel request", but encompassed all products, the importation of which is prohibited from countries reporting NAI pursuant to S.O. 1663(E).<sup>28</sup> The Panel further concluded that the United States' panel request did not fail to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the claims under Articles 2.3, 5.5, and 5.6 of the SPS Agreement.<sup>29</sup> More specifically, with respect to each of these claims, the Panel found that: (i) the United States was challenging the treatment of imports under India's AI measures with respect to both HPAI and LPAI<sup>30</sup>; and (ii) the United States' challenge was not limited to the ten categories of products expressly mentioned in its panel request.<sup>31</sup> The Panel rejected other aspects of India's challenge to the specificity and scope of the panel request, and, in certain respects, concluded that it was premature for it to make a determination on whether certain measures not specifically listed in the panel request were within the Panel's terms of reference.<sup>32</sup>

1.10. On 31 May 2013, as part of its first written submission, India submitted a second request for a preliminary ruling from the Panel concerning the consistency of the United States' panel request with Article 6.2 of the DSU.<sup>33</sup> India argued that the United States, in its first written submission, had raised claims concerning India's National Action Plan for 2012 (NAP 2012) and health certificate requirements for products listed in S.O. 1663(E), notwithstanding the fact that these measures were not mentioned in the United States' panel request.<sup>34</sup> India requested the Panel to rule that these measures and the claims relating to them were outside the Panel's terms of reference. The Panel included its ruling on these requests in its Report.<sup>35</sup> The Panel concluded that, as a measure that applies only to India's domestic agricultural products, the NAP 2012 does not fall within the scope of India's AI measures relating to import prohibitions on products from countries reporting NAI, as identified by the United States in its panel request. Accordingly, the Panel found that the NAP 2012 is not a measure at issue within the meaning of Article 6.2 of the DSU.<sup>36</sup> The Panel further concluded that the health certificates that accompany a sanitary import permit (SIP) were not identified in the United States' panel request and are therefore not measures at issue within the meaning of Article 6.2 of the DSU.<sup>37</sup>

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<sup>25</sup> India's request for a preliminary ruling, para. 79.

<sup>26</sup> WT/DS430/5, paras. 1.3-1.4.

<sup>27</sup> The Preliminary Ruling was circulated as document WT/DS430/5 on 28 June 2013. (Panel Report, paras. 1.16 and 7.2. The Preliminary Ruling forms an integral part of the Panel Report. (Ibid., para. 7.4))

<sup>28</sup> Panel Report, para. 7.3 (quoting Preliminary Ruling, para. 4.1); and para. 8.1.a.i-ii. See also Preliminary Ruling, paras. 3.36-3.37 and 3.66.

<sup>29</sup> Panel Report, para. 8.1.a.v. See also para. 7.3; and Preliminary Ruling, paras. 3.94, 3.124, and 3.141.

<sup>30</sup> Preliminary Ruling, paras. 3.91, 3.115, and 3.136.

<sup>31</sup> Preliminary Ruling, paras. 3.93, 3.118-3.119, and 3.140.

<sup>32</sup> Preliminary Ruling, para. 4.1. See also Panel Report, para. 7.3.

<sup>33</sup> Panel Report, paras. 1.17 and 7.5.

<sup>34</sup> Panel Report, para. 7.5 (referring to India's first written submission to the Panel, paras. 67-68).

<sup>35</sup> Panel Report, section 7.1.2.

<sup>36</sup> Panel Report, paras. 7.104.a and 8.1.b.i. The Panel denied India's request that the United States' claim under Article 2.3 of the SPS Agreement be set aside because the NAP 2012 was not identified in the United States' panel request. (Ibid., paras. 7.105 and 8.1.b.iv)

<sup>37</sup> Panel Report, paras. 7.104.b and c and 8.1.b.ii-iii.

1.11. The United States requested that the Panel find that India's AI measures are inconsistent with India's obligations under Articles 2.2, 2.3, 3.1, 5.1, 5.2, 5.5, 5.6, 6.1, 6.2, 7, and certain provisions of Annex B to the SPS Agreement, and with Article XI of the General Agreement on Tariffs and Trade 1994 (GATT 1994).<sup>38</sup>

1.12. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 14 October 2014, the Panel found that:

- a. India's AI measures are inconsistent with Article 3.1 of the SPS Agreement because they are not "based on" the relevant international standard as set out in Chapter 10.4 of the OIE Code; and that India's AI measures are not entitled to benefit from the presumption of consistency, under Article 3.2 of the SPS Agreement, with other provisions of the SPS Agreement and of the GATT 1994 because these measures do not "conform to" the relevant international standard within the meaning of Article 3.2<sup>39</sup>;
- b. India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement because they are not based on a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations and the factors set forth in Article 5.2; and, in the light of these findings, India's AI measures are also inconsistent with Article 2.2 of the SPS Agreement because they are not based on scientific principles and are maintained without sufficient scientific evidence<sup>40</sup>;
- c. India's AI measures are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail; and India's AI measures are inconsistent with Article 2.3, second sentence, of the SPS Agreement because they are applied in a manner which constitutes a disguised restriction on international trade<sup>41</sup>;
- d. India's AI measures are inconsistent with Article 5.6 of the SPS Agreement because they are significantly more trade restrictive than required to achieve India's appropriate level of protection (ALOP) with respect to the products covered by Chapter 10.4 of the OIE Code; and, in the light of these findings, India's AI measures are also inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect human and animal life or health<sup>42</sup>;
- e. India's AI measures are inconsistent with Article 6.2, first sentence, of the SPS Agreement because they fail to recognize the concepts of disease-free areas and areas of low disease prevalence; and, in the light of these findings, India's AI measures are also inconsistent with: (i) Article 6.2, second sentence, of the SPS Agreement because the failure to recognize the concepts of disease-free areas and areas of low disease prevalence renders impossible a determination of such areas based on the factors enumerated in Article 6.2, second sentence; (ii) Article 6.1, first sentence, of the SPS Agreement because they are therefore not adapted to the SPS characteristics of the areas from which products originate and to which they are destined; and (iii) Article 6.1, second sentence, of the SPS Agreement because India has not taken into account factors including those specified in that provision<sup>43</sup>;
- f. India acted inconsistently with various provisions of Annex B to the SPS Agreement regarding the proposal, publication, and entry into force of S.O. 1663(E) and, in the light of these findings, that India also acted inconsistently with Article 7 of the SPS Agreement.<sup>44</sup>

<sup>38</sup> Panel Report, para. 3.1.

<sup>39</sup> Panel Report, para. 8.1.c.ii.

<sup>40</sup> Panel Report, para. 8.1.c.iii-v.

<sup>41</sup> Panel Report, para. 8.1.c.vi.

<sup>42</sup> Panel Report, para. 8.1.c.vii-viii.

<sup>43</sup> Panel Report, para. 8.1.c.ix-x.

<sup>44</sup> Panel Report, para. 8.1.c.xi-xvi.

1.13. In the light of the above findings, the Panel declined to rule on the United States' alternative or additional claims under Article 5.5 of the SPS Agreement and Article XI of the GATT 1994.<sup>45</sup> The Panel also declined to rule on the United States' claim pursuant to Annex B(5)(c) to the SPS Agreement because the United States had failed to make a *prima facie* case of violation thereof.<sup>46</sup> The Panel found that, pursuant to Article 3.8 of the DSU, to the extent that India has acted inconsistently with the specified provisions of the SPS Agreement, it has nullified or impaired benefits accruing to the United States under that Agreement.<sup>47</sup> The Panel recommended, pursuant to Article 19.1 of the DSU, that the DSB request India to bring its measures into conformity with its obligations under the SPS Agreement.<sup>48</sup>

1.14. At a meeting held on 18 November 2014, the DSB adopted a decision to extend the time period for the adoption of the Panel Report to no later than 26 January 2015.<sup>49</sup> The DSB adopted this decision following a joint request by India and the United States, which was filed in view of the "current workload of the Appellate Body" and in order to "provide greater flexibility in scheduling any possible appeal of the panel report in this dispute".<sup>50</sup>

1.15. On 26 January 2015, India notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal<sup>51</sup> and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>52</sup> (Working Procedures). On 13 February 2015, the United States filed an appellee's submission.<sup>53</sup> On 18 February 2015, Argentina, Australia, Brazil, the European Union, and Japan each filed a third participant's submission.<sup>54</sup> On the same day, Colombia, Ecuador, and Guatemala each notified its intention to appear at the oral hearing as a third participant.<sup>55</sup> On 16 March 2015, China and Viet Nam also each notified the Secretariat of its intention to appear at the oral hearing as a third participant.<sup>56</sup>

1.16. On 30 January 2015, India requested authorization, pursuant to Rule 18(5) of the Working Procedures, to correct a clerical error in paragraph 9 of its Notice of Appeal. The Appellate Body Division hearing this appeal provided the United States and the third participants with an opportunity to comment in writing on India's request. On 2 February 2015, the United States provided a letter stating that it had no objection to the correction of the clerical error identified by India, and the Division received no objections to India's request from the third participants. On that same date, the Division, pursuant to Rule 18(5) of the Working Procedures, authorized India to correct the clerical error in its Notice of Appeal.<sup>57</sup>

1.17. On 30 January 2015, the Division received a letter from Australia requesting an extension of the deadline for the filing of the third participants' submissions in these proceedings. Australia noted that the deadline for the appellee's submission was on a Friday, and that the deadline for the third participants' submissions was on the following Monday. Observing that third participants would have only one working day to incorporate the appellee's arguments into their own written submissions, Australia requested that the deadline for the filing of the third participants' submissions be extended by two days. The Division provided the participants and other third participants with an opportunity to comment in writing on Australia's request. On 2 February 2015, comments were received from India, the United States, Japan, and Viet Nam. The Division

<sup>45</sup> Panel Report, paras. 8.2 and 8.4.

<sup>46</sup> Panel Report, para. 8.3.

<sup>47</sup> Panel Report, para. 8.5.

<sup>48</sup> Panel Report, para. 8.6.

<sup>49</sup> The DSB decided that it would, no later than 26 January 2015, adopt the Panel Report unless: (i) the DSB decided by consensus not to do so; or (ii) either party to the dispute notified the DSB of its decision to appeal the Panel Report pursuant to Article 16.4 of the DSU. (WT/DSB/M/352, para. 6.5)

<sup>50</sup> WT/DS430/7.

<sup>51</sup> WT/DS430/8 (attached as Annex 1 to this Report).

<sup>52</sup> WT/AB/WP/6, 16 August 2010.

<sup>53</sup> Pursuant to Rule 22 of the Working Procedures.

<sup>54</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>55</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>56</sup> China and Viet Nam each submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For the purposes of this appeal, we have interpreted these actions as notifications expressing the intention of China and Viet Nam to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.

<sup>57</sup> The document circulated as WT/DS430/8 reflects the corrected version of India's Notice of Appeal.

received no objections to Australia's request. On that same date, the Division, noting that India had presented arguments in its appellant's submission concerning the Panel's understanding of Australia's risk assessment, quarantine measures, and position in this dispute, decided, pursuant to Rule 16 of the Working Procedures, to extend the deadline as requested by Australia.

1.18. The oral hearing in this appeal was held on 18-20 March 2015. The participants and five of the third participants (Argentina, Australia, Brazil, the European Union, and Japan) made opening oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

1.19. By letter dated 25 March 2015, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period stipulated in Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision, and informed the Chair of the DSB that the Report in this appeal would be circulated no later than 4 June 2015.<sup>58</sup>

## 2 ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

### 2.1 Claims of error by India – Appellant

#### 2.1.1 Articles 2.2, 5.1, and 5.2 of the SPS Agreement

2.1. India appeals the Panel's findings under Articles 2.2, 5.1, and 5.2 of the SPS Agreement. India requests the Appellate Body to reverse the Panel's finding that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement because they are not based on scientific principles and are maintained without sufficient scientific evidence.<sup>59</sup> India also requests the Appellate Body to reverse the Panel's finding that India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement because they are not based on a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations and the factors set forth in Article 5.2.<sup>60</sup>

2.2. India maintains that the Panel erred in its interpretation and application of Article 2.2 of the SPS Agreement by failing to distinguish between Articles 2.2 and 5.1 of the SPS Agreement as independent legal provisions setting out distinct obligations. Although Article 5.1 constitutes a specific application of the basic obligation contained in Article 2.2, the "close link" between the two provisions does not mean that they are identical. A risk assessment under Article 5.1 is "a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions"; by contrast, Article 2.2 focuses on the necessary link that must exist between an SPS measure and the relevant scientific principles and evidence.<sup>61</sup> Articles 5.1 and 5.2 still require a link, but it is an indirect link because it rests on the requirement of a risk assessment. Thus, a Member can *either* base its SPS measure on Article 2.2 by directly establishing a link between the SPS measure and the scientific principles and sufficient scientific evidence, *or*, alternatively, follow the process under Article 5.1 by conducting a risk assessment and, thus, also comply with Article 2.2. The Panel correctly identified that an SPS measure which does not comply with Articles 5.1 and 5.2 is presumed to be inconsistent with Article 2.2; however, the Panel incorrectly ignored that the obligations under Article 2.2 can also be independently fulfilled without resorting to Article 5.1. By equating Article 2.2 with Articles 5.1 and 5.2 in such a manner, the Panel rendered Article 2.2 redundant and thereby acted contrary to the customary principles of treaty interpretation, which require that each word in a treaty be given meaning and effect. Noting that it had based its defence on Article 2.2, India submits that the Panel should have started its analysis with Article 2.2 and not Article 5.1, given the United States'

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<sup>58</sup> WT/DS430/9. The Chair of the Appellate Body explained that the Appellate Body faced a substantial workload in the first half of 2015, with several appeals proceeding in parallel, and that there was overlap in the composition of the Appellate Body Divisions hearing these different appeals during this period. The Chair added that, due to the scheduling issues arising from these circumstances and the number and complexity of the issues raised in this and concurrent appeal proceedings, together with the demands that these concurrent appeals place on the WTO Secretariat's translation services, the Appellate Body would not be able to circulate its report in this dispute within the timeframe provided for in Article 17.5 of the DSU.

<sup>59</sup> India's appellant's submission, para. 26 (referring to Panel Report, paras. 7.331-7.332) and para. 58.

<sup>60</sup> India's appellant's submission, para. 63 (referring to Panel Report, paras. 7.318-7.319).

<sup>61</sup> India's appellant's submission, para. 17 (quoting Appellate Body Report, *Australia – Apples*, para. 207; and referring to Panel Report, *Australia – Apples*, para. 7.214).



independent claim under Article 2.2 and India's defence thereto. India asserts that the Panel's approach resulted in shifting the burden of proof onto India to establish the WTO-consistency of its measures without first requiring the establishment of a *prima facie* case by the United States.

2.3. India also claims that the Panel failed to make an objective assessment of the matter, pursuant to Article 11 of the DSU, by disregarding India's arguments and evidence that sought to establish that India's AI measures are based on scientific principles and are not maintained without sufficient scientific evidence, as required by Article 2.2 of the SPS Agreement. India recalls the three-pronged argument that it made before the Panel, namely that: (i) in the event India's AI measures are found to be consistent with Article 3.1 and/or Article 3.2 of the SPS Agreement, this would satisfy the requirements under Article 2.2; (ii) various scientific studies and a risk assessment conducted by Australia established that India's AI measures are based on scientific principles and are not maintained without sufficient evidence; and (iii) similar import restrictions upon occurrence of HPNAI and/or LPNAI as maintained by many other countries established that the risk was well founded. India argues that the Panel did not come to a reasoned conclusion on the basis of an objective assessment of these facts and evidence but, instead, limited its analysis under Article 2.2 to a single paragraph in the Panel Report. In India's view, this shows that the Panel disregarded India's arguments and evidence and failed to analyse the United States' claim under Article 2.2.

2.4. Furthermore, India highlights that its second and third arguments pursuant to Article 2.2 were made in the alternative, and that the Panel should have analysed them once it found that India's AI measures are inconsistent with Articles 3.1 and 3.2. These arguments were critical to India's defence, as they sought to establish the consistency of India's measures with Article 2.2. The Panel did not analyse any of the scientific studies provided by India, and gave no reason for disregarding this evidence. In doing so, the Panel not only failed to make an objective assessment, but also denied India the right to defend itself, which constitutes a "fundamental violation" of India's due process rights.<sup>62</sup> India also takes issue with the Panel's finding that Australia's risk assessment does not support an import prohibition, and contests a statement made by the Panel suggesting that Australia's position in this dispute is different than that of India. In India's view, Australia's submissions to the Panel make clear that, in Australia's opinion, "there exists a scientific basis for restricting import of chicken meat from a country/zone which is infected with HPNAI/LPNAI and the same conforms to the OIE Code."<sup>63</sup> Furthermore, although Australia sought, before the Panel, to distinguish its approach from that of India by characterizing India's AI measures as a "blanket ban", India in fact clarified that any ban under its measures is "only temporary and not perpetual", which was accepted by the Panel.<sup>64</sup> For these reasons, the Panel's conclusion that Australia's risk assessment does not support the type of import prohibition imposed by India was misconstrued and was not based upon the factual evidence available before the Panel, and is therefore inconsistent with the Panel's obligation under Article 11.

2.5. India further claims that the Panel also failed to make an objective assessment of the matter, as required under Article 11 of the DSU, in finding that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement because, in doing so, the Panel ruled on a claim that was not made by the United States. India relies on WTO jurisprudence that a complaining party has the burden of proving an inconsistency with specific provisions of the covered agreements, and that a *prima facie* case must be based on "evidence and legal argument" that "must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision".<sup>65</sup> In this dispute, however, the Panel's finding under Article 2.2 covered the import prohibition upon the occurrence of both HPNAI and LPNAI for India's AI measures notwithstanding that the United States only made arguments and presented evidence with respect to "import restriction[s] against eggs and fresh meat of poultry on account of occurrence of LPNAI" with respect to its claim under Article 2.2.<sup>66</sup> At no time did the United States indicate that its Article 2.2 claim covered import restrictions against any other products or on account of HPNAI. To

<sup>62</sup> India's appellant's submission, para. 39.

<sup>63</sup> India's appellant's submission, para. 43.

<sup>64</sup> India's appellant's submission, paras. 44-45 (referring to India's first written submission to the Panel, paras. 29-38; and Panel Report, para. 7.71).

<sup>65</sup> India's appellant's submission, para. 49 (quoting Appellate Body Reports, *US – Gambling*, paras. 140-141; and *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, p. 335).

<sup>66</sup> India's appellant's submission, paras. 50-51 (referring to United States' first written submission to the Panel, para. 124; and United States' response to Panel question No. 3, para. 17). (emphasis omitted)

the contrary, according to India, the United States accepted that a trade restriction against imports of poultry and poultry products upon the occurrence of HPNAI is "legitimate", thereby confirming that the nature of the United States' claim under Article 2.2 was "limited".<sup>67</sup> The Panel could therefore not have concluded that India's AI measures covering all the products and both HPNAI and LPNAI are inconsistent with Article 2.2. By doing so, the Panel deprived India of its right to defend itself, and thereby acted inconsistently with Article 11 of the DSU.

2.6. India also appeals the Panel's findings under Articles 5.1 and 5.2 of the SPS Agreement. In its analysis under Article 5.1, the Panel stated that it was India's position that it was not required to conduct a risk assessment since its AI measures conform to an international standard. At the same time, however, the Panel noted India's assertion that, because its AI measures are based on scientific principles and are not maintained without scientific evidence, they meet the requirements of Article 2.2 and India is therefore under no obligation to conduct a separate risk assessment under Article 5.1 in the present case. Thus, the Panel's statement that India had only argued that it is not required to conduct a risk assessment as its AI measure conforms to the international standard is a "misrepresentation" of India's position.<sup>68</sup> This factual assertion by the Panel falls short of the objective assessment required under Article 11 of the DSU and, therefore, should be reversed. Noting the Panel's failure to analyse all the grounds advanced by India for not conducting a risk assessment, India requests the Appellate Body to reverse the Panel's findings under Articles 5.1 and 5.2.

2.7. In the event the Appellate Body reverses the Panel's finding under Article 2.2 of the SPS Agreement, India requests the Appellate Body to complete the legal analysis and find that India's AI measures are consistent with Article 2.2. The obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence requires that there be a rational or objective relationship between the SPS measure and the scientific evidence, which should be determined on a case-by-case basis depending upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence.<sup>69</sup> India also notes that the word "sufficient" has been interpreted by the Appellate Body as requiring the existence of a sufficient or adequate relationship between the SPS measure and the scientific evidence, and that, in order for the scientific evidence to support a measure sufficiently, it must also demonstrate the existence of the risk that the measure is supposed to address.<sup>70</sup> India reiterates that the United States' claim under Article 2.2 was limited to import restrictions against eggs and fresh meat of poultry on account of occurrence of LPNAI, and adds that the United States' claim was limited to the third element of Article 2.2, i.e. that India's AI measures are "not maintained without sufficient scientific evidence", and does not cover the aspect of "scientific principles" under that provision.

2.8. India stresses that the United States has the burden to establish *prima facie* that India's measures are maintained without sufficient scientific evidence within the meaning of Article 2.2. In order to present a *prima facie* case with respect to India's AI measures relating to the import restrictions on poultry meat and eggs from LPNAI reporting countries, the United States relied only on a statement by Dr David E. Swayne.<sup>71</sup> The essence of Dr Swayne's statement, in India's view, is that, since the LPNAI virus is only present in the respiratory and digestive tracts of chicken, neither the inside of eggs nor fresh meat of poultry presents any risk. By contrast, because HPNAI causes a systemic infection, the HPNAI virus is present in various parts of the chicken and, therefore, a restriction on fresh poultry meat and eggs (and other poultry products) originating from HPNAI-infected countries is justified. For India, this reasoning shows that, except for systemic distribution, LPNAI and HPNAI viruses are exactly alike in respect of, for example, the efficacy and modes of transmission.

2.9. In rebutting the United States' arguments under Article 2.2, India relied on a study by Jacob Post et al., which "clearly establishes that LPAI viruses ... can cause systemic infection and

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<sup>67</sup> India's appellant's submission, para. 51 (referring to United States' second written submission to the Panel, paras. 36-49; and Panel Exhibits US-97; US-19, p. 466; and US-24, p. 294).

<sup>68</sup> India's appellant's submission, para. 61.

<sup>69</sup> India's appellant's submission, para. 65 (referring to Appellate Body Report, *Japan – Agricultural Products II*, para. 84).

<sup>70</sup> India's appellant's submission, para. 66 (referring to Appellate Body Report, *Japan – Agricultural Products II*, para. 73; and Panel Report, *Japan – Apples (Article 21.5 – US)*, para. 8.45).

<sup>71</sup> India's appellant's submission, para. 69 (referring to Panel Exhibit US-97).

can spread to internal organs of the bird."<sup>72</sup> According to India, this clearly puts the risk emanating from the LPNAI virus on the same pedestal as the HPNAI virus and undermines the only argument of the United States, namely, that the distinction between the HPNAI and LPNAI lies in the difference of systemic distribution. Additionally, India underlines that the Swayne and Beck study submitted by the United States and relied upon by Dr Swayne in his statement is based on experiments wherein only two isolates of the LPAI virus were used. By contrast, the Post et al. study is more comprehensive as it used four isolates of the LPAI virus, including the H7 subtype, which has been reported in the past by the United States. Finally, even if both sets of evidence were to be in equipoise, India claims that the benefit of doubt has to be given to the responding party.<sup>73</sup>

2.10. India submits that other scientific evidence also demonstrates the existence of the risk that India's measures address. India refers, in this regard, to the risk assessment conducted by Australia, on the basis of which Australia prohibits imports of unprocessed meat and meat products from regions reporting the occurrence of LPNAI in poultry. India emphasizes that the United States does not contest Australia's assertion that its quarantine measures, pursuant to which the products can be banned, conform to the OIE Code. India, therefore, concludes that "the risk assessment conducted by Australia and its quarantine measures have been accepted by both the parties and by the Panel."<sup>74</sup> India points to other evidence that was before the Panel, including several studies that address the risk of the spread of the LPNAI virus through contaminated materials, equipment, and trays, and that point to the risk of infection for humans with both LPNAI and HPNAI viruses. This evidence establishes that there exists risks of introduction of the LPNAI virus upon trade in poultry and poultry commodities, and that India's AI measures address these risks by not allowing the import of poultry and poultry commodities upon an outbreak of LPNAI in the exporting country.<sup>75</sup> India notes that many other countries maintain similar measures.

2.11. In view of the above, India concludes that the scientific evidence that it submitted establishes the risk of trade in these products and fulfils the requirements of Article 2.2 of the SPS Agreement. As a result, India also submits that it is under no obligation to conduct a separate risk assessment pursuant to Article 5.1 and Article 5.2 of the SPS Agreement.

### 2.1.2 Articles 3.1 and 3.2 of the SPS Agreement

2.12. India requests the Appellate Body to reverse the Panel's findings that India's AI measures are inconsistent with Articles 3.1 and 3.2 of the SPS Agreement because they are not based on, and do not conform to, the international standard set out in the OIE Code. India argues that the Panel: (i) exceeded the permissible scope of consultation with the OIE as prescribed by Article 11.2 of the SPS Agreement and Article 13.2 of the DSU; (ii) acted inconsistently with its duty to make an objective assessment of the matter within the meaning of Article 11 of the DSU, and with Article 3.2 of the DSU, by relying on the OIE's interpretation of the OIE Code, without itself conducting such an interpretation; and (iii) otherwise acted inconsistently with Article 11 of the DSU by disregarding arguments and evidence provided by India, and by arriving at a conclusion that is not supported by the evidence.

2.13. India submits that the Panel's "terms of reference" to the OIE exceeded the scope of consultation with international organizations allowed under Article 11.2 of the SPS Agreement and Article 13.2 of the DSU. Article 11.2 of the SPS Agreement permits panels to consult with experts in disputes involving scientific or technical issues, and the scope of a panel's consultation with an international organization is, therefore, limited to scientific and technical issues. The obligation of making a legal interpretation of an issue rests with a panel and cannot be delegated to scientific experts.<sup>76</sup> India considers that the Panel's terms of reference and its questions to the OIE indicate that the Panel was consulting with the OIE not only to understand the evidence submitted by the

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<sup>72</sup> India's appellant's submission, para. 75 (referring to J. Post et al., "Systemic distribution of different low pathogenic avian influenza (LPAI) viruses in chicken" (2013) 10(23) *Virology Journal* (Panel Exhibit IND-68)).

<sup>73</sup> India's appellant's submission, para. 77 (referring to Panel Report, *US – Section 301 Trade Act*, para. 7.14).

<sup>74</sup> India's appellant's submission, para. 80 (referring to United States' opening statement at the second Panel meeting, para. 22; and Panel Report, para. 7.313).

<sup>75</sup> India's appellant's submission, para. 82.

<sup>76</sup> India's appellant's submission, para. 95 (referring to Appellate Body Report, *Australia – Apples*, paras. 384 and 399).

parties, but also concerning the interpretation of the OIE Code. Most of the Panel's questions to the OIE pertained to the interpretation of the OIE Code, and the Panel's analysis and findings under Article 3.1 of the SPS Agreement confirm that the Panel relied solely on the OIE's interpretation in reaching its conclusion. Accordingly, India submits that the Panel's terms of reference to the OIE went beyond the scope of the assistance that a panel is permitted to seek from an international organization under Article 11.2 of the SPS Agreement.

2.14. India further asserts that the Panel committed several errors that are inconsistent with its duty to make an objective assessment of the matter under Article 11 of the DSU. A panel may not rely on the opinion provided by an expert but must, instead, make an objective assessment of the matter "by critically assessing the views provided by the expert and considering the other data and opinion before reaching its conclusion".<sup>77</sup> The Panel failed to assess critically the answers provided by the OIE with respect to the interpretation of the OIE Code. The Panel adopted the OIE's interpretation of Article 10.4.1.10 and the product-specific recommendations in the OIE Code without mentioning, or analysing, India's subsequent submission in which it provided various grounds supporting India's understanding of the OIE Code, and in which it highlighted inconsistencies in the OIE's answers. Similarly, in its analysis of the reference to zones and compartments, the Panel simply relied on the interpretation provided by the OIE and discarded the arguments and evidence provided by India without providing any reason for doing so. India contends that the Panel, therefore, "delegated the judicial function of making an objective assessment of the matter to the OIE" in a manner inconsistent with Article 11 of the DSU.<sup>78</sup>

2.15. India asserts that the Panel disregarded arguments and evidence on other specific matters as well. For instance, the Panel ignored India's reference to the practice of other countries in support of its interpretation of the OIE Code. Before the Panel, India had pointed to bans imposed by Ecuador, Japan, and Chile on account of LPNAI in the United States. Although the bans by Japan and Chile are restricted to certain states, these arrangements reinforce "the fundamental aspect of the OIE Code", namely, that it permits countries to prohibit imports on account of LPNAI.<sup>79</sup> India also introduced evidence of agreements between the United States and its trading partners that establish, pursuant to the OIE Code, bans upon the occurrence of LPNAI. According to India, the Panel disregarded the relevance of similar measures undertaken by other countries, including the United States.

2.16. India further contends that the Panel ignored statements by Australia that Australia's measures conform to the OIE Code and allow the importation of chicken meat only from a country that is both HPNAI free and LPNAI free. The United States has not contested Australia's statement that its quarantine measures conform to the OIE Code. Instead, the United States makes the argument that the practice of Australia and other countries does not establish subsequent practice within the meaning of Article 31(3) of the Vienna Convention on the Law of Treaties<sup>80</sup> (Vienna Convention). This is a question of legal interpretation that can be done only after analysing the arguments and evidence of the parties, which the Panel did not do. In addition, the Panel disregarded India's argument that the United States' position with respect to its claims under Article 6 of the SPS Agreement implies that it accepts that a trade restriction can be imposed upon the occurrence of HPNAI/LPNAI. India maintains that the Panel disregarded and did not analyse these inherent contradictions in the United States' claim, and that these arguments were a critical part of India's defence under Article 3 of the SPS Agreement.

2.17. India argues that the Panel also acted inconsistently with Articles 3.2 and 11 of the DSU by not interpreting the OIE Code in accordance with the customary rules of treaty interpretation. Because the OIE Code is the international reference standard for the purposes of Article 3 of the SPS Agreement, it "forms the relevant context for interpretation of Article 3.1 and Article 3.2 of the SPS Agreement".<sup>81</sup> The OIE Code must, therefore, be interpreted in the light of the customary rules of treaty interpretation, which is a legal function reserved for the Panel, not the OIE. Alternatively, the OIE Code "would also be considered a treaty as it is a subsequent application ... and it also establishes a subsequent practice of the application of Article 3.1 and Article 3.2 of the

<sup>77</sup> India's appellant's submission, para. 102 (referring to Appellate Body Report, *India – Quantitative Restrictions*, para. 149).

<sup>78</sup> India's appellant's submission, para. 107.

<sup>79</sup> India's appellant's submission, para. 109.

<sup>80</sup> Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.

<sup>81</sup> India's appellant's submission, para. 121 (referring to Appellate Body Report, *EC – Chicken Cuts*, paras. 195-199).

SPS Agreement with respect to [AI]".<sup>82</sup> India maintains that, by failing to interpret the treaty in accordance with the customary rules of treaty interpretation and, instead, relying solely on the opinion provided by the OIE, the Panel abdicated its responsibility to interpret the OIE Code and thereby acted inconsistently with Article 3.2 of the DSU. India also maintains that, although it repeatedly urged the Panel to interpret the OIE Code in accordance with customary principles of treaty interpretation, the Panel disregarded its argument and therefore acted inconsistently with Article 11 of the DSU.<sup>83</sup>

2.18. India further claims that the Panel failed to make an objective assessment of the matter in accordance with Article 11 of the DSU because its conclusions regarding the OIE Code were not based on either the arguments and evidence advanced by the United States, or the interpretation of the OIE Code provided by the OIE. First, the United States admitted that the OIE Code permits the imposition of trade restrictions upon the occurrence of HPNAI/LPNAI on a regionalized basis. Because a panel cannot make findings that lack a factual basis in the record, there was no basis to conclude that the OIE Code does not allow the imposition of trade restrictions upon the occurrence of HPNAI/LPNAI. Second, because the United States acknowledged that a ban against HPNAI is a legitimate trade barrier, there was no factual basis for the Panel to conclude that the OIE Code does not provide for a ban against import of poultry products upon the occurrence of HPNAI. Third, the Panel's conclusion is not supported by the OIE's interpretation of the OIE Code. In this regard, the Panel concluded that the OIE Code does not provide for import prohibitions upon the occurrence of HPNAI despite an OIE statement indicating that a country that is not free from HPNAI cannot export fresh poultry meat pursuant to Article 10.4.19 of the OIE Code.

2.19. India requests the Appellate Body to complete the legal analysis and find that India's AI measures conform to the OIE Code in a manner consistent with Article 3.2 of the SPS Agreement, or are, alternatively, based on the OIE Code and are, therefore, consistent with Article 3.1 of the SPS Agreement. India recalls that, for purposes of an analysis under Articles 3.1 and 3.2 of the SPS Agreement, in the present dispute, the relevant international organization is the OIE and the relevant international standard is the OIE Code. The OIE Code provides recommendations that can be followed for safe trade in poultry and poultry products upon occurrence of HPNAI/LPNAI. Since the risk with respect to trade in each product within the OIE Code is different, each product-specific recommendation in the OIE Code is structured differently in order to address the specific risk therein. India considers that each product-specific recommendation should be considered an international standard for the purpose of Articles 3.1 and 3.2 of the SPS Agreement, and that this approach is consistent with the legal principle that it is every Member's prerogative to determine its own appropriate level of protection.<sup>84</sup>

2.20. According to India, the United States considers that the OIE Code envisages a ban or a trade restriction only if the exporting country cannot fulfil the requirement of HPNAI freedom. In all other circumstances, the OIE Code recommends trade in poultry products even though the country may be infected with LPNAI. India agrees with the United States' proposition that, pursuant to the OIE Code, a ban can be imposed upon trade in poultry products on account of occurrence of HPNAI. India, however, disagrees with the United States that a similar trade restriction on trade in poultry products on account of the occurrence of LPNAI cannot be imposed, since India does not consider that there is a basis to distinguish between HPNAI and LPNAI in the OIE Code.

2.21. Relying on the arguments and evidence that it submitted to the Panel, India advances its interpretation of the OIE Code using the customary rules of treaty interpretation for guidance. First, India refers to Article 10.4.1.10 of the OIE Code, which provides that Members should not impose a ban on trade in poultry products in response to a notification of infection of HPAI or LPAI viruses in birds other than poultry, including wild birds. According to India, because the OIE requires HPAI and LPAI notification with respect to both wild birds and poultry, a notification of a virus in poultry can lead to a ban "as the same has not been specifically excluded from the ambit of Article 10.4.1.10 of the OIE Code."<sup>85</sup> In support of its understanding, India points out that the

<sup>82</sup> India's appellant's submission, para. 122 (referring to Appellate Body Reports, *US – Clove Cigarettes*, paras. 265-267; and *EC – Computer Equipment*, paras. 90-99).

<sup>83</sup> India's appellant's submission, para. 124.

<sup>84</sup> India's appellant's submission, para. 140 (referring to Panel Reports, *Australia – Apples*, para. 7.1134; *Australia – Salmon*, para. 8.172; *US – Poultry (China)*, para. 7.333; and Appellate Body Report, *Australia – Salmon*, para. 199).

<sup>85</sup> India's appellant's submission, para. 151.

OIE Code recommendations relating to Newcastle disease and foot and mouth disease allow for import prohibitions even though such prohibitions are not explicitly mentioned. India also highlights that the United States, itself, advocates and imposes trade bans on occurrence of HPNAI. Thus, for India, the correct interpretation of Article 10.4.1.10 of the OIE Code is that it provides a basis for a ban on trade in poultry products upon notification of HPAI and/or LPNAI in poultry.

2.22. India further submits that its interpretation is supported by the practice of other Members. India provided evidence of laws maintained by other countries that impose bans on exporting countries that notify AI, and specifically noted that Australia does not allow import of chicken meat from territories reporting HPNAI/LPNAI and that it considers that its quarantine measure conforms to the OIE Code. India adds that even the United States has entered into bilateral agreements allowing its trading partners to prohibit the import of poultry products upon the occurrence of HPNAI/LPNAI in the United States.

2.23. India submits that, more generally, Chapter 10.4 of the OIE Code provides risk mitigation conditions that, if applied by the importing and exporting country, prevent disease introduction in the importing country through trade in products that are considered to be agents of disease transmission. According to India, the OIE has formulated a code that reflects the flexibility provided to member countries to import poultry and poultry products based on the level of protection that countries have deemed appropriate. Thus, the importing country may condition the entry of a poultry product upon the exporting country being free from both HPNAI and LPNAI. In such cases, the OIE Code recognizes the importing country's prerogative to seek NAI-freedom from the exporting country and details sanitary conditions that the importing country may further require to be attested to by the veterinary authorities of the exporting country when the product is exported. Moreover, if an importing country has entered into an arrangement and recognized specific disease-free areas or establishments in the exporting country, the OIE also enables countries to condition the entry of the poultry product only from the specific zone or compartment that has been recognized. According to India, however, "[t]he condition of entry an importing country chooses is a decision to be made by the importing country alone and the OIE Code provides full flexibility to an importing country to structure its regime in the manner it deems appropriate."<sup>86</sup>

2.24. In seeking to refute the arguments that the United States made to the Panel, India asserts that the OIE Code recognizes a Member's sovereign right to set its own ALOP, and that OIE guidance makes clear that, while the animal health situation in the exporting country is a relevant consideration for an importing country, so too is the disease and control situation in the importing country. India also challenges the United States' position that the OIE Code allows for a ban in respect of HPNAI, but does not recommend imposing a ban on imports on account of LPNAI. This distinction is "contradictory and logically untenable"<sup>87</sup> because the OIE Code does not provide for such a distinction, and the NAI-free and HPNAI-free recommendations are similarly worded. India also refutes the United States' contention that the OIE does not recommend imposing import restrictions upon notification of LPNAI but simply sets out veterinary certificate requirements. The OIE Code does not state that notifications of LPNAI in poultry are for the limited purpose of surveillance; rather, the OIE Code is designed to prevent diseases, including HPNAI and LPNAI, from being introduced into the importing country. India highlights, in this respect, certain recommendations in the OIE Code that provide that countries can ban imports on account of LPNAI. For example, Article 10.4.5 – which pertains to imports of adult live poultry – sets out a recommendation for NAI-free areas, but does not provide a recommendation for HPNAI-free areas. This suggests that, if a country declares LPNAI, it would not be free from NAI, and an importing country need not import from such country. For India, "the issue is not whether products can be safely traded from countries which have notified LPNAI but whether the OIE Code permits countries to import only from NAI free countries."<sup>88</sup> In India's view, the OIE Code does allow countries to choose such recommendations when they meet that country's ALOP.

2.25. For these reasons, India submits that S.O. 1663(E) is in conformity with the OIE Code. In India's view, its law implements the "condition of entry" requirement reflected in each product-specific recommendation and in Article 10.4.1.10 of the OIE Code, and implements the

<sup>86</sup> India's appellant's submission, para. 172.

<sup>87</sup> India's appellant's submission, para. 184.

<sup>88</sup> India's appellant's submission, para. 190.

health certificate requirements under each product-specific recommendation. Accordingly, India requests the Appellate Body to find that its AI measures conform to Article 3.2 of the SPS Agreement, and that these measures are, therefore, presumed to be consistent with the SPS Agreement and the GATT 1994. Alternatively, India requests the Appellate Body to find that its AI measures are consistent with Article 3.1 of the SPS Agreement. Lastly, if India's AI measures are found to be consistent with Article 3.2 and/or Article 3.1 of the SPS Agreement, India requests the Appellate Body also to reverse the Panel's findings with respect to Article 2.3, second sentence, of the SPS Agreement, and with respect to Article 5.6 and, consequently, Article 2.2 of the SPS Agreement.

### 2.1.3 Article 6 of the SPS Agreement

2.26. India requests the Appellate Body to reverse the Panel's findings that India's AI measures are inconsistent with Articles 6.1 and 6.2 of the SPS Agreement. India argues that the Panel: (i) erred in concluding that India's AI measures are inconsistent with Article 6.2, first sentence, of the SPS Agreement; (ii) failed to make an objective assessment of the matter, as required by Article 11 of the DSU; and (iii) erred in its interpretation of the relationship between Article 6.1 and Article 6.3 of the SPS Agreement.

2.27. India first contends that the Panel erred in understanding the obligation under Article 6.2, first sentence, to be an obligation to *implement* a domestic measure that recognizes disease-free areas rather than an obligation to *recognize* that concept. India recalls that the legislative act in this dispute is the Livestock Act, which empowers the Central Government of India to regulate, restrict, or prohibit the import into India of any livestock that may be liable to be affected by infectious or contagious disorders. The role of doing so is in turn delegated to India's Department of Animal Husbandry, Dairying and Fisheries (DAHD), which issues notifications that constitute delegated legislation. Furthermore, India notes that S.O. 1663(E) was issued pursuant to Sections 3 and 3A of the Livestock Act and that the DAHD, through S.O. 1663(E), implements the task of regulating the import of livestock products into India.

2.28. According to India, the Panel found that the requirement under Article 6.2, first sentence, is that a domestic SPS measure should not deny or contradict the recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. In this regard, the Panel, itself, admitted that, pursuant to Sections 3 and 3A of the Livestock Act, India *could recognize* the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Despite this finding, the Panel concluded that India's AI measures, as a whole – i.e. Sections 3 and 3A of Livestock Act and S.O. 1663(E) – are inconsistent with Article 6.2, first sentence, on the basis that S.O. 1663(E) does not recognize these concepts.<sup>89</sup> Given that the parent legislation – Sections 3 and 3A of the Livestock Act – recognizes the concepts set out in the first sentence of Article 6.2, the Panel erred in basing its conclusion on S.O. 1663(E), which is the delegated legislation. This is because, pursuant to the Panel's own analysis, India is only required to "recognize" the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, and is not required to "implement" such concepts in its domestic measures. According to India, the implementation of these concepts in domestic measures would be subject to the fulfilment of the requirements under Article 6.3 of the SPS Agreement and Chapter 4.3 of the OIE Code.

2.29. India points out that, given the United States' failure to submit a properly documented proposal pursuant to Article 6.3, India is not, on its own, required to implement the relevant concepts in its domestic measures. India explains that, since it is not required to implement the concepts domestically, it enacted S.O. 1663(E) on a country-wide basis. In addressing the United States' claim under Article 6.2, first sentence, the Panel was only required to examine whether Sections 3 and 3A of the Livestock Act recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Having found in the affirmative, the Panel should not have examined S.O. 1663(E), given that such examination also entailed analysing Article 6.3, a provision that was not within the ambit of the panel request. Thus, India submits that the Panel made a legal error under the first sentence of Article 6.2 by analysing and basing its conclusion on S.O. 1663(E).

2.30. India also argues that, given that the United States' claim referred to the "non-recognition" of the concepts under Article 6.2 of the SPS Agreement, the Panel acted inconsistently with

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<sup>89</sup> India's appellant's submission, paras. 215-216.

Article 11 of the DSU by basing its conclusion on the "non-implementation" of such concepts. In addition, India argues that the Panel acted inconsistently with its obligation under Article 11 of the DSU by disregarding critical evidence submitted by India. The Panel found no evidence that the discretion to recognize pest- or disease-free areas and areas of low pest or disease prevalence under Sections 3 and 3A of the Livestock Act has been exercised to date. The Panel's observation, however, "is not based on the factual evidence available".<sup>90</sup> Panel Exhibit IND-121<sup>91</sup> contains evidence showing that India had informed the United States in 2010 of its willingness to consider the issue of compartmentalization for the purpose of trade with the United States. Despite this communication, the United States never reverted to India with a proper proposal under Article 6.3 of the SPS Agreement. According to India, the Panel's analysis did not reflect Panel Exhibit IND-121, and this cannot be considered an unbiased and even-handed treatment of the evidence.

2.31. For the foregoing reasons, India submits that the Panel erred in its application of the requirements of recognition under Article 6.2, first sentence, of the SPS Agreement, and failed to make an objective assessment of the matter, as required by Article 11 of the DSU. Accordingly, India requests the Appellate Body to reverse the Panel's findings with respect to Article 6.2 of the SPS Agreement. Alternatively, India requests the Appellate Body to reverse the Panel's findings under Article 6.2 with respect to the Livestock Act. Since the Panel's conclusion on the United States' claim under Article 6.1 of the SPS Agreement was based upon its findings under Article 6.2, India also requests the Appellate Body to reverse the Panel's findings under Article 6.1.

2.32. Finally, India argues that the Panel committed a legal error in interpreting the relationship between the first sentence of Article 6.1 and the first sentence of Article 6.3 of the SPS Agreement. In India's view, an importing Member's obligation under the first sentence of Article 6.1 of adapting its SPS measures to the sanitary or phytosanitary characteristics of the area of the exporting Member *arises only* after an exporting Member makes a formal proposal under Article 6.3. In the absence of such a proposal from the exporting Member, an importing Member is not required on its own, and without any proposal from the exporting country, to recognize the exporting Member's pest- and disease-free areas. According to India, any contrary interpretation would result in Article 6.3 of the SPS Agreement becoming redundant. India considers that Articles 4.3.1 and 4.3.2 of the OIE Code also support its position.

2.33. India asserts that the Panel's analysis regarding the relationship between Article 6.1 and Article 6.3 of the SPS Agreement is incorrect and inconclusive. Despite the fact that the Panel assessed the relationship between the second sentence of Article 6.1 and Article 6.3, the Panel concluded that no such relationship exists. Contrary to the Panel's observation, a harmonious reading of Articles 6.1 and 6.3 requires that an exporting Member first make a formal proposal under Article 6.3. Once this proposal is made, the importing Member must take into account the factors outlined in the second sentence of Article 6.1. Consequently, India submits that the Panel erred in its analysis of Article 6.1 of the SPS Agreement, and requests the Appellate Body to reverse the findings made by the Panel under that provision.

2.34. India requests the Appellate Body to complete the legal analysis and find that India's AI measures are consistent with Article 6.1 and Article 6.2 of the SPS Agreement. With respect to Article 6.2, first sentence, the Panel itself observed that, pursuant to Sections 3 and 3A of the Livestock Act, India could recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Therefore, India's AI measure – i.e. Sections 3 and 3A of the Livestock Act – is consistent with both sentences in Article 6.2. Moreover, given that India is only required to adapt its AI measures to the areas of the exporting Member after receiving a proposal pursuant to Article 6.3, and that the United States has not made such proposal, India submits that it has not acted inconsistently with Article 6.1 of the SPS Agreement.

#### **2.1.4 Article 5.6 and Article 2.2 of the SPS Agreement**

2.35. India requests the Appellate Body to reverse the Panel's findings that India's AI measures are more trade restrictive than necessary to achieve India's ALOP and are therefore inconsistent with Article 5.6 of the SPS Agreement. India also requests the Appellate Body to reverse the

<sup>90</sup> India's appellant's submission, para. 230.

<sup>91</sup> Letter dated 28 January 2010 from Assistant Commissioner, DAHD, to US Minister-Counsellor for Agricultural Affairs regarding: "India's comments on US proposed certificates for export of poultry, pork, pet food and feather to India".



Panel's finding that, as a consequence of its finding under Article 5.6, India's AI measures are inconsistent with Article 2.2 of the SPS Agreement. India argues that the Panel committed legal error by concluding that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement and consequently with Article 2.2 of the SPS Agreement. Additionally, India claims that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU.

2.36. India first argues that the Panel acted inconsistently with Article 11 of the DSU because it ruled on a claim that was not argued by the United States. It is well established that the complaining party has the burden of proving an inconsistency with specific provisions of the covered agreements, and that a *prima facie* case must be based on evidence and legal argument put forward by the complaining party in relation to each of the elements of a claim.<sup>92</sup> Before the Panel, the United States limited its arguments and evidence under Article 5.6 of the SPS Agreement to countries notifying LPNAI and did not include the application of S.O. 1663(E) in respect of countries notifying HPNAI. Thus, the Panel could not have concluded that India's AI measures, which include import restrictions on account of occurrence of HPNAI and LPNAI, are inconsistent with Article 5.6 of the SPS Agreement. Moreover, since the United States never explicitly made arguments and presented evidence with respect to the application of S.O. 1663(E) on account of countries notifying HPNAI, India argues that it never had an opportunity to defend itself on this issue.<sup>93</sup>

2.37. India disagrees with the Panel's statement that the United States expressly clarified the scope of its claim under Article 5.6.<sup>94</sup> The United States' statement mentioned by the Panel refers only to products and not to diseases. For India, the latter omission shows that the United States did intend to limit its Article 5.6 claim in respect of LPNAI. Moreover, the statement by the United States was made in the context of Article 3 of the SPS Agreement, not Article 5.6, and does not present any argument or evidence with respect to HPNAI pursuant to its claim under Article 5.6 of the SPS Agreement. For the foregoing reasons, India submits that the Panel did not make an objective assessment of the matter as required by Article 11 of the DSU.

2.38. India also maintains that the United States failed to present a *prima facie* case under Article 5.6 of the SPS Agreement. In order to discharge its burden of proof under Article 5.6, a complainant must establish that the proposed alternative measure fulfils the ALOP of the respondent country. In doing so, the complaining party must first identify the measure that reflects the ALOP as sought by the responding country. Only once the correct measure is identified can a complaining party then propose an alternative measure offering a similar ALOP, and thereby discharge its burden of proof. If the complaining party identifies an incorrect measure, the ALOP reflected in the incorrect measure would not be the ALOP as sought by the respondent country. Thus, in such circumstances, the alternative measure would not be able to fulfil the ALOP of the respondent country.

2.39. India submits that it is accepted jurisprudence that the ALOP has to be discerned from the measure at issue.<sup>95</sup> Thus, in the present case, any alternative measure has to fulfil the ALOP as reflected in the measure at issue, i.e. S.O. 1663(E). However, according to India, the United States identified India's ALOP based on India's domestic control measures, instead of on the basis of the measure at issue. Therefore, the United States failed to fulfil its burden of proof under Article 5.6. India further considers that, if the United States' position were to be accepted, the United States would be able to determine India's ALOP, which would be contrary to the principle that a country has a right to determine its own ALOP.<sup>96</sup> Consequently, India submits that the United States failed to make a *prima facie* case that its alternative measure is able to fulfil India's ALOP.

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<sup>92</sup> India's appellant's submission, para. 256 (referring to Appellate Body Report, *US – Gambling*, paras. 138 and 140).

<sup>93</sup> India's appellant's submission, paras. 257-258 (referring to Appellate Body Report, *Chile – Price Band System*, para. 164).

<sup>94</sup> India's appellant's submission, para. 261 (referring to Panel Report, para. 7.516).

<sup>95</sup> India's appellant's submission, para. 266 (referring to Appellate Body Report, *Australia – Salmon*, paras. 190-191, 197, and 207).

<sup>96</sup> India's appellant's submission, para. 267 (referring to Appellate Body Reports, *Australia – Salmon*, para. 199; and *US/Canada – Continued Suspension*, para. 523).

2.40. India further argues that the Panel also erred under Article 11 of the DSU by failing to analyse India's defence under Article 5.6 of the SPS Agreement. In particular, the Panel disregarded India's argument that the United States' claim under Article 5.6 is inadequate as the alternative measure that it proposed is based on the ALOP reflected in India's domestic control measures instead of being based on the ALOP reflected in the measure at issue. This was a critical defence for India in respect of the claim under Article 5.6. In the light of Appellate Body jurisprudence indicating that a panel should not disregard evidence that is relevant to the case of one of the parties, the Panel's dismissal of India's defence without providing any reasons shows that the Panel acted inconsistently with Article 11 of the DSU.

2.41. Finally, India argues that the Panel erred under Article 5.6 of the SPS Agreement by not identifying the proposed alternative measure with precision. According to India, the Panel's comparison of the level of protection reflected in the alternative measure, as proposed by the United States, with India's ALOP is "highly inadequate" and constitutes legal error.<sup>97</sup> India notes that the United States' challenge covers all the products within S.O. 1663(E) and that the OIE Code – the alternative measure – covers several product-specific recommendations for both NAI as well as HPNAI. Since the product-specific recommendations in the OIE Code address different risks, they are designed to prevent the introduction of the disease in question into the importing country. Since the United States' claim was limited to LPNAI, "the Panel should have identified the product specific recommendations in the OIE Code for the corresponding product in question and the applicability of the same in the event of the occurrence of HPNAI or NAI."<sup>98</sup> Although the United States and the Panel identified two product-specific recommendations in the OIE Code that could be applied upon occurrence of HPNAI, they did not identify the product-specific recommendations in the OIE Code which could be applied upon occurrence of LPNAI. For example, with respect to eggs for human consumption, neither the United States nor the Panel specified the appropriate OIE recommendation that should be applied by India. India further emphasizes that, for other products covered by S.O. 1663(E), neither the United States nor the Panel identified the corresponding product-specific recommendations in the OIE Code and their applicability in the event of the occurrence of HPNAI or NAI.

2.42. For the foregoing reasons, India considers that the Panel incorrectly concluded that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement and, consequently, with Article 2.2 of the SPS Agreement. Since the United States thus failed to establish one of the three factors in Article 5.6, the United States' claim under Article 5.6 of the SPS Agreement cannot be sustained and the Panel's findings must be reversed. India, therefore, requests the Appellate Body to complete the legal analysis and conclude that India's AI measures are consistent with Article 5.6 of the SPS Agreement and, consequently, with Article 2.2 of the SPS Agreement.

### **2.1.5 Article 2.3 of the SPS Agreement**

2.43. India alleges that the Panel acted inconsistently with Article 11 of the DSU and erred in certain aspects of its assessment of the United States' claim under Article 2.3, first sentence, of the SPS Agreement. India challenges, in particular, the Panel's consultations with the individual experts on the AI surveillance regime with particular respect to India's domestic measures and disease situation, and the Panel's findings based on the testimony of such experts. India requests the Appellate Body to reverse the Panel's findings that there is insufficient evidence on the record to support a finding that LPNAI is exotic to India, as well as its ultimate finding that India's AI measures are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily and unjustifiably discriminate between Members where identical or similar conditions prevail, and are applied in a manner that constitutes a disguised restriction on international trade.

2.44. India first alleges that, because the "terms of reference" of the Panel's consultations with the individual experts went beyond the scope of the OIE Code, the Panel acted inconsistently with Article 11 of the DSU. Recalling that the OIE Code is the relevant international standard for purposes of this dispute, India points out that Article 1.6.1 of Chapter 1.6 of the OIE Code identifies six diseases in respect of which the OIE may officially recognize that a country, zone, or compartment is free from such disease, once a country has submitted prescribed documentary evidence for evaluation by the OIE. By contrast, this procedure is not applicable in respect of other OIE-listed diseases, including AI. Thus, India submits that a country claiming to be free from NAI

<sup>97</sup> India's appellant's submission, para. 273.

<sup>98</sup> India's appellant's submission, para. 276.

is not subject to any technical or scientific evaluation by the OIE, or any scrutiny by experts who are not officially part of the OIE. By requiring the individual experts in these proceedings to assess and review the evidence submitted by India to support its claim that it is free from LPNAI, the Panel put AI on the same pedestal as the six listed diseases in respect of which the OIE may officially recognize disease-free status. This is inconsistent with Chapter 1.6 of the OIE Code, which only requires the assessment of evidence as submitted by member countries with respect to six OIE-listed diseases, excluding AI. India points out that it had expressed concerns to the Panel regarding the propriety of consulting the individual experts on these issues, but that the Panel did not acknowledge and, in fact, "discarded" India's submissions in this respect, thereby acting inconsistently with Article 11 of the DSU.<sup>99</sup>

2.45. Second, India asserts that the Panel's questions to the experts erroneously shifted to India the burden of proving that LPNAI is exotic to India, rather than properly requiring the United States to bear the burden of proving that LPNAI is present in India. The Panel should have asked the experts to opine first on whether the evidence submitted by the United States supported its allegations, and only then could it have asked the experts to assess India's evidence. The Panel, however, ruled that the burden of establishing that LPNAI is exotic to India was on India. As a result of the Panel's approach, the United States' arguments and evidence on this issue were "not ... evaluated at all", notwithstanding that it was clear that the United States had failed to present a *prima facie* case.<sup>100</sup> Moreover, since the OIE Code requires countries to report any occurrence of LPNAI, the fact that India had never reported an occurrence of LPNAI to the OIE should have been sufficient for the Panel to conclude that LPNAI is exotic to India. India claims that, by wrongly allocating the burden of proof to India in this manner, the Panel acted inconsistently with Article 11 of the DSU.

2.46. Finally, India submits that the questions posed by the Panel to the individual experts improperly delegated to those experts the factual determination of whether LPNAI is exotic to India. This is contrary to Article 11 of the DSU, which requires that an objective assessment of the facts must be made by a panel and cannot be delegated to experts.<sup>101</sup> For the foregoing reasons, India seeks reversal of the Panel's findings based on the testimony provided by the individual experts.

## 2.2 Arguments of the United States – Appellee

### 2.2.1 Articles 2.2, 5.1, and 5.2 of the SPS Agreement

2.47. The United States requests the Appellate Body to uphold the Panel's findings under Articles 2.2, 5.1, and 5.2 of the SPS Agreement. In its view, India has failed to establish that the Panel erred in reaching these findings. As a preliminary matter, the United States notes that claims of error under Article 11 of the DSU and claims relating to errors in interpreting or applying provisions are distinct and should not be pleaded in the alternative as India does on appeal.<sup>102</sup> India's claims that the Panel failed to make an objective assessment by disregarding India's arguments and evidence do not, in fact, relate to the objectivity of the Panel's assessment but, rather, to an alleged error on the part of the Panel in interpreting and applying Article 2.2. That is, India believes that, properly interpreted and applied, Article 2.2 permits India to demonstrate an independent basis for its measures. It follows that India has erred in claiming a breach of Article 11 and its appeal can be rejected on this basis. The United States adds that, although the Panel's findings are consistent with previous findings by panels and the Appellate Body, India claims, without any authority, that the Panel's findings are legally incorrect because they do not allow India independently to establish that its measures are consistent with Article 2.2. India's argument that, if a measure is consistent with Article 2.2, it cannot breach Articles 5.1 and 5.2, "cannot be reconciled with the obligation to base an SPS measure on a risk assessment – that is,

<sup>99</sup> India's appellant's submission, para. 296.

<sup>100</sup> India's appellant's submission, para. 302.

<sup>101</sup> India's appellant's submission, para. 306 (referring to Appellate Body Reports, *India – Quantitative Restrictions*, para. 149; and *Australia – Apples*, para. 384).

<sup>102</sup> United States' appellee's submission, para. 34 (referring to Appellate Body Reports, *China – Rare Earths*, para. 5.173).

to ensure that the measure is rationally related to the scientific evidence underlying the assessment of risks".<sup>103</sup>

2.48. The United States argues that the Panel's findings are consistent with the plain meaning of Articles 2.2, 5.1, and 5.2 of the SPS Agreement, which confirms that Article 2.2 is a general obligation that encompasses the obligations in Articles 5.1 and 5.2, and that there is no basis to India's claim that compliance with Article 2.2 obviates the need to comply with the risk assessment obligations in Articles 5.1 and 5.2. Thus, while the texts of Articles 2.2, 5.1, and 5.2 are interrelated, Article 2.2 is broader and more general in character, such that Articles 5.1 and 5.2 constitute specific applications of Article 2.2, but do not encompass all situations where Article 2.2 might apply. The United States also highlights that the Panel's findings challenged by India, in paragraphs 7.282 and 7.331 of the Panel Report, are consistent with and "closely track" the analysis in previous panel and Appellate Body reports.<sup>104</sup> The United States maintains that none of India's arguments that Article 2.2 should be interpreted to preclude consideration of whether Articles 5.1 and 5.2 were breached is supported by the text of these provisions or by WTO jurisprudence.<sup>105</sup>

2.49. The United States takes issue with India's argument that its interpretation of Article 2.2 is warranted because the United States brought an independent claim under Article 2.2 of the SPS Agreement.<sup>106</sup> This argument is a *non sequitur* because the United States brought both consequential and independent claims under Article 2.2. There is nothing in the text of Articles 2.2, 5.1, and 5.2 that suggests that, when a party asserts that Article 2.2 has been violated consequentially as a result of violating Articles 5.1 and 5.2 and also for another independent reason, then "the former [consequential] claims are converted into subsidiary claims dependent for their success on the latter [independent] claim."<sup>107</sup> Article 2.2 does not preclude multiple bases for breaching that obligation, and the fact that the United States also advanced an independent claim cannot change the fact that India's measures are inconsistent with Articles 5.1 and 5.2 and that, as a consequence, India breached Article 2.2.

2.50. The United States also asserts that India's contention that the Panel improperly "conflated" Articles 2.2 and 5.1 "lacks any basis in the record or logic".<sup>108</sup> The Panel did not render these provisions redundant but, instead, correctly recognized that Article 2.2 could be breached even in the absence of a breach of Articles 5.1 and 5.2. Moreover, the WTO jurisprudence cited by India actually supports the United States' position concerning the relationship between Articles 5.1, 5.2, and 2.2, and the Panel's finding that a failure to base measures on a risk assessment under Articles 5.1 and 5.2 creates a presumption that Article 2.2 has been breached.<sup>109</sup> There is also no basis in the DSU for India's argument that, because it based its defence under Article 2.2, the relevant text before the Panel was Article 2.2, and not Article 5.1. Pointing out that Article 7 of the DSU required the Panel to examine the matter set out in the panel request in the light of the provisions cited by the parties to the dispute, the United States asserts that the Panel correctly considered all those provisions.

2.51. Turning to India's claims of error under Article 11 of DSU, the United States recalls the Panel's findings that India breached Articles 5.1 and 5.2 by failing to base its measures on a risk assessment, and that this failure means that India's measures can also be presumed to breach Article 2.2.<sup>110</sup> Because the Panel findings at issue, including with respect to Article 2.2, concern whether India's measures are based on a risk assessment, the United States submits that a

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<sup>103</sup> United States' appellee's submission, para. 35.

<sup>104</sup> United States' appellee's submission, para. 39 (referring to Appellate Body Reports, *EC – Hormones*, para. 180; *Australia – Salmon*, para. 138; *US/Canada – Continued Suspension*, para. 674; *Australia – Apples*, para. 340; and *Japan – Agricultural Products II*, para. 82).

<sup>105</sup> United States' appellee's submission, para. 40 (referring to Appellate Body Report, *Australia – Apples*, para. 340).

<sup>106</sup> United States' appellee's submission, para. 41 (referring to India's appellant's submission, paras. 20-21).

<sup>107</sup> United States' appellee's submission, para. 42.

<sup>108</sup> United States' appellee's submission, para. 43.

<sup>109</sup> United States' appellee's submission, para. 44 (referring to India's appellant's submission, paras. 22-24; Appellate Body Reports, *Japan – Agricultural Products II*, para. 82; *EC – Hormones*, paras. 179-180 and 250; and Panel Report, *US – Poultry (China)*).

<sup>110</sup> United States' appellee's submission, paras. 47-48 (referring to Panel Report, paras. 7.302, 7.318-7.319, and 7.331-7.332).

threshold question in examining India's claims of error under Article 11 of the DSU is whether India has cited any evidence it brought to the Panel's attention indicating that its measures were, in fact, based on a risk assessment.

2.52. With respect to India's argument concerning the scientific studies and practice of other countries, the United States submits that India fails to explain how these are relevant to the question of whether India's measures are based on a risk assessment. Contrary to India's claim of error, the Panel acknowledged that India had invoked the scientific studies it cited as an argument. India, however, failed to establish the relevance of these studies to the issue of whether India's measures are based on a risk assessment, and did not explain how these studies constitute a risk assessment. The United States disputes that these studies even suggest the type of risk India alleges. As explained by the Appellate Body, the obligation to conduct a risk assessment is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of a measure, but must be sufficiently specific to the case at hand.<sup>111</sup> Here, India has not explained the relationship between its measures and these studies. Similarly, India's reliance on the Australian risk assessment is irrelevant to the inquiry under Article 5.1 as India does not claim that its measures are based on this risk assessment, or argue that its AI measures are the same as the Australian measures supported by the Australian risk assessment. In addition, the practice of other countries is not relevant to an assessment of the consistency of India's AI measures with its obligations under the SPS Agreement. Finally, the United States argues that India has not explained why any of the evidence cited by it is relevant to the obligation under Article 2.2, as it does not tie the purported pieces of evidence it references to the measures it maintains. Instead, according to the United States, the evidence India cites, such as the Australian risk assessment, in fact, suggests that India's measures are maintained without sufficient scientific evidence.

2.53. Next, the United States addresses India's argument that the Panel acted inconsistently with Article 11 of the DSU, by failing to recognize that the United States' claim under Article 2.2 of the SPS Agreement was limited to poultry meat and eggs. India's claim is without merit for four reasons. First, the Panel found a breach of Article 2.2 as a consequential breach of Article 5.1 and, therefore, it did not go on to address the independent claim put forth by the United States under Article 2.2. Second, the purported limitation on product scope asserted by India does not exist because, with respect to the risk assessment claims at issue, the United States argued that India failed to base its AI measures on a risk assessment with respect to all products subject to the measures. Given that the Panel's findings under Articles 5.1 and 5.2 are with respect to all products subject to the measures, the United States submits that the consequential breach of Article 2.2 "extends likewise".<sup>112</sup> Third, India cites no authority for the notion that, when a party brings one claim that is more limited in scope, then all other claims must likewise be so limited. Finally, India does not appeal the Panel's preliminary ruling, wherein the Panel rejected India's argument that the listing of products in the panel request rendered that request vague. WTO dispute settlement is about assessing the consistency of a specific measure against the covered agreements, not particular products. Since the United States established that India's AI measures are inconsistent with Articles 5.1, 5.2, and 2.2, all the products that are covered by the measures are within the scope of this dispute.<sup>113</sup>

2.54. The United States next responds to India's claim that the Panel, in its analysis under Articles 5.1 and 5.2 of the SPS Agreement, acted inconsistently with Article 11 of the DSU by misrepresenting India's position that India is not required to conduct a risk assessment because its measures conform to international standards. Referring to the Panel statement in question, the United States notes that India does not claim that the Panel's quotation of India's submission is incorrect but, instead, appears to be taking issue with the fact that the Panel did not reproduce India's arguments repeatedly throughout its analysis.<sup>114</sup> There is no requirement under Article 11 of the DSU that a panel restate a party's arguments in full each time they are referenced, and, as a result, India has presented no basis for a claim under Article 11.

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<sup>111</sup> United States' appellee's submission, para. 53 (referring to Appellate Body Reports, *EC – Hormones*, para. 200; and *Japan – Apples*, paras. 202-203).

<sup>112</sup> United States' appellee's submission, para. 60 (referring to India's appellant's submission, para. 57).

<sup>113</sup> United States' appellee's submission, para. 62 (referring to Preliminary Ruling, para. 3.92).

<sup>114</sup> United States' appellee's submission, para. 63 (referring to India's appellant's submission, paras. 59-60; and Panel Report, para. 7.312).

2.55. Finally, in response to India's request to complete the legal analysis and to find that India's AI measures are consistent with Article 2.2, the United States asserts that such a finding is not related to the Article 2.2 breaches found by the Panel in this dispute as a consequence of the breaches of Articles 5.1, 5.2, and 5.6 of the SPS Agreement. Rather, India's request goes to the United States' independent claim under Article 2.2, which was not addressed in the Panel Report. If India does not prevail in its claims of error with respect to the Panel's findings under Articles 5.1, 5.2, and 5.6, the Article 2.2 findings will stand. On the other hand, if the Panel's findings under Articles 5.1, 5.2, and 5.6 are reversed, the consequential findings under Article 2.2 would also be reversed. In either circumstance, an additional finding on the United States' independent claim under Article 2.2 would not be necessary to resolve the dispute. The United States also submits that, were the Panel's Article 2.2 findings based on the inconsistencies with Articles 5.1 and 5.2 to be reversed, then completion of the legal analysis would assist in resolving the dispute, had the United States requested it. The United States notes, however, that it is not requesting the Appellate Body to complete the legal analysis. While reiterating its view that India's AI measures are maintained without sufficient scientific evidence in breach of Article 2.2, the United States observes that it is not certain that the Panel examined the scientific evidence in question or made the factual findings necessary to reach a legal conclusion on the United States' independent claim under Article 2.2 of the SPS Agreement.

### **2.2.2 Articles 3.1 and 3.2 of the SPS Agreement**

2.56. The United States requests the Appellate Body to uphold the Panel's findings that India's AI measures are inconsistent with Articles 3.1 and 3.2 of the SPS Agreement. For the United States, the Panel's consultation with the OIE was permissible and consistent with the SPS Agreement and the DSU. The Panel did not delegate its responsibilities to the OIE but, rather, carefully examined and assessed the text of the OIE Code and reached correct conclusions regarding its content. India's challenges under Article 11 of the DSU are without merit and do not call into question the Panel's objectivity. The United States adds that there is no need to complete the legal analysis because the Panel's findings are correct and, in any event, India has not established that there are sufficient undisputed facts on the record in order for the legal analysis to be completed in the manner it seeks.

2.57. Regarding India's claim under Article 11.2 of the SPS Agreement and Article 13.2 of the DSU, the United States argues that both provisions afford considerable discretion to a panel to seek relevant information. Article 13.2 of the DSU provides that a panel may seek information from any relevant source, and Article 11.2 of the SPS Agreement provides that, where a dispute involves scientific and technical issues, panels may seek advice, including from a relevant international organization. The present dispute certainly involves scientific and technical issues regarding appropriate AI control measures, and the OIE is clearly a relevant international organization on these matters. In addition, the authority of a panel under Article 13.2 of the DSU is not limited in an SPS dispute by Article 11.2 of the SPS Agreement, and a panel in an SPS dispute, therefore, does not commit error by posing questions relating to issues other than scientific and technical issues. Once a dispute involves scientific or technical issues and the terms of Article 11.2 are met, that provision encourages seeking advice, and does not limit the information a panel may seek generally, or from an international organization.

2.58. The United States also rejects India's contentions that the OIE Code is a treaty, that its interpretation must be governed by the customary rules of interpretation of public international law reflected in the Vienna Convention, and that it would be improper to ask an international organization any questions regarding the legal interpretation of a treaty. India has not explained why it considers that the OIE Code is a treaty. In the United States' view, the OIE Code is an instrument promulgated by an international organization and is not a treaty. India also has not established why the covered agreements would prevent a panel from seeking advice on the proper interpretation of a treaty, or identified how the initial act of seeking such advice would be inconsistent with any provision of the covered agreements. According to the United States, the Panel did exactly what Article 11.2 of the SPS Agreement suggests in seeking legal and technical advice from the OIE, including with respect to the proper interpretation of the standard promulgated by the OIE.

2.59. The United States points out that the Appellate Body has found that determining the existence and content of international standards are questions of fact, not questions of law.<sup>115</sup> The United States agrees that the interpretation of a standard such as the OIE Code is inherently a factual query. This is consistent with how the drafters of the SPS Agreement understood international standards, namely, as scientifically based recommendations. International standards are not the result of a political negotiation but a synthesis of scientific awareness, which means that understanding these standards requires a factual rather than legal understanding. In addition, the evidence on the Panel record confirms an understanding of the OIE Code as consisting of scientific recommendations. The OIE Code is a technical document as opposed to an agreement in which States negotiate their respective rights and obligations. In this dispute, India initially made no reference to the Vienna Convention but, instead, cited multiple reports from the OIE Terrestrial Animal Health Standards Commission to argue in favour of its interpretation of the OIE Code. The United States adds that only after it became apparent that the Panel might request technical assistance from the OIE did India argue that the Vienna Convention governed the OIE Code, and on this basis argued that there was no need to consult with the OIE.<sup>116</sup> The United States, thus, characterizes as "erroneous, *ab initio*", the foundation upon which India's arguments are built, namely, that the examination of a legal standard is exclusively a legal exercise to be performed by a panel.<sup>117</sup>

2.60. The United States also considers that India has not demonstrated that the Panel acted inconsistently with Article 3.2 of the DSU by not interpreting the OIE Code in accordance with the customary rules of interpretation of public international law. According to the United States, India has not explained why interpreting the OIE Code in accordance with the customary rules would result in any different outcome than what the Panel found. Under Article 3.2 of the DSU, the customary rules of interpretation apply to interpreting the covered agreements, which do not include the OIE Code. Moreover, the text of Article 3.2 does not itself impose an obligation that can be breached for failure to apply the customary rules of interpretation of public international law. Rather, an adjudicative body may err in its interpretation of a provision of the covered agreements if it fails to read that provision in accordance with the customary rules. Thus, the error would be one of interpretation of a substantive provision, not a procedural breach of the interpretive approach reflected in Article 3.2. In addition, contrary to India's assertion, the OIE Code is not context for an interpretation of the SPS Agreement in accordance with the Vienna Convention. The United States points out that, although context may include agreements made by parties to a treaty in connection with the conclusion of that treaty, the relevant version of the OIE Code was concluded in 2013, and thus it was not part of the conclusion of the Uruguay Round Agreements.

2.61. With respect to India's claims under Article 11 of the DSU, the United States maintains that these claims ignore the "clarity of the evidence" that was before the Panel.<sup>118</sup> As the United States explained before the Panel, where a measure has a form and operation wholly disparate from, and contradictory to, an international standard, the measure cannot be said to be based upon that standard. This was the crux of the United States' challenge to India's measures under Article 3.1 of the SPS Agreement, and was fully supported by the Panel's findings. The Panel correctly framed the question before it by asking whether India's measures are so divergent from the OIE Code that they are not based upon it, or whether India was correct in arguing that its AI measures conform to the OIE Code. The United States highlights three particular findings of the Panel. First, the Panel found that Article 10.4.1.10 of the OIE Code does not envisage the imposition of an import prohibition with respect to poultry products. Second, the Panel concluded, on the basis of its review of the product-specific recommendations in the OIE Code, that Chapter 10.4 of the OIE Code does not envisage, either explicitly or implicitly, the imposition of import prohibitions with respect to poultry products. Third, the Panel found that the recommendations of Chapter 10.4 of the OIE Code are not only intended for country-wide purposes, but could also be applied on the

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<sup>115</sup> United States' appellee's submission, para. 82 (referring to Appellate Body Report, *EC – Hormones*, para. 132).

<sup>116</sup> United States' appellee's submission, para. 86 (referring to India's letter to the Panel dated 11 July 2013).

<sup>117</sup> United States' appellee's submission, para. 87.

<sup>118</sup> United States' appellee's submission, para. 91.

basis of zones and compartments. Each of these findings, the United States maintains, was made on the basis of the Panel's scrutiny of the text of the OIE Code.<sup>119</sup>

2.62. In response to India's claim that the Panel improperly delegated its judicial function to the OIE in a manner inconsistent with its duties under Article 11 of the DSU, the United States restates its view that the Panel's consultation with the OIE is within the bounds of Article 11.2 of the SPS Agreement, which explicitly encourages a panel, in a dispute involving scientific and technical issues, to obtain views from relevant international organizations. It is plain from its Report that the Panel fully engaged with all the evidence on the record, including the text of the OIE Code itself, in reaching its own conclusions. In addition, there is nothing wrong with the fact that the Panel's discussion references the OIE's comments, and India has not explained why the Panel should not have done so. India's reliance on the Appellate Body report in *India – Quantitative Restrictions* is unavailing since, in this dispute, the Panel did not "simply accept" the views of the OIE.<sup>120</sup> Finally, the United States asserts that India fails to meet the high standard for establishing a valid Article 11 claim of error, and has not identified which, if any, alleged inconsistencies there are with respect to the OIE's answers to the Panel's questions, or how these affected the objectivity of the Panel's assessment.

2.63. The United States also disputes India's claim that the Panel acted in a manner inconsistent with Article 11 of the DSU by disregarding certain evidence and observes that the evidence in question was irrelevant to the Panel's assessment of India's AI measures. With respect to India's allegation that the Panel ignored the practice of other countries with respect to AI control measures, the measures adopted by other countries do not necessarily reflect their view of the OIE Code. India's argument ignores that other WTO Member's control measures may be based on a risk assessment justifying a departure from OIE Code recommendations, and that some Members may have an incorrect view of the OIE Code and may, therefore, have adopted WTO-inconsistent measures. Noting India's reference to Australia's practice, the United States points to Australia's disagreement with how India interpreted its documents and measures. According to the United States, India is not in a position to speak for Australia, the Panel was not in a position to adjudicate the merits of Australia's measures, and there is no reason why Australia's views regarding the OIE Code are dispositive. In addition, India does not claim that it maintains the same practices or measures that Australia does. The United States observes that the Panel's task was to determine the consistency of India's measures, not to make determinations with respect to other Member's measures.

2.64. The United States also responds to India's argument that the United States impliedly recognized that trade restrictions could be imposed by bringing a claim under Article 6 of the SPS Agreement. According to India, the reason the United States is putting its regionalization claim is because it recognizes that import prohibitions are proper but wants them applied in a regionalized fashion. This argument "has no basis in logic", and ignores the Panel's finding that the OIE Code provides that the product-specific recommendations can be applied on a zone or compartment basis.<sup>121</sup>

2.65. Finally, the United States contests India's claim under Article 11 of the DSU that the Panel's findings are not supported by evidence. The Panel's conclusion is supported by evidence including, most importantly, the plain text of the OIE Code itself. The United States further notes that, in its submissions, the United States provided additional information that directly touched upon the OIE Code, such as the User's Guide to the OIE Code, reports of the OIE, scholarly articles, and statements by OIE officials.<sup>122</sup> India's argument focuses on three pieces of evidence on the Panel record, none of which undermine the Panel's findings on the proper meaning of the OIE Code.

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<sup>119</sup> United States' appellee's submission, paras. 95-97 (referring to Panel Report, paras. 7.239, 7.251-7.253, and 7.258-7.259).

<sup>120</sup> United States' appellee's submission, para. 101 (quoting Appellate Body Report, *India – Quantitative Restrictions*, para. 149).

<sup>121</sup> United States' appellee's submission, para. 106 (referring to Panel Report, para. 7.263).

<sup>122</sup> United States' appellee's submission, para. 110 (referring to e.g. User's Guide to the OIE Code (Panel Exhibit US-117); *Report of the Meeting of the OIE Terrestrial Animal Health Standards Commission* (February 2010) (Panel Exhibit US-123); D.E. Swayne and B.L. Akey, "Avian influenza control strategies in the United States of America", in R.S. Schrijver and G. Koch (eds.), *Avian Influenza – Prevention and Control* (Springer, 2005), chapter 13 (Panel Exhibit US-48); and statements by OIE officials contained in document G/SPS/R/46, Committee on Sanitary and Phytosanitary Measures, Note by the Secretariat, Summary of the Meeting of 18-19 October 2007 (Panel Exhibit US-119)).



India argues that a letter from a US official requesting India to reconsider its measures establishes the opinion of the United States that the OIE Code warrants import prohibitions for a period of three months after an outbreak of NAI.<sup>123</sup> The United States does not agree with how India is reading the documents but, in any event, maintains that a request to allow a trade accommodation does not suggest that a Member is asserting a particular interpretation of either the OIE Code or the WTO Agreement.

2.66. As for the various US exhibits that, according to India, discuss the purported legitimacy of import barriers on account of HPAI, the United States argues that these documents are not inconsistent with the United States' position or the Panel's findings regarding the OIE Code. Although countries are entitled to control for both HPAI and LPAI, the issue is whether an import prohibition on all products, rather than less-restrictive control measures, can be based on the OIE Code. The OIE Code provides that there are less-restrictive measures than an across-the-board ban on all products to ensure safe trade. In addition, the United States maintains that India has not shown that any of these exhibits go to the interpretation of the OIE Code.

2.67. The United States also addresses India's argument that the Panel's conclusion is contradicted by the OIE's interpretation of the OIE Code. India asserts that the OIE stated that, if a country cannot fulfil the requirements of Article 10.4.19 because it is not HPNAI free, then it could export processed products pursuant to Article 10.4.20. According to the United States, India uses this statement to jump to the conclusion that a country would face trade restrictions if the requirement of HPNAI freedom is not fulfilled. The United States considers that this conclusion is unwarranted because neither the OIE Code provision, nor the OIE in its advice to the Panel, supports India's position. The OIE Code provides that trade in the relevant products conducted in accordance with the methods in the OIE recommendations is safe according to the relevant science. In the United States' view, that is not the same as saying that the OIE is recommending the imposition of import prohibitions.

### 2.2.3 Article 6 of the SPS Agreement

2.68. The United States asserts that India's claims that the Panel both committed legal errors under Article 6 of the SPS Agreement and breached its obligations under Article 11 of the DSU lack merit, and should be rejected by the Appellate Body. According to the United States, the Panel correctly analysed its claims under Article 6 of the SPS Agreement, and properly concluded that India does not recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Moreover, nothing about the Panel's handling of the evidence was contrary to its obligation under Article 11 of the DSU to make an objective assessment of the matter, and the Panel correctly concluded that a request for recognition of a specific area under Article 6.3 is not a prerequisite to the existence of obligations under Article 6.1 of the SPS Agreement. The United States requests the Appellate Body to uphold the Panel's findings that India's AI measures are inconsistent with Articles 6.1 and 6.2 of the SPS Agreement.

2.69. The United States submits that India's argument that the Panel erred under Article 6.2 of the SPS Agreement by basing its conclusion on S.O. 1663(E) is without merit, as it rests on a misunderstanding of Article 6.2 and of the Panel's findings. India has not challenged the Panel's findings that the format of the recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence will depend on the circumstances of each particular case, and that, in order to comply with Article 6.2, an SPS measure must at a minimum not deny or contradict the recognition of the concepts of such areas when these concepts are relevant with respect to the disease at issue. The Panel found that the text of S.O. 1663(E) – which explicitly requires the application of import bans on a country-wide basis – serves as a strong indication that India does not recognize the concept of disease-free areas, before turning to consider India's assertion that, notwithstanding this text, India does recognize the concept of disease-free areas. The Panel found no evidence to support this assertion. The United States highlights that, specifically with respect to India's arguments regarding the Livestock Act, the Panel noted that, while this instrument provides broad discretion that the Indian Government could use in the future, it does not in any way reflect that India *has recognized* disease-free areas.

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<sup>123</sup> United States' appellee's submission, para. 112 (referring to India's appellant's submission, paras. 126-127, in turn referring to Letter dated 20 October 2009 from M. Gilkey (Director, APHIS) to A. Kaushal (Joint Secretary, DAHD) regarding "S.O. 2208(E) Notification published in the Gazette of India on August 28, 2009" (Panel Exhibit US-141), p. 3).

2.70. According to the United States, India's position that the content of S.O. 1663(E) is irrelevant to the analysis under Article 6.2 in the light of the Livestock Act appears to be premised on two elements: (i) the Livestock Act is the underlying legislation providing India's Central Government the ability to regulate livestock imports, while S.O. 1663(E) implements the task of regulating livestock imports into India; and (ii) the Panel did not find that Article 6.2 requires a Member to implement the concept of disease-free areas in its domestic measures.<sup>124</sup> In the United States' view, India's reasoning is "illogical".<sup>125</sup> The United States highlights that S.O. 1663(E) is clearly a measure at issue in this dispute and that, "as the Panel found, 'by imposing a prohibition on a country-wide basis, [S.O. 1663(E)] contradicts the requirement to recognize the concept of disease-free areas and areas of low disease prevalence.'"<sup>126</sup>

2.71. Moreover, the United States asserts that India confuses the idea of recognizing the concept of disease-free areas with having the capacity to do so in the future. In particular, India seems to equate the Panel's correct discussion of the need to examine the particular situation regarding the format of recognition with a conclusion that "India is not required to implement the concept domestically" in the absence of a request compliant with Article 6.3.<sup>127</sup> India also tries to equate implementing the concept with recognizing the concept. The United States contends that, contrary to India's argument, the Panel left no doubt that there is a distinction between recognizing specific disease-free areas and recognizing *the concept* of disease-free areas, and that Article 6.2 requires, not just a *capacity* to recognize *the concept* of disease-free areas, but actual recognition of the concepts.<sup>128</sup> Thus, to the United States, the Panel's conclusion that India has not *recognized the concept* of disease-free areas reflects a correct understanding of Article 6 of the SPS Agreement.

2.72. The United States also disagrees with India's argument that the Panel made findings on a claim different from the one brought by the United States. The Panel did not conclude that India breached Article 6.2 on account of the "non-implementation" of the concepts of disease-free areas or areas of low disease prevalence. Rather, the Panel found that India had breached the first sentence of Article 6.2 because it did not recognize "the *concept* of disease-free areas and areas of low disease prevalence with respect to AI".<sup>129</sup> The Panel then concluded that India had breached the second sentence of Article 6.2 and also the first and second sentences of Article 6.1. According to the United States, the Panel, thus, did not base its conclusions with respect to the claims under Article 6 on India's failure to "implement" anything. Instead, the Panel's conclusions were based on India's failure to recognize the concepts of disease-free areas and areas of low disease prevalence with respect to AI, which was precisely the claim brought by the United States.

2.73. In addition, the United States rejects India's argument that the Panel acted inconsistently with Article 11 of the DSU by allegedly disregarding a statement in Panel Exhibit IND-121 that, according to India, constitutes evidence of its compliance with the first sentence of Article 6.2 of the SPS Agreement. India has not established that this evidence was so material to its case that the Panel was required to deal more explicitly with it. Furthermore, Panel Exhibit IND-121 does not support India's position. The United States asserts that this is underscored by that text's broader context, including the remainder of Panel Exhibit IND-121 and the broader exchange of which it forms part.

2.74. The United States submits that the Panel was "clearly aware" of Panel Exhibit IND-121 when it concluded that, "[i]n the absence of any substantiating evidence to support [India's] assertion [that it did recognize the concept of disease-free areas], we are unable to overcome the clear and unequivocal language to the contrary as reflected on the face of a measure at issue (that is, S.O. 1663(E))."<sup>130</sup> Indeed, footnotes to the paragraph of the Panel Report immediately following that conclusion, and two paragraphs preceding it, explicitly reference Panel Exhibit IND-121.<sup>131</sup> The Appellate Body has found that the weighing of evidence is within the discretion of the panel,

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<sup>124</sup> United States' appellee's submission, para. 169 (referring to India's appellant's submission, paras. 213 and 218).

<sup>125</sup> United States' appellee's submission, para. 169.

<sup>126</sup> United States' appellee's submission, para. 169 (quoting Panel Report, para. 7.702).

<sup>127</sup> United States' appellee's submission, para. 170 (quoting India's appellant's submission, para. 219).

<sup>128</sup> United States' appellee's submission, para. 170 (referring to Panel Report, paras. 7.670-7.677 and 7.698-7.706).

<sup>129</sup> United States' appellee's submission, para. 173 (quoting Panel Report, para. 7.706).

<sup>130</sup> United States' appellee's submission, para. 176 (quoting Panel Report, para. 7.703).

<sup>131</sup> United States' appellee's submission, para. 176 (referring to Panel Report, fn 1219 to para. 7.701, and fn 1221 to para. 7.704).

and that it is not an error under Article 11 of the DSU for a panel to fail to accord to the evidence the weight that one of the parties believes should be accorded to it.<sup>132</sup> Consequently, the United States considers that India's claim under Article 11 amounts to a "quibble" with the Panel's weighing of the evidence that cannot establish a breach of this provision.<sup>133</sup>

2.75. Furthermore, the United States argues that Panel Exhibit IND-121, whether viewed alone or in context, does not show that India recognizes the concepts of disease-free areas or areas of low disease prevalence with respect to AI or that it would entertain a proposal to recognize a specific area. Before the Panel, the United States pointed out that India has maintained a uniform policy of requiring country-level certification despite requests by the United States dating back to 2006 that India adjust its required certification to recognize the concept of disease-free regions or zones, and despite requests before the SPS Committee that India regionalize its AI-related import restrictions. Similarly, the United States indicated to the Panel that the Indian delegate at the meeting of the OIE in May 2012 criticized the OIE Code AI chapter, "asserting that for India 'the concept of zoning looked irrelevant as far as avian influenza was concerned.'"<sup>134</sup> In response, India submitted Panel Exhibit IND-121 to establish that "India had indicated to the United States that it was willing to consider trade from compartments, yet, to date the United States has neither made a request to India nor submitted relevant documentation evidencing establishment of bio-secure compartments."<sup>135</sup> The United States points out that, despite India's reference to Panel Exhibit IND-121, India's appellant's submission appears to recognize that India was not expressing a willingness to consider a proposal for recognition of specific disease-free areas but, instead, only that India would "consider *the issue* of compartmentalization".<sup>136</sup>

2.76. The United States argues that the broader context of the interactions between the two countries shows that neither in Panel Exhibit IND-121 nor elsewhere did India indicate that it had recognized the applicability of the concepts of disease-free areas or areas of low disease prevalence with respect to AI. In the period between the comments by India set out in Panel Exhibit IND-121 and the commencement of this dispute, India promulgated new iterations of its AI measures that apply to products from anywhere in a country reporting NAI. The United States concludes that the text and context of Panel Exhibit IND-121 demonstrate that it was perfectly consistent with Article 11 of the DSU for the Panel not to have found that this exhibit was evidence of any recognition by India of disease-free areas or areas of low disease prevalence.

2.77. Finally, the United States argues that the Panel correctly concluded that a request under Article 6.3 is not a prerequisite to the existence of obligations under Article 6.1 of the SPS Agreement. The Panel noted that Article 6.3 refers to a situation that is distinct from those in Articles 6.1 and 6.2 and that it is not directly linked to the first two paragraphs of Article 6. Similarly, the Panel recognized that Article 6.1 negates the idea that the obligations under that provision arise only after an exporting Member requests recognition of specific pest- or disease-free areas or areas of low pest or disease prevalence pursuant to Article 6.3. Moreover, the United States rejects India's argument that its understanding of the relationship between Articles 6.3 and 6.1 is supported by the OIE Code. India has not explained how a statement by the OIE would be pertinent to the legal interpretation of a WTO covered agreement, and nothing in the OIE Code supports India's legal interpretation. The United States contends that the passages from Chapter 4.3 of the OIE Code to which India refers are fully consistent with the Panel's interpretation of Article 6 of the SPS Agreement.

2.78. The United States reiterates that India's argument that the obligation under Article 6.1 is triggered only by a request pursuant to Article 6.3 reads non-existent distinctions into the text of Article 6.1. As the Panel pointed out, where the SPS Agreement foresees that a requirement for a Member will arise only upon action by another, the Agreement explicitly so states.<sup>137</sup> In the United States' view, India's proposed reading of Article 6.1 also ignores the second sentence of

<sup>132</sup> United States' appellee's submission, para. 177 (referring to Appellate Body Report, *Korea – Dairy*, para. 137; and quoting Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164 (fn omitted)).

<sup>133</sup> United States' appellee's submission, para. 177.

<sup>134</sup> United States' appellee's submission, para. 178 (quoting United States' first written submission to the Panel, para. 148).

<sup>135</sup> United States' appellee's submission, para. 178 (quoting India's first written submission to the Panel, para. 252).

<sup>136</sup> United States' appellee's submission, para. 182 (quoting India's appellant's submission, para. 226). (emphasis added by the United States)

<sup>137</sup> United States' appellee's submission, para. 192 (referring to Panel Report, para. 7.679).

this provision, which clarifies that there is an obligation to adapt SPS measures to the SPS characteristics of regions. According to the United States, there is no indication in Article 6 that any precipitating event is required before an SPS measure must be adapted to the characteristics of a region.

2.79. Finally, the United States asserts that the Panel correctly found that India's failure to recognize the concepts of disease-free areas and areas of low disease prevalence with respect to AI led to the conclusion that India also breached the first sentence of Article 6.1 of the SPS Agreement. The United States highlights the significance of the wording of this sentence – that Members must "ensure that their sanitary or phytosanitary measures are adapted" – which, in its view, makes clear that the obligation covers not only a failure to recognize particular disease-free areas where an exporting Member has made the necessary demonstration, but also adoption of measures that fail to permit the importing Member to account for relevant differences in the SPS characteristics of different areas. The United States explains that a Member could not have ensured that its measures are adapted in a situation where its measures contradict the concepts of disease-free areas and areas of low disease prevalence, as this would leave no possibility for adaptation to the characteristics of a specific area in the event that an exporting Member demonstrates the existence of such an area.

#### **2.2.4 Article 5.6 and Article 2.2 of the SPS Agreement**

2.80. The United States argues that India has failed to establish that the Panel erred in its findings under Article 5.6 of the SPS Agreement. India's claims fail to recognize critical findings made by the Panel with respect to the measures that were identified by the United States and the fact that these measures provide for an optimal level of security. The United States requests the Appellate Body to uphold the Panel's findings that India's AI measures are inconsistent with Article 5.6 and, as a consequence, Article 2.2 of the SPS Agreement.

2.81. The United States contests India's claim under Article 11 of the DSU that the Panel ruled on a claim that was not before it. India argues that the United States limited its claim under Article 5.6 such that it applied to India's AI measures only to the extent that they impose trade restrictions on countries reporting LPNAI. However, the record in this dispute provides no basis for India's assertion that the scope of the United States' claim under Article 5.6 was so limited. In the United States' view, India's position is inconsistent with India's own arguments in the context of its next claim under Article 11, where India argues that the United States' claim was with respect to two products and HPNAI.

2.82. Moreover, the United States argues that India does not reference or explain the precise language upon which it bases its assertion that the United States limited its claim under Article 5.6 to measures addressing LPNAI, and that the references to the United States' submissions do not support India's assertion. To the contrary, India's reference to the United States' responses to the Panel's questions actually supports the United States' claim that the recommendations in the OIE Code are the specified alternative measures. According to the United States, the other two citations to the United States' submissions provided by India are just as irrelevant, because they concern arguments about whether the OIE Code would achieve India's ALOP, and do not relate to the scope of the United States' claim.

2.83. The United States also argues that India fails to engage with the Panel's finding that actually determined the scope of the United States' claim as it related to the identified alternative measures. The Panel Report makes clear that the United States proposed the OIE Code against which to compare India's AI measures, and submitted that the alternative measures should be those provisions of the OIE Code that provide recommendations allowing for safe trade. The United States provided evidence to that point, which was acknowledged and referenced by the Panel. The United States highlights the Panel's finding that the United States identified as reasonably available alternatives the recommendations in Chapter 10.4 of the OIE Code that correspond to the products covered by S.O. 1663(E). Consequently, the United States asserts that the record affirmatively shows that the United States' claim under Article 5.6 was addressed to the ban imposed by S.O. 1663(E) on countries reporting NAI.<sup>138</sup>

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<sup>138</sup> United States' appellee's submission, para. 198 (referring to Panel Report, para. 7.529).

2.84. The United States also maintains that the two arguments that serve as the basis for India's second claim under Article 11 of the DSU that the Panel erred in failing to find that the United States had not made out its *prima facie* case are not supported by the Panel record. India first asserts that the United States attempted to discern India's ALOP by examining India's domestic measures. According to the United States, India does not and cannot explain how or why this means that the United States did not make a *prima facie* case, or how or why this supports the conclusion that the Panel failed to conduct an objective assessment of the matter, as required by Article 11. Given that India's measures do not explicitly state India's ALOP, the United States asserts that a *prima facie* case with respect to the identification of the ALOP must be based on an inferred ALOP supported by evidence on the record. This is precisely what the United States did in presenting its *prima facie* case. Moreover, the Panel ultimately agreed with India that its ALOP was higher than that presented in the United States' *prima facie* case. The United States considers that the Panel's engagement with the parties' arguments and its finding in favour of India's position regarding the ALOP confirms that the Panel made an objective assessment of the matter. As for India's argument that the Panel erred by allowing the United States to specify India's ALOP, the United States contends that the Panel Report shows that India's contention is untrue. In fact, the Panel disagreed with the United States' argument that the inferred ALOP should be low due to the level of protection indicated by India's domestic measures. Instead, the Panel held that India's ALOP is very high or very conservative. Accordingly, the United States submits that this challenge under Article 11 of the DSU should also fail, given that the record shows that the Panel did not allow the United States to specify India's ALOP.<sup>139</sup>

2.85. Finally, the United States contends that India is wrong in arguing that the Panel erred because it did not precisely identify the alternative measures, except with respect to two unidentified products. In fact, the Panel identified the precise OIE Code recommendations that serve as the proposed alternative measures on the basis of evidence provided by the United States, and also noted the two products not covered by OIE Code recommendations in respect of which the United States did not propose an alternative measure.<sup>140</sup> India's assertion appears premised on its argument that the OIE Code achieves different levels of protection depending on the recommendation adopted. The Panel properly rejected India's argument regarding the different levels of protection in the OIE Code, and found that the OIE Code achieves a high level of protection. Accordingly, the United States submits that India has presented no support for its argument that the alternative measures under Article 5.6 were not sufficiently defined, and that India's final claim under Article 11 of the DSU regarding the Panel's finding under Article 5.6 has no merit.<sup>141</sup>

### 2.2.5 Article 2.3 of the SPS Agreement

2.86. The United States submits that India's appeal of the Panel's findings under Article 2.3 of the SPS Agreement is without merit, and that its arguments, styled as assertions that the Panel breached Article 11 of the DSU in different ways, are "fundamentally not proper claims of error for an appeal".<sup>142</sup> The United States requests the Appellate Body to reject India's claims of error on appeal and to uphold the Panel's finding that India's AI measures are inconsistent with Article 2.3 of the SPS Agreement.

2.87. The United States recalls that the Panel found India's AI measures to be inconsistent with Article 2.3 in three different ways. With respect to the first sentence of Article 2.3, the Panel agreed with the United States that India engages in two forms of discrimination against imported products and in favour of domestic products. First, the Panel found that, under India's AI measures, if there is an NAI outbreak anywhere in the exporting country, the importation of the covered products into India is prohibited. India, however, permits the sale of domestic products in India following an outbreak of NAI, provided that the product originates outside a ten kilometre zone of the location where NAI is detected. Second, India prohibits the importation of the covered products if LPNAI is detected in the exporting country, whereas India does not maintain surveillance sufficient to detect LPNAI in India's domestic poultry.<sup>143</sup> Third, the United States recalls the Panel's finding that India's measures constitute a disguised restriction on international

<sup>139</sup> United States' appellee's submission, paras. 200-201 (referring to Panel Report, para. 7.570).

<sup>140</sup> United States' appellee's submission, para. 202 (referring to Panel Report, para. 7.533).

<sup>141</sup> United States' appellee's submission, para. 203 (referring to Panel Report, para. 7.580).

<sup>142</sup> United States' appellee's submission, para. 123.

<sup>143</sup> United States' appellee's submission, para. 117 (referring to Panel Report, para. 7.392).

trade, inconsistent with the second sentence of Article 2.3.<sup>144</sup> Given that India's claims of error on appeal relate only to the second of the three ways that the Panel found India's AI measures to be inconsistent with Article 2.3, and given that India has not even appealed the other two bases for the Panel's finding under Article 2.3, the United States submits that India's appeal cannot, in any event, result in a reversal of the Panel's ultimate conclusion that India's AI measures are inconsistent with Article 2.3.

2.88. The United States argues that India has failed to establish that the Panel's consultations with individual experts regarding India's surveillance regime and the question of whether LPNAI is exotic to India are inconsistent with the Panel's obligations under Article 11 of the DSU. India ignores the requirements of Article 11 of the DSU in arguing that the OIE Code required the Panel to defer to India's self-assessment that it had no LPNAI, and that, therefore, the Panel was precluded from asking the experts whether the record evidence supported India's claim to be free from LPNAI. Article 11 of the DSU requires a panel to assess whether the evidence on the record supports the assertions made by the parties. Even if the OIE Code had provided that, for the purposes of trade or any other purpose, an OIE member should defer to another OIE member's self-assessment that it has no AI, this could not have absolved the Panel of its responsibility to assess the record evidence and determine whether the evidence supported India's assertion of being LPNAI-free. India fails to identify anything in the OIE Code that prescribes the weight that a WTO panel, as opposed to OIE members, must give to self-assessment by an OIE member of its disease situation with respect to a listed disease, such as AI, for which the OIE does not grant official recognition. The part of the OIE Code relied on by India (Article 1.6.1) addresses what an OIE member making a claim of its disease status with respect to a disease can or should do, and what the OIE may or will not do in response; however, it "does not speak to any other entity".<sup>145</sup>

2.89. Further, the United States argues that the OIE Code does not support the alleged factual basis for India's claim that the Panel did anything inconsistent with the OIE Code. According to the United States, there is nothing in the OIE Code to support India's position that the fact that "*the OIE reviews disease-freedom claims made by Members with respect to six animal diseases – not including AI – means that for other OIE-listed diseases, a country's self-report of its AI situation must be accepted as unassailably correct*", not only by the OIE, but also by other OIE members, the WTO, and the Panel.<sup>146</sup> Although Article 1.6.1 of the OIE Code states that members "may" inform the OIE of their claimed disease-status, and that the OIE may "publish" such claims, "[p]ublication does not imply endorsement of the claim."<sup>147</sup> Given that self-declarations of disease status are merely claims, and not official disease statuses, the Panel could not have failed to make an objective assessment by considering whether the record evidence supports India's self-assertion of LPNAI-freedom, and by posing questions on this issue to the experts. The chapter of the OIE Code relating to AI – Chapter 10.4 – is fully consistent with the Panel's approach, as it makes clear that self-declarations of freedom from AI must be supported by evidence of surveillance capable of justifying the self-categorization. The United States submits, moreover, that the adequacy of India's LPNAI surveillance to reliably detect LPNAI and to support India's claim of LPNAI-freedom is a crucial issue in this dispute, and is a technical issue on which the Panel could reasonably seek expert evidence in a manner consistent with Article 11.2 of the SPS Agreement and Article 11 of the DSU. The United States also points out that India's claim of error rests on Article 1.6.1 of the OIE Code, even though that provision was not placed on the record before the Panel. Given that, in the United States' view, the contents of an international standard are a question of fact in WTO dispute settlement, India's claim on appeal asks the Appellate Body to rely on facts not on the Panel record, and to find that the Panel failed objectively to assess evidence that was not even presented to it.

2.90. The United States also submits that, in making its claims under Article 11 of the DSU, India misunderstands the allocation of burden of proof in WTO dispute settlement proceedings. The Panel's questions to the experts did not improperly shift the burden of proof with respect to the question of whether India had LPNAI. The Panel rightly explained that, while the United States has the burden of establishing a *prima facie* case, India has the burden of proving the facts it asserted

<sup>144</sup> United States' appellee's submission, para. 118 (referring to Panel Report, para. 7.479).

<sup>145</sup> United States' appellee's submission, para. 129 (referring to India's appellant's submission, para. 290).

<sup>146</sup> United States' appellee's submission, para. 130 (referring to India's appellant's submission, paras. 291-294). (emphasis original)

<sup>147</sup> United States' appellee's submission, para. 132 (quoting Article 1.6.1 of the OIE Code; and referring to OIE's response to Panel question No. 9).

in attempting to rebut that case.<sup>148</sup> The United States had established that India treats domestic and imported products differently with respect to the risk of LPNAI, depending on whether the risk originates in India or in another Member. The United States had, therefore, made a *prima facie* case that India's measures discriminate against imported products in an apparently arbitrary manner and without apparent justification. In order to rebut this *prima facie* case, India had the burden of establishing the facts supporting any justification for the discriminatory treatment. The Panel correctly explained that India's justification for the differential treatment is that LPNAI is exotic to India, and the Panel, therefore, correctly proceeded to assess whether the factual premise of India's justification, i.e. that LPNAI is exotic to India, was supported by the evidence adduced by India.<sup>149</sup>

2.91. Contrary to India's assertion, the United States submits that it did not have to establish that LPNAI is present in India in order to make its *prima facie* case. Instead, with respect to the second form of discrimination, the United States' case focused on the fact that India imposed LPNAI-based import bans, but failed to undertake surveillance capable of reliably detecting LPNAI domestically. The Panel found that the United States had established this point, and India does not, in its appeal, contest the Panel's findings in this regard. By contrast, it was India's assertion before the Panel that LPNAI was absent from India and this, therefore, was a fact that India needed to establish.

2.92. The United States also takes issue with India's argument that, since the OIE Code requires OIE members to report LPNAI outbreaks that they detect, and that, since India never reported an occurrence of LPNAI to the OIE, the Panel should have accepted that India had established that LPNAI is absent from India. The United States views this as a "repackaging" of India's argument that India's self-assessment of LPNAI-freedom should have been accepted by the Panel as a fact even in the absence of scientific evidence supporting it – an argument that is contrary to both logic and the requirements of the OIE Code.<sup>150</sup> Moreover, the Panel's questions to the experts on whether India is free from LPNAI did not reflect an allocation by the Panel of the burden of proof, but, instead, only sought expert comments on what the record evidence showed regarding the different points made by the parties on the issue. For these reasons, the United States submits that India has established no error with respect to the Panel's framing of its questions to the experts, let alone one so egregious that it calls into question the Panel's good faith, as required under Article 11 of the DSU.<sup>151</sup>

2.93. Finally, the United States submits that the Panel's questions to the experts did not result in a delegation of the Panel's decision-making responsibilities. India's argument on appeal fails for two reasons. First, the Panel conducted its own objective assessment and review of the record evidence and found that there was insufficient evidence to support India's assertion that LPNAI is exotic to India.<sup>152</sup> Second, the Panel's questions to the experts did not delegate its decision-making responsibility, but only sought their assistance in evaluating scientific and technical evidence, including various studies and articles. The Panel asked the experts for comments on what the record evidence showed regarding different points made by the parties in relation to India's LPNAI situation. Such consultation with the experts is consistent with Article 11.2 of the SPS Agreement, as well as Article 13.2 of the DSU, as neither of these provisions imposes any limitation on a panel's ability to ask experts whether technical evidence on the record reveals a factual basis for the scientific or technical claims made by a party to a dispute. The United States considers that the questions posed by the Panel were factual in nature, as they addressed what scientific and technical facts could be ascertained from the evidence on the record, and they were not questions of "legal characterization".<sup>153</sup> The United States notes, moreover, that, to the extent India takes issue with the Panel Report's discussion or use of the experts' views, and not just the questions posed by the Panel, this is an issue that falls beyond the scope of this appeal.

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<sup>148</sup> United States' appellee's submission, para. 138 (referring to Appellate Body Report, *Japan – Apples*, paras. 152 and 154; and Panel Report, para. 7.442).

<sup>149</sup> United States' appellee's submission, para. 140 (referring to Panel Report, para. 7.441).

<sup>150</sup> United States' appellee's submission, paras. 143-144.

<sup>151</sup> United States' appellee's submission, para. 146 (referring to Appellate Body Report, *EC – Hormones*, para. 133).

<sup>152</sup> United States' appellee's submission, paras. 149-151 (referring to Panel Report, paras. 6.56-6.57 and 7.454-7.455).

<sup>153</sup> United States' appellee's submission, para. 154 (referring to Appellate Body Report, *Australia – Apples*, para. 384).

2.94. For these reasons, the United States submits that the Panel properly complied with its obligations under the DSU and the SPS Agreement, including its obligation to make an objective assessment of the evidence under Article 11 of the DSU. Despite being afforded numerous opportunities to comment on the Panel's questions to the individual experts, India failed to object to the questions posed by the Panel or to argue that they reflected an improper delegation of the Panel's decision-making responsibilities. Thus, India cannot plausibly claim that the Panel denied it due process or fundamental fairness by framing its questions to the experts in the manner it did.

## 2.3 Arguments of the third participants

### 2.3.1 Argentina

2.95. With regard to India's claim under Article 3 of the SPS Agreement, Argentina maintains that the reference to scientific or technical issues in Article 11.2 of the SPS Agreement does not limit the manner in which an international organization consulted by a panel may perform its advisory role. Argentina notes that the obligation under Article 3.2 of the DSU to apply customary rules of interpretation applies expressly to the WTO covered agreements and not to other instruments, but that such other instruments must still be interpreted in accordance with customary rules of interpretation of public international law. In addition, any interpretation of the OIE Code undertaken by the OIE at the request of a panel reflects the position of the OIE as an international organization, and not that of the OIE officials engaged in the task. Argentina, therefore, considers that the task of interpreting the OIE Code is not limited under Article 11.2 of the SPS Agreement or under Article 3.2 of the DSU and, as such, may be delegated to the OIE.

2.96. In addition, Argentina concurs with the United States' logic that, where the OIE recommends import prohibitions, it expressly so provides. Argentina also agrees with the United States that, where a measure has a form and operation wholly disparate from, and contradictory to, an international standard, the measure cannot be said to be "based upon" that standard. On the other hand, Argentina considers that India's purely fact-based analysis is sound, since the United States has failed to apply this same logic to all the chapters of the OIE Code, notably the chapter relating to foot and mouth disease.

2.97. In its opening statement at the oral hearing, Argentina indicated that Article 6 of the SPS Agreement guarantees the smooth flow of international trade and, at the same time, a Member's right to protect its territory from the introduction or spread of diseases or pests. Argentina also maintains that Article 6.2 provides a more detailed description of the factors that Members should bear in mind when they make a determination as to regionalisation, pursuant to Article 6.1. Therefore, a breach of Article 6.1 necessarily entails a violation of Article 6.2. Moreover, Argentina points out that Article 6.3 sets out procedural obligations regarding the process of regionalization, which could be used in the context of dispute settlement as a potential defence against a claim under Article 6.1 or Article 6.2 of the SPS Agreement.

### 2.3.2 Australia

2.98. With regard to the AI risk assessment conducted by Australia and referred to by India in its submissions, Australia argues that it is "inappropriate to directly correlate the conclusions of one country's risk assessment based on [its] methodology to another country".<sup>154</sup> It is up to each WTO Member to determine its individual ALOP and, like risk assessments, the ALOP is not directly transferable between Members, particularly where Members have quite different SPS statuses. In addition, India's assertion that Australia's risk assessment does not permit imports of chicken meat from countries reporting LPNAI constitutes a misreading of its risk assessment. Australia permits the importation of chicken meat from a country or zone that has notified LPNAI, provided that the chicken meat has been processed to ensure destruction of the AI virus. Australia's risk assessment also does not support the imposition of a blanket ban on imports of chicken meat from a country or zone that has notified LPNAI. Australia, therefore, considers that the Panel was correct to observe that Australia's submission "did not concur with India's assertion" as to whether poultry meat from countries that have notified LPNAI should be imported.<sup>155</sup>

<sup>154</sup> Australia's third participant's submission, para. 5.

<sup>155</sup> Australia's third participant's submission, para. 14 (quoting Panel Report, para. 7.313).



2.99. In its opening statement at the oral hearing, Australia expressed the view that Article 3.2 of the DSU does not speak to interpretative rules to be adopted by a panel in determining the scope or content of an international standard. An international standard is not one of the covered agreements to which Article 3.2 refers and which are listed in Appendix 1 to the DSU. Australia considers that a panel may use a range of tools in assessing an international standard, including an interpretative approach akin to that contained in the Vienna Convention, and taking into account information sought pursuant to Article 13 of the DSU.

### 2.3.3 Brazil

2.100. Without taking any position on the conformity of India's AI measures with an international standard, Brazil considers that an analysis under Article 3.2 of the SPS Agreement can only be conducted on a case-by-case basis, since only by analysing a concrete case would it be possible to determine whether all the elements of the standard were adopted by the relevant domestic SPS measure. In this respect, the mere reference to an OIE standard may not be sufficient to demonstrate the conformity of a domestic measure with that standard or with the relevant provisions of the SPS Agreement. If the SPS measure contradicts or deviates from the standard, this measure cannot be considered as being in conformity with the international standard. At the same time, a Member cannot simply pick and choose parts of a standard and still argue that the measure conforms to that standard. The presumption established in Article 3.2 does not extend to measures that are "based on" standards, or which apply those standards "partially or liberally".<sup>156</sup>

2.101. With respect to India's claim under Article 2.2 of the SPS Agreement, Brazil recalls that scientific evidence is a necessary requirement for the adoption of an SPS measure, and one of the main objectives of this provision is to minimize the negative effects SPS measures may have on trade. Brazil considers it clear that a risk assessment is a necessary instrument for a Member to fulfill the requirement of providing "scientific justification" for its SPS measures.<sup>157</sup> Brazil submits that, by subjecting SPS measures to scientific scrutiny, Article 2.2 establishes an objective standard to be followed when assessing the consistency of SPS measures. Such scrutiny should be conducted on a case-by-case basis, because the required scientific evidence may vary depending upon the particular circumstances of the case and may require a quantitative analysis by empirical or experimental methods.<sup>158</sup> Furthermore, what constitutes scientific evidence sufficient to be included in a risk assessment should also take into account the "value under protection and the objective characteristics" of the measure at issue.<sup>159</sup> Brazil also recalls that the term "sufficient", as used in Article 2.2, is a relational concept requiring an "adequate relationship" between the SPS measure and the scientific evidence, such that the characteristics of the measures, as well as the quality and quantity of the scientific evidence, always need to be taken into account in this analysis.<sup>160</sup> Brazil, therefore, considers that, in order to fulfill the requirements of Article 2.2, the risk assessment justifying the adoption of an SPS measure should encompass all the scientific evidence necessary to support the SPS measure at issue.

2.102. With regard to Article 6 of the SPS Agreement, Brazil argues that the principle of regionalization embodied in this provision contributes to reducing the relevant SPS measures' negative effects on trade, and mitigating the risks of contamination and spread of the pest or disease in the territory of the importing country. The first and foremost obligation derived from Article 6 is the recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Without such recognition, none of the other obligations in the SPS Agreement regarding regionalization could be fulfilled. Brazil asserts that, since Article 6 was established to regulate specific circumstances among Members, the correct interpretation of the term "recognize" should also carry the idea of "implementation" rather than merely signifying an abstract "acknowledgement or consideration" of the concepts.<sup>161</sup> Moreover, Brazil agrees with the Panel that the word "recognition" should be analysed on a case-by-case basis, and points out that the

<sup>156</sup> Brazil's third participant's submission, para. 8.

<sup>157</sup> Brazil's third participant's submission, paras. 10-11 (referring to Appellate Body Report, *Australia – Salmon*, paras. 136-137; and quoting Panel Reports, *US – Poultry (China)*, paras. 7.173 and 7.201; and *Australia – Apples*, para. 7.214).

<sup>158</sup> Brazil's third participant's submission, para. 13 (quoting Panel Report, *Japan – Apples*, para. 8.92).

<sup>159</sup> Brazil's third participant's submission, para. 14 (referring to Panel Report, *Japan – Apples*, para. 8.93).

<sup>160</sup> Brazil's third participant's submission, para. 15 (referring to Appellate Body Report, *Japan – Agricultural Products II*, para. 73).

<sup>161</sup> Brazil's third participant's submission, paras. 24-25.

second sentence of Article 6.2 establishes the specific and concrete factors that shall be considered as a basis for a determination of recognition. This would allow Members "to concretely 'acknowledge/consider' (and implement) these concepts through a 'de jure' or 'de facto' recognition in their law and/or individual or collective decisions".<sup>162</sup> Brazil points out that the recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence does not entail an obligation on the importing Member to confer automatically a pest- or disease-free status to all regions in an exporting Member that are claimed to be disease-free. Rather, in order to agree with a claim that a certain area is disease-free, an importing Member must have before it the relevant scientific evidence. At the same time, Brazil emphasizes that, pursuant to these provisions, an importing Member can no longer justify a blanket import ban if the exporting Member argues – and provides evidence – that its territory also comprises pest- or disease-free areas and areas of low pest or disease prevalence.

2.103. In its opening statement at the oral hearing, Brazil addressed India's appeal with respect to Article 2.3 of the SPS Agreement. Brazil submits that, because India asserted that LPNAI is exotic to India in response to the United States' claim, WTO jurisprudence relating to the burden of proof under the SPS Agreement supports the view that India is primarily responsible for providing proof of its factual allegation.

### 2.3.4 European Union

2.104. With respect to the issues relating to Articles 3.1 and 3.2 of the SPS Agreement, the European Union considers that the provisions of Article 10.4.1.10 of the OIE Code, as well as the product-specific recommendations in Chapter 10.4, should be read together. While there is clear language in Article 10.4.1.10 that no bans can be imposed on account of notifications in pets and wild birds, for notifications regarding poultry, the importing country may impose a ban "*only to the extent that* the exporting country is not able to properly regionalize its territory or to fulfil the appropriate risk mitigation conditions, like processing, so as to ensure the destruction of the NAI virus".<sup>163</sup> The European Union adds that, contrary to what India suggests, the so-called "condition of entry" with respect to specific product recommendations "does not concern a subjective risk management choice of the importing Member, but rather an objective element, taking into account the evidence supplied by the exporting Member".<sup>164</sup> If the exporting Member claiming that areas within its territory are disease-free has provided the necessary evidence to demonstrate objectively that such areas are, and are likely to remain, disease-free, then the importing Member can no longer ban the products from the entire country. The same is true when different OIE recommendations refer to NAI-free status or HPNAI-free status. A country's AI status is an objective element and not a choice of the importing Member. If a country has reported LPNAI, then the applicable product-specific standard is that with regard to an HPNAI-free country. The European Union maintains that "[i]t is not for the importing Member to pick a standard and to automatically ban trade on this ground".<sup>165</sup>

2.105. The European Union stresses that Chapter 10.4 recommendations are designed to prevent HPNAI and LPNAI being introduced into the importing country *while allowing trade in safe products*. Accordingly, a notification of NAI in poultry can lead to a country-wide ban only in those instances when the exporting Member did not fulfil the requirements of Article 6.3 of the SPS Agreement, as reflected in Chapter 4.3 of the OIE Code, on zoning and compartmentalisation, and when other risk-mitigation conditions, like processing so as to ensure the destruction of the NAI virus, are not fulfilled. It follows that India's measures not only are not based on, and do not conform to, the relevant international standards, but they "go against the very standards they purport to follow".<sup>166</sup> The European Union, therefore, asserts that the Panel's findings with regard to Articles 3.1 and 3.2 of the SPS Agreement must be upheld.

2.106. With regard to India's claim under Article 2.2 of the SPS Agreement, the European Union notes that Article 2.2 contains the general principles of the SPS Agreement relating to necessity and scientific disciplines for the use and maintenance of SPS measures. Article 5.1, which requires WTO Members to undertake a risk assessment, is a more specific provision relating to the general

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<sup>162</sup> Brazil's third participant's submission, para. 23.

<sup>163</sup> European Union's third participant's submission, para. 12 (referring to Panel Report, para. 7.252).

<sup>164</sup> European Union's third participant's submission, para. 15.

<sup>165</sup> European Union's third participant's submission, para. 16.

<sup>166</sup> European Union's third participant's submission, para. 19.

requirements under Article 2.2 to base SPS measures on scientific principles and not to maintain them without sufficient scientific evidence. A violation of the more specific provision in Article 5.1 constitutes a violation of the more general requirements in Article 2.2; however, given the more general wording of Article 2.2, the reverse is not necessarily true.<sup>167</sup> The European Union, therefore, considers that the Panel did not err in finding that a violation of the more specific obligation in Article 5.1 results in a violation of the more general obligation in Article 2.2.

2.107. Regarding Article 6 of the SPS Agreement, the European Union considers that paragraph 2 of this provision imposes an independent obligation on Members, and that it can be inferred from a Member's SPS measures whether or not it recognizes the concepts of pest- or disease-free areas or areas of low pest or disease prevalence. The format of such recognition will depend on the circumstances of each particular case and it is not required that this must be done explicitly and, if so, in writing through a legislative or administrative act. In this dispute, S.O. 1663(E), which requires the application of a country-wide import ban on the products at issue, serves as a strong indication that India does not recognize the concept of disease-free areas. The European Union further considers that a request under Article 6.3 is not a prerequisite to the existence of obligations under Article 6.2. However, these two provisions are related in the sense that, if the importing Member does not even recognize the concept of regionalization, any attempts by an exporting Member to prove that the conditions for safe trade in the products at issue are fulfilled would be rendered fruitless. In the light of the above, the European Union considers that the Panel did not commit legal error in finding that India's measures are inconsistent with Article 6.2 of the SPS Agreement.

2.108. In its opening statement at the oral hearing, the European Union indicated that the recognition of the concepts set out under Article 6.2 is a prerequisite for the adaptation of a Member's measures under Article 6.1. Therefore, a breach of the more specific obligation in Article 6.2 results in a breach of the more general obligation in Article 6.1. Furthermore, while an importing Member is under no obligation to automatically accept a regionalization proposal from an exporting Member pursuant to Article 6.3, its discretion is limited by objective factors, such as those enunciated in the second sentence of Article 6.2 of the SPS Agreement.

2.109. With regard to India's claim under Article 5.6 of the SPS Agreement, the European Union argues that each product-specific recommendation in the OIE Code is an alternative measure that achieves India's ALOP and is significantly less trade restrictive. These recommendations, therefore, fulfil the requirements set out in Article 5.6 and footnote 3 of the SPS Agreement. Moreover, the regionalization requirements in Article 6 should be understood in the light of the "significantly less trade restrictive alternative" requirement in Article 5.6. Accordingly, an importing country may adopt different measures that will have a different impact on trade on the basis of the same ALOP. In addition, a regional ban, as opposed to a country-wide ban, should not be automatically equated to a low ALOP. To the contrary, a very high ALOP may be reflected in a regional ban, which allows safe trade in the products at issue from the unaffected regions within the same exporting country. For these reasons, the European Union considers that the Panel's findings with respect to the available alternative measures should be upheld.

### 2.3.5 Japan

2.110. Japan considers that, in ascertaining the meaning of the OIE Code in its analysis under Article 3 of the SPS Agreement, the Panel relied extensively on information from the OIE Secretariat. Japan disagrees with India that a panel's consultation with international organizations, when deciding matters raised under the SPS Agreement, is limited to scientific and technical issues. The scope of consultation under Article 11.2 of the SPS Agreement is not more limited than that under Article 13 of the DSU. Rather, Japan believes that the text of Article 11.2 suggests that the provision simply regulates a panel's recourse to experts on any aspects of an SPS dispute involving scientific or technical issues.<sup>168</sup> At the same time, Japan underscores that a balance must be struck between a panel's right to seek information from any individual or body, and a panel's duty to discharge its own function and obligations under Article 11 of the DSU. In Japan's view,

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<sup>167</sup> European Union's third participant's submission, para. 29 (referring to Appellate Body Report, *Australia – Salmon*, paras. 137-138).

<sup>168</sup> Japan's third participant's submission, para. 10 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.236; *EC – Seal Products*, para. 5.123; *US – Anti-Dumping and Countervailing Duties (China)*, para. 570; and *US – Upland Cotton*, para. 549).

although non-WTO bodies may provide useful information in ascertaining Members' rights and obligations under the relevant provisions of the covered agreements that refer to international instruments developed under the auspices of such bodies, panels cannot simply defer to the views of outside bodies, and must, instead, conduct their own rigorous assessments of the matters before them. In this dispute, it would have been appropriate for the Panel to determine whether the OIE Secretariat has the legal authority to provide an opinion or interpretation on the meaning and scope of the OIE Code, and whether any answers provided to the Panel were on behalf of the OIE membership or the OIE Secretariat. It would also have been desirable for the Panel to have explained in greater detail its own assessment of the OIE Code.

2.111. Regarding India's view that the relevant international standards must be interpreted in accordance with the customary rules of interpretation, Japan argues that a panel is not required to discern the meaning of an international standard in accordance with the Vienna Convention. A panel may, however, use such tools, among other analytical tools, including expert evidence on the meaning of those standards. Referring to the explicit reference to "international standards" in Article 3.2, as well as the definition set out in paragraph 3 of Annex A to the SPS Agreement, Japan argues that "[a]n instrument constituting an international standard thereby acts as an objective benchmark for assessing the consistency of a measure".<sup>169</sup> Although the OIE Code may serve as a benchmark, it is merely an international standard, not a binding legal instrument itself, such as a treaty. In addition, a panel may seek and examine evidence relevant to the meaning of an international standard, in particular, because standards are developed outside of the WTO in bodies with particular expertise. Japan disagrees with India's suggestion that the international standards referred to in Article 3 and Annex A to the SPS Agreement have the status of a covered agreement, and points out that such standards are not listed in Appendix 1 to the DSU. Japan also disagrees with the implication of India's view that the norms of the OIE Code are binding on panels even outside the context of Article 3 of the SPS Agreement. Any incorporation of the relevant international standard into WTO law would be limited to the extent necessary to interpret and apply the incorporating provisions, in this case, Articles 3.1 and 3.2 of the SPS Agreement.<sup>170</sup>

2.112. In its opening statement at the oral hearing, Japan indicated its view that, in the context of the Panel's findings under Articles 2.2, 5.1, and 5.2 of the SPS Agreement, the defence raised by India to rebut the United States' "independent" claim under Article 2.2 cannot be automatically treated as the rebuttal to the United States' "consequential" claim under Article 2.2. If an SPS measure is not based on a risk assessment, it is difficult to see how it could still be justified as being based on scientific principles and maintained with sufficient scientific evidence. Japan submits that Article 2.2 sets out general obligations and does not constitute an exception to Articles 5.1 and 5.2 of the SPS Agreement. Japan further stresses that simply referring to certain scientific studies and other Members' practice, without showing the existence of a "rational or objective relationship" between the SPS measure and scientific evidence, would not establish a measure's compliance with Article 2.2.

2.113. With regard to Article 5.6 of the SPS Agreement, Japan expresses its agreement with the Panel's approach of examining all the relevant evidence in order to ascertain a Member's ALOP. While the choice of an ALOP is the prerogative of a WTO Member adopting the SPS measure, it is for the panel to ascertain the ALOP and, in so doing, a panel must consider all the relevant evidence including evidence that goes beyond the defending Member's own characterization of its ALOP. Furthermore, Japan asserts that the fact that the ALOP is an objective and the SPS measure is an instrument to attain that objective does not mean that such measure cannot form part of the relevant evidence for assessing a Member's ALOP.

2.114. Japan disagrees with India's claim that the alternative measures proposed by the United States and examined by the Panel under Article 5.6 of the SPS Agreement lacked precision. By arguing that Chapter 10.4 of the OIE Code is not a sufficiently precise alternative measure, India is requiring that the complainant identify the alternative measure with too high a level of precision. A complainant discharges its duty to make a *prima facie* case by identifying an

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<sup>169</sup> Japan's third participant's submission, para. 18.

<sup>170</sup> Japan's third participant's submission, para. 27. Japan notes that, in *EC – Bananas III*, the panel and the Appellate Body considered that they had "no alternative" but to examine the Lomé Convention, which had been incorporated by reference into the Lomé Waiver agreed to by GATT contracting parties. (Japan's third participant's submission, para. 21 (referring to Panel Reports, *EC – Bananas III*, para. 7.98; and Appellate Body Report, *EC – Bananas III*, para. 167 ff))

alternative measure at the level of precision that allows a respondent to rebut the complainant's claim and a panel ultimately to determine if the challenged measure is more trade restrictive than necessary. Japan highlights, in this regard, that the role of less restrictive alternative measures is to serve as a conceptual tool for analysing a measure's consistency with Article 5.6, and that such measures are not ones that the defending Member must adopt. In its opening statement at the oral hearing, Japan indicated its view that, although a complainant does bear the burden of proof under Article 5.6, a respondent cannot abuse this rule by failing to articulate clearly its ALOP. According to Japan, the Appellate Body has emphasized the need to avoid abuses of the rules on burden of proof by indicating that a Member is not free to establish its ALOP with such vagueness or equivocation as to render impossible the application of the relevant disciplines of the SPS Agreement, including the obligations set out in Article 5.6.

2.115. With respect to India's allegations that the Panel acted inconsistently with Article 11 of the DSU in analysing the United States' claim under Article 2.3 of the SPS Agreement, Japan disagrees with India's position that the OIE Code and the OIE's self-reporting regime for LPNAI limited the scope of the Panel's assessment under Article 11 of the DSU. Whatever the status of the relevant international standards for purposes of Article 3 of the SPS Agreement, in the present case, the Panel identified the relevant standards as contained in Chapter 10.4 of the OIE Code, and that part of the OIE Code provides no support for India's arguments regarding self-declarations of LPNAI-freedom. For Japan, India's self-reporting is one fact among many pieces of evidence that the Panel had to evaluate in determining whether India's territory was free from LPNAI, and Chapter 1.6 of the OIE Code (on self-declaration of LPNAI-freedom) could not limit the Panel's duty, under Article 11 of the DSU, to make an objective assessment of the claims of discrimination under Article 2.3 of the SPS Agreement.

### **3 ISSUES RAISED IN THIS APPEAL**

3.1. The following issues are raised in this appeal:

- a. with respect to Articles 2.2, 5.1, and 5.2 of the SPS Agreement:
  - i. whether the Panel erred in its interpretation of Articles 2.2, 5.1, and 5.2 and, in particular, in its understanding of the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand;
  - ii. whether the Panel erred in its application of Article 2.2 to India's AI measures, in finding that those measures are inconsistent with Article 2.2 solely as a consequence of its findings that these measures are inconsistent with Articles 5.1 and 5.2; and
  - iii. whether the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU by:
    - disregarding arguments and evidence presented by India to establish that India's AI measures are based on scientific principles and are not maintained without sufficient scientific evidence pursuant to Article 2.2;
    - ruling on a claim under Article 2.2 that was broader than the one argued by the United States; and
    - failing to consider India's argument that it was not required to conduct a risk assessment under Articles 5.1 and 5.2 because its AI measures are consistent with Article 2.2;
- b. with respect to Article 3 of the SPS Agreement:
  - i. whether the Panel acted inconsistently with Article 11.2 of the SPS Agreement and Article 13.2 of the DSU in consulting with the OIE regarding the meaning of the OIE Code; and

- ii. whether 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 by:
  - failing to conduct its own assessment of the meaning of the OIE Code, including by failing to do so in accordance with customary rules of treaty interpretation;
  - disregarding arguments and evidence presented by India pertaining to the meaning of the OIE Code; and
  - reaching findings regarding the meaning of the OIE Code that lack support in the evidence on the record;
- c. with respect to Article 6 of the SPS Agreement:
  - i. whether the Panel erred in its interpretation of the relationship between Article 6.1 and Article 6.3;
  - ii. whether the Panel erred in its application of Article 6.2 by not relying solely on Sections 3 and 3A of the Livestock Act in assessing whether India recognizes the concepts of "disease-free areas" and "areas of low disease prevalence" in respect of AI; and
  - iii. whether the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU in its analysis of the consistency of India's AI measures with Article 6.2 by:
    - basing its finding under Article 6.2 on India's "non-implementation" of the concept of "disease-free areas", and thereby ruling on a claim not argued by the United States; and
    - disregarding evidence presented by India to rebut the United States' claim that India's AI measures are inconsistent with the first sentence of Article 6.2;
- d. with respect to Articles 5.6 and 2.2 of the SPS Agreement:
  - i. whether the Panel erred in its application of Article 5.6 and, consequently, Article 2.2 to India's AI measures and, more specifically:
    - whether the Panel erred in finding that the United States had identified alternative measures that would achieve India's appropriate level of protection; and
    - whether the Panel failed to identify the alternative measures with precision; and
  - ii. whether the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU in its analysis of the consistency of India's AI measures with Article 5.6 by:
    - ruling on a claim that was broader than the one argued by the United States; and
    - disregarding India's arguments regarding the United States' identification of India's appropriate level of protection; and

- e. with respect to Article 2.3 of the SPS Agreement:
- i. whether, with respect to the issue of whether LPNAI is exotic to India, the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU by:
- setting "terms of reference" for individual experts that were beyond the scope of the OIE Code;
  - requiring India to prove that LPNAI is exotic to India; and
  - delegating to the individual experts the factual determination of whether LPNAI is exotic to India.

#### 4 BACKGROUND AND OVERVIEW REGARDING THE MEASURES AT ISSUE, AVIAN INFLUENZA, AND THE OIE CODE

##### 4.1 The measures at issue

4.1. The United States challenges India's measures that prohibit the importation of various agricultural products into India from countries reporting certain types of avian influenza (AI).<sup>171</sup> India maintains its AI measures through, *inter alia*, the Live-Stock Importation Act, as amended<sup>172</sup> (Livestock Act), and Statutory Order 1663(E)<sup>173</sup> (S.O. 1663(E)).<sup>174</sup>

4.2. The Livestock Act was enacted "to make better provision for the regulation of the importation of live-stock and live-stock products which is liable to be affected by infectious or contagious disorders".<sup>175</sup> The Act includes in its definition of "infectious or contagious disorders" any disease or disorder that may be specified by the Indian Central Government by notification in the Official Gazette.<sup>176</sup> "Live-stock" includes any animal that may be specified by the Central Government by notification in the Official Gazette.<sup>177</sup> "Live-stock products" consist of "meat and meat products of all kinds including fresh, chilled and frozen meat, tissue, organs of poultry, pig, sheep, goat; egg and egg powder" and "any other animal product which may be specified by the Central Government by notification in the Official Gazette".<sup>178</sup>

4.3. Section 3 of the Livestock Act is entitled "Power to regulate importation of live-stock". Section 3(1) provides:

The Central Government may, by notification in the Official Gazette, regulate, restrict or prohibit in such a manner and to such extent as it may think fit, [the import] into [India] or any specified place therein, of any live-stock which may be liable to be affected by infectious or contagious disorders, and of any fodder, dung, stable-litter, clothing harness or fittings appertaining to live-stock or that may have been in contact therewith.<sup>179</sup>

<sup>171</sup> Panel Report, para. 2.22. Additional information regarding India's AI and other measures can be found in sections 2.3 and 2.4 of the Panel Report.

<sup>172</sup> The Live-Stock Importation Act, 1898 (No. 9 of 1898), published on 12 August 1898 (Panel Exhibit US-114), as amended by The Live-Stock Importation (Amendment) Act, 2001 (No. 28 of 2001) (19 July 2001), published in *The Gazette of India* on 29 August 2001, No. 35, Part II, Section 1, pp. 1-2 (Panel Exhibit US-115).

<sup>173</sup> Statutory Order 1663(E), issued by India's Department of Animal Husbandry, Dairying and Fisheries (DAHD) on 19 July 2011 pursuant to the Livestock Act and published in *The Gazette of India* on 20 July 2011, No. 1390, Part II, Section 3(ii), pp. 1-2 (Panel Exhibit US-80).

<sup>174</sup> Panel Report, para. 2.22.

<sup>175</sup> Livestock Act, preamble. See also Panel Report, para. 2.23.

<sup>176</sup> Livestock Act, Section 2(a). See also Panel Report, para. 2.24.

<sup>177</sup> Livestock Act, Section 2(b). See also Panel Report, para. 2.24.

<sup>178</sup> Livestock Act, Section 3(d). See also Panel Report, para. 2.26.

<sup>179</sup> See also Panel Report, para. 2.25.

4.4. In addition, Section 3A of the Livestock Act provides:

The Central Government may, by notification in the Official Gazette, regulate, restrict or prohibit in such manner and to such extent as it may think fit, the import into the territories to which this Act extends, of any live-stock product, which may be liable to affect human or animal health.<sup>180</sup>

4.5. India's Department of Animal Husbandry, Dairying and Fisheries (DAHD) is tasked with regulating the importation of livestock and livestock products under Sections 3(1) and 3A of the Livestock Act. A notification under Section 3(1) or Section 3A of the Livestock Act operates as a customs notification under Indian law, and constitutes delegated legislation. Such notifications are assigned a statutory order (S.O.) number and published in the Official Gazette of India.<sup>181</sup>

4.6. On 19 July 2011, the DAHD issued S.O. 1663(E) in the exercise of powers conferred by the Livestock Act.<sup>182</sup> The preamble and Section 1 of S.O. 1663(E) read<sup>183</sup>:

In exercise of the powers conferred by sub-section (1) of Section 3 and Section 3A of the Livestock Importation Act, ... the Central Government hereby prohibits, with effect from the date of publication of this notification, in the Official Gazette, namely:

- (1)(i) the import into India from all countries, in view of Notifiable Avian Influenza (both Highly Pathogenic Notifiable Avian Influenza and Low Pathogenic Notifiable Avian Influenza), of wild birds except those reared and bred in captivity;
- (ii) the import into India from the countries reporting Notifiable Avian Influenza (both Highly Pathogenic Notifiable Avian Influenza and Low Pathogenic Notifiable Avian Influenza), the following livestock and livestock products, namely:
  - (a) domestic and wild birds (including poultry and captive birds);
  - (b) day-old chicks, ducks, turkeys 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;
  - (j) semen of domestic and wild birds including poultry.

Provided that the Central Government may allow the import of processed poultry meat after satisfactory conformity assessment of the exporting country.

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<sup>180</sup> See also Panel Report, para. 2.27.

<sup>181</sup> Panel Report, para. 2.28.

<sup>182</sup> Panel Report, para. 2.30. India notified S.O. 1663(E) to the WTO SPS Committee on 11 October 2011 in document G/SPS/N/IND/73.

<sup>183</sup> See also Panel Report, paras. 2.31-2.32.



4.7. S.O. 1663(E) further stipulates that its prohibitions are not applicable to the import of "processed pet food" or "pathological materials and biological products for use in research purposes exclusively used by the National Referral Laboratories."<sup>184</sup>

4.8. Thus, India's AI measures at issue in this dispute consist of prohibitions on the importation of various agricultural products into India from countries reporting notifiable avian influenza (NAI), as maintained through, *inter alia*, the Livestock Act and S.O. 1663(E).<sup>185</sup>

## 4.2 Avian influenza (AI)

4.9. In the introduction to this Report, we have identified certain features of AI that were described by the Panel.<sup>186</sup> We have also noted that AI is classified into one of two groups according to its ability to cause disease, or "pathogenicity", in birds: (i) highly pathogenic avian influenza (HPAI); and (ii) low pathogenicity avian influenza (LPAI).<sup>187</sup> HPAI is an extremely infectious, systemic viral disease of poultry that causes high mortality and various types of lesions in multiple visceral organs, the brain, and skin.<sup>188</sup> By contrast, poultry infected with LPAI may exhibit no symptoms of the disease, or only very mild symptoms, such as ruffled feathers, reduced egg production, or mild effects on the respiratory system.<sup>189</sup>

4.10. AI viruses are transmitted among birds through direct contact between infected and susceptible birds or indirect contact through aerosol droplets or exposure to virus-contaminated materials, trays, or the surface of eggs.<sup>190</sup> Wild birds, particularly wild aquatic birds such as ducks, geese, and gulls, are the principal reservoirs for LPAI viruses.<sup>191</sup> Moreover, wild birds are the original source of the H5 and H7 LPAI viruses that, when circulating in poultry, give rise to HPAI viruses. In general, the longer that an H5 or H7 LPAI virus is allowed to circulate in poultry, particularly in areas of high poultry density, the greater the chances that an HPAI virus will emerge.<sup>192</sup> Wild birds thus play a significant role in introducing AI viruses in domestic poultry.

4.11. Once AI is established or adapted in poultry, however, wild birds play a very limited role in secondary dissemination.<sup>193</sup> Instead, the spreading or wider distribution of AI takes place within flocks or sizeable numbers of poultry and is greatly influenced by commercial production and marketing practices.<sup>194</sup> Humans may facilitate transmission of AI viruses through the movement of dead infected birds and the use of contaminated equipment. With respect to HPAI viruses, the high virus levels in tissues mean that consumption of infected carcasses by birds can also be a route for transmission.<sup>195</sup>

4.12. While AI is primarily a disease affecting birds, some AI viruses are zoonotic, meaning that they can infect humans and cause disease.<sup>196</sup> Transmission between humans appears to have occurred only rarely and, in nearly all reported cases of human infection with AI viruses, there has

<sup>184</sup> See also Panel Report, para. 2.33.

<sup>185</sup> Panel Report, para. 2.22.

<sup>186</sup> See *supra*, paras. 1.3-1.4. We have noted that AI has a variety of subtypes that are classified according to the two components that make up the virus – haemagglutinin (H) and neuraminidase (N). Consequently, the various subtypes of AI that have been identified are labelled as some form of the "HxNy" combination. The Panel explained that 16 H and nine N subtypes of AI have been identified to date and that new influenza viruses are constantly emerging as a result of genetic mutation and reassortment. (Panel Report, para. 2.7) Additional information regarding AI can be found in section 2.2 of the Panel Report.

<sup>187</sup> Panel Report, para. 2.8.

<sup>188</sup> Panel Report, para. 2.9.

<sup>189</sup> Panel Report, para. 2.11.

<sup>190</sup> Panel Report, para. 2.16. Faeces contain large amounts of the virus, and faecal-oral transmission is the predominant means of spread in wild bird reservoirs.

<sup>191</sup> Panel Report, para. 2.12. LPAI viruses are endemic to more than 100 different wild bird species of more than 25 different families.

<sup>192</sup> Panel Report, para. 2.17.

<sup>193</sup> Panel Report, para. 2.17.

<sup>194</sup> Panel Report, para. 2.18. The Asian lineage of the H5N1 HPAI virus constitutes an exception, since it is generally accepted that this virus may be carried by wild birds and transmitted to poultry directly from such birds without mutation from LPAI.

<sup>195</sup> Panel Report, para. 2.16.

<sup>196</sup> Panel Report, paras. 2.19-2.20. AI has also been known to infect cats and related animals such as leopards, tigers, ferrets, stone martens, dogs, and pigs, likely through eating raw infected birds.

been a close association with infected birds or infective carcasses.<sup>197</sup> Generally, serious complications or fatal cases in humans have been reported in cases of infection with certain strains of HPAI viruses, notably H5N1.<sup>198</sup> Other AI subtypes including H7N7, H7N9, and H9N2 have also infected humans; some of these cases have resulted in fatalities, but most infections have been mild or even subclinical.<sup>199</sup> Although there have been outbreaks of LPAI (H7N9) resulting in fatalities and illness to humans<sup>200</sup>, illness from infection with LPAI viruses has generally been clinically mild and has ranged from mild signs and symptoms (e.g. conjunctivitis) to more acute systemic illness (e.g. fever and upper respiratory tract disease) with full recovery.<sup>201</sup>

4.13. Between 2004 and January 2014, the United States did not notify the World Organization for Animal Health (OIE) of any outbreaks of HPAI, but did notify occurrences of LPAI in poultry.<sup>202</sup> Over a ten-year period from the end of 2003 to March 2013, India notified to the OIE 95 outbreaks of HPAI (subtype H5N1) in poultry.<sup>203</sup> As of October 2014, India had never notified an occurrence of LPAI in poultry to the OIE.<sup>204</sup>

### 4.3 The OIE Code

4.14. The OIE is the international organization responsible for establishing health standards for international trade in animals and animal products, including standards relating to AI.<sup>205</sup> The preamble of the SPS Agreement refers explicitly to the OIE, stating that it is desirable "to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including ... the [OIE]". Annex A(3)(b) to the SPS Agreement recognizes the OIE as the relevant standard-setting body for SPS measures relating to animal health and zoonoses. We further note that a cooperation agreement was developed between the WTO and the OIE in 1998<sup>206</sup>, and that the OIE was granted permanent observer status by the SPS Committee at its first meeting of March 1995.<sup>207</sup> Representatives of the OIE are invited to attend meetings of the SPS Committee and to participate, without voting rights, in deliberations on items on the agenda in which the OIE has an interest, with the exception of meetings limited to WTO Members.<sup>208</sup> Similarly, representatives of the WTO are invited to attend the annual general sessions of the International Committee of the OIE in which the WTO has an interest.<sup>209</sup>

4.15. Members of the OIE annually adopt the OIE Terrestrial Animal Health Code (OIE Code), the aim of which is to set international standards for the improvement of terrestrial animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals, including mammals, birds, and bees, and their products.<sup>210</sup> The OIE Code contains recommendations that are based on the most up-to-date scientific information and available techniques, and that are designed to prevent specific diseases from being introduced into the importing country, taking into account the nature of the commodity and the animal health

<sup>197</sup> Panel Report, para. 2.20.

<sup>198</sup> One of the most well-known examples of AI transmission to humans is the H5N1 virus, which has caused human disease and deaths since 1997, fuelling concerns that the H5N1 virus could potentially cause a global influenza pandemic in humans. (Panel Report, para. 2.21)

<sup>199</sup> Panel Report, para. 2.21.

<sup>200</sup> Panel Report, para. 2.20.

<sup>201</sup> Panel Report, para. 2.20.

<sup>202</sup> Panel Report, paras. 2.45-2.46.

<sup>203</sup> Panel Report, para. 2.47.

<sup>204</sup> Panel Report, para. 2.48.

<sup>205</sup> Panel Report, para. 2.50. Additional information regarding the OIE and the OIE Code can be found in sections 2.4 and 7.4 of the Panel Report.

<sup>206</sup> Agreement between the World Trade Organization and the Office International des Epizooties, signed on 4 May 1998, document WT/L/272. The WTO and the OIE agreed that: "in order to facilitate the accomplishment of their respective missions as set out in the International Agreement for the creation of the OIE, and the texts relating to the WTO, notably ... the SPS Agreement, to act in collaboration and to consult each other on questions of mutual interest, in particular those concerning the sanitary aspect of international trade in animals and products of animal origin and zoonoses."

<sup>207</sup> WTO SPS Committee, Relationship with Codex, IPPC and OIE, 15 May 2007, document G/SPS/GEN/775, para. 1; see also para. 10.

<sup>208</sup> Agreement between the WTO and the OIE, WT/L/272, para. 2.

<sup>209</sup> Agreement between the WTO and the OIE, WT/L/272, para. 3.

<sup>210</sup> Panel Report, paras. 2.52-2.53 (referring to OIE Code, Foreword).

status of the exporting country.<sup>211</sup> The recommendations in the OIE Code, when correctly applied, provide for safe international trade in animals and animal products while avoiding unjustified sanitary barriers to trade.<sup>212</sup> For purposes of this Report, unless otherwise specified, all references are to the 21st edition of the OIE Code, which was adopted in May 2012.<sup>213</sup>

4.16. The OIE Code contains numerous substantive provisions and recommendations grouped into two volumes.<sup>214</sup> Volume I is comprised of general provisions that concern horizontal standards applicable to a wide range of species, production sectors, and diseases.<sup>215</sup> Volume II contains recommendations applicable to OIE-listed diseases and other diseases of importance to international trade. This volume sets out the standards that apply in respect of specific diseases, including recommendations regarding disease surveillance and zoning and compartmentalization. Section 10 of Volume II is entitled "Aves" and deals with diseases of avian species. Chapter 10.4 is specifically devoted to "Infection with viruses of notifiable avian influenza".<sup>216</sup>

4.17. Chapter 10.4 of the OIE Code requires OIE members to notify the OIE of any occurrence of HPAI in birds and the occurrence of certain types of LPAI in poultry in their territories.<sup>217</sup> The term "poultry" is defined in the OIE Code as consisting of all domesticated birds, including backyard poultry, used for the production of meat or eggs for consumption or other commercial products.<sup>218</sup> Thus, although the notification obligation in respect of certain types of LPAI is confined to poultry, OIE members must notify the occurrence of HPAI in all birds, including poultry, wild birds, and pet birds.<sup>219</sup>

4.18. Apart from these general notification obligations, Chapter 10.4 of the OIE Code contains various recommendations that apply on the basis of the type of poultry product concerned, as well as the disease status of the place of origin.<sup>220</sup> The disease status is determined on the basis of

<sup>211</sup> Panel Report, paras. 2.54 and 2.59.

<sup>212</sup> Panel Report, paras. 2.53 and 7.250.

<sup>213</sup> The parties agreed, and the Panel found, that the 21st edition of the OIE Code (2012) was the relevant international standard for purposes of this dispute since it was the edition that was in force at the time the Panel was established. (Panel Report, paras. 7.206 and 7.213)

<sup>214</sup> Panel Report, para. 2.57. The OIE Code also contains a Foreword, User's Guide, and Glossary.

<sup>215</sup> Panel Report, para. 2.58. Volume I is organized into seven sections, and contains rules pertaining to animal disease diagnosis, surveillance, and notification (Section 1); disease prevention and control (Section 4); and trade measures, import and export procedures, and veterinary certification (Section 5).

<sup>216</sup> Panel Report, para. 2.59.

<sup>217</sup> Panel Report, para. 2.13.

<sup>218</sup> Panel Report, fn 519 to para. 7.230 (referring to the Glossary of the OIE Code). The definition also includes domesticated birds used for restocking supplies of game, or for breeding these categories of birds, as well as fighting cocks used for any purpose. Birds that are kept in captivity for any reason other than these reasons, including those that are kept for shows, races, exhibitions, competitions, or for breeding or selling these categories of birds, as well as pet birds, are not considered to be poultry.

<sup>219</sup> Panel Report, para. 7.237 (referring to OIE's response to Panel question No. 10(a)). See also OIE Code, Articles 10.4.1.1 and 10.4.27.

<sup>220</sup> Panel Report, para. 7.229. For example, the recommendations set out in Chapter 10.4 of the OIE Code for eggs and egg products, as specified in paragraph (1)(ii)(e) of S.O. 1663(E), are as follows:

Article 10.4.13.

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

For eggs for human consumption

Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the eggs were produced and packed in a NAI free country, zone or compartment; 2) the eggs are transported in new or appropriately sanitized packaging materials.

Article 10.4.14.

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

For eggs for human consumption

Veterinary Authorities should require the presentation of an international veterinary certificate attesting that: 1) the eggs were produced and packed in a HPNAI free country, zone or compartment; 2) the eggs have had their surfaces sanitized (in accordance with Chapter 1.1.); 3) the eggs are transported in new or appropriately sanitized packaging materials.

Article 10.4.15.

Recommendations for importation of egg products of poultry

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

NAI, which is defined as an infection of poultry that can be classified as either highly pathogenic notifiable avian influenza (HPNAI)<sup>221</sup> or low pathogenicity notifiable avian influenza (LPNAI).<sup>222</sup> With regard to disease status, the applicability of a specific recommendation may depend on whether the importation takes place from a territory that is NAI free or HPNAI free. By definition, a territory that is HPNAI free might not be LPNAI free.<sup>223</sup> For six product categories, Chapter 10.4 contains recommendations applicable to importation from an NAI-free country, zone, or compartment. For five product categories, Chapter 10.4 contains recommendations regarding importation from an HPNAI-free country, zone, or compartment.<sup>224</sup> In addition, for ten product categories, Chapter 10.4 indicates that the specific recommendations apply regardless of the NAI status of the country of origin.<sup>225</sup>

4.19. Chapter 10.4 of the OIE Code provides that disease status can be determined with respect to a country, zone<sup>226</sup>, or compartment<sup>227</sup> based on certain criteria.<sup>228</sup> Specifically, Articles 10.4.3 and 10.4.4 provide the conditions that must be met for a country, zone, or compartment to be considered either "NAI free" or "HPNAI free".<sup>229</sup> Article 10.4.3 provides that a country, zone, or compartment may be considered NAI free when it is shown that neither HPNAI nor LPNAI infection in poultry has been present for the past 12 months, based on a surveillance system in accordance with the OIE Code.<sup>230</sup> Article 10.4.4 prescribes two scenarios for establishing that a country, zone, or compartment is HPNAI free: (i) when it has been shown that HPNAI infection in poultry has not been present for the past 12 months, although its LPNAI status is unknown; or (ii) when the country, zone, or compartment does not meet the criteria for freedom from NAI but no NAI virus detected has been identified as an HPNAI virus.<sup>231</sup> Together with the text of the product-specific recommendations in Chapter 10.4, these general provisions indicate that Chapter 10.4 allows for

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

(See Panel Report, para. 7.230)

<sup>221</sup> HPNAI viruses consist of any AI virus that meets certain pathogenicity or mortality levels, or any H5 or H7 subtype that satisfies prescribed sequencing protocols. Specifically, the OIE Code defines HPNAI as follows:

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 (HAO); if the amino acid motif is similar to that observed for other HPNAI isolates, the isolate being tested should be considered as HPNAI.

(Panel Report, para. 2.14 (quoting OIE Code, Article 10.4.1.2(a))

<sup>222</sup> LPNAI viruses consist only of H5 or H7 subtypes that are not HPNAI viruses. (Panel Report, para. 2.15 (referring to OIE Code, Article 10.4.1.2(b))

<sup>223</sup> Panel Report, para. 7.252.

<sup>224</sup> Panel Report, paras. 7.230 and 7.252. The recommendations applicable to the importation of products from an NAI-free country, zone, or compartment are provided in Articles 10.4.5, 10.4.7, 10.4.10, 10.4.13, 10.4.16, and 10.4.19, whereas those applicable to the importation of products from an HPNAI-free country, zone, or compartment are set forth in Articles 10.4.8, 10.4.11, 10.4.14, 10.4.17, and 10.4.19. Article 10.4.19 contains the same recommendations for importation, whether from an NAI-free or HPNAI-free country, zone, or compartment. (Ibid., para. 7.250)

<sup>225</sup> Panel Report, para. 7.229. The recommendations applicable to the importation of products regardless of the NAI status of the country of origin are set forth in Articles 10.4.6, 10.4.9, 10.4.12, 10.4.15, 10.4.18, 10.4.20, 10.4.21, 10.4.22, 10.4.23, and 10.4.24. (Ibid., para. 7.252)

<sup>226</sup> The Panel noted the OIE's clarification that, for purposes of the OIE Code, "zoning" and "regionalisation" have the same meaning. The Glossary of the OIE Code defines the term "zone" or "region" as "a clearly defined part of a territory containing an animal subpopulation with a distinct health status with respect to a specific disease for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade". (Panel Report, para. 7.255 and fn 563 thereto)

<sup>227</sup> The Glossary of the OIE Code defines the term "compartment" as "an animal subpopulation contained in one or more establishments under a common biosecurity management system with a distinct health status with respect to a specific disease or specific diseases for which required surveillance, control and biosecurity measures have been applied for the purpose of international trade". (Panel Report, fn 564 to para. 7.255)

<sup>228</sup> Panel Report, para. 7.256.

<sup>229</sup> Panel Report, para. 7.257.

<sup>230</sup> Panel Report, para. 7.257. A surveillance system that meets the requirements of the OIE Code is prescribed in Articles 10.4.27 through 10.4.33.

<sup>231</sup> Panel Report, para. 7.257.

importation from NAI-free or HPNAI-free countries, as well as from NAI-free or HPNAI-free zones and compartments when the relevant criteria are met.<sup>232</sup>

4.20. OIE members may make self-declarations as to their disease status, which may be published by the OIE; however, such publication does not imply endorsement of the claim.<sup>233</sup> In addition, an OIE member declaring freedom from NAI or HPNAI for a country, zone, or compartment must provide evidence of an effective surveillance programme.<sup>234</sup> Articles 10.4.27 through 10.4.33 of the OIE Code define the principles of, and provide guidance on, surveillance for NAI for members seeking to determine their NAI status for a particular country, zone, or compartment. These AI-specific provisions complement the general provisions of the OIE relating to animal health surveillance. With respect to a few specific diseases, OIE members may request official recognition of disease-free status by the OIE. However, AI is not one of these diseases.<sup>235</sup>

4.21. Finally, we note that the product-specific recommendations set out in Chapter 10.4 of the OIE Code apply to eight of the ten product categories listed in S.O. 1663(E), as set out in the table below.<sup>236</sup>

Product categories in S.O. 1663(E)	Corresponding OIE Code recommendations
Paragraph (1)(ii)(a): domestic and wild birds (including poultry and captive birds)	Articles 10.4.5 and 10.4.6
Paragraph (1)(ii)(b): day old chicks, ducks, turkey, and other newly hatched avian species	Articles 10.4.7 and 10.4.8
Paragraph (1)(ii)(c): un-processed meat and meat products from Avian species, including domesticated, wild birds and poultry	Articles 10.4.19 and 10.4.20
Paragraph (1)(ii)(d): hatching eggs	Articles 10.4.10, 10.4.11, and 10.4.12
Paragraph (1)(ii)(e): eggs and egg products (except Specific Pathogen Free eggs)	Articles 10.4.13, 10.4.14, and 10.4.15
Paragraph (1)(ii)(f): un-processed feathers;	Articles 10.4.22 and 10.4.23
Paragraph (1)(ii)(i): products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use	Article 10.4.21
Paragraph (1)(ii)(j): semen of domestic and wild birds including poultry	Articles 10.4.17 and 10.4.18

Source: Panel Report, paras. 7.230 and 7.529.

4.22. The two other product categories identified in S.O. 1663(E) are not covered by Chapter 10.4 of the OIE Code – "live pigs" (paragraph (1)(ii)(g))<sup>237</sup>, and "pathological material and biological products from birds" (paragraph (1)(ii)(h)).<sup>238</sup>

## 5 ANALYSIS OF THE APPELLATE BODY

### 5.1 Articles 2.2, 5.1, and 5.2 of the SPS Agreement

5.1. India requests us to reverse the Panel's finding that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement because they are not based on scientific principles and are

<sup>232</sup> Panel Report, paras. 7.259 and 7.263.

<sup>233</sup> OIE Code, Article 1.6.1.

<sup>234</sup> OIE Code, Article 10.4.30.1.

<sup>235</sup> OIE Code, Article 1.6.1.

<sup>236</sup> Panel Report, para. 7.220.

<sup>237</sup> Chapter 10.4 contains no product-specific recommendations for live pigs because, "even if they can be infected, they have been found not to play a significant epidemiological role in avian influenza". (Panel Report, para. 7.221 (quoting OIE's response to Panel question No. 6))

<sup>238</sup> Chapter 10.4 contains no product-specific recommendations for pathological material and biological products from birds. (Panel Report, para. 7.222 (referring to OIE's response to Panel question No. 5), and paras. 7.225-7.227) The Panel also found that it did not have sufficient evidence to determine whether India's AI measures in respect of these products are based on recommendations in another chapter of the OIE Code.

maintained without sufficient scientific evidence.<sup>239</sup> India also requests reversal of the Panel's finding that India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement because they are not based on a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations and the factors set forth in Article 5.2.<sup>240</sup> In the event that we reverse the Panel's finding under Article 2.2 of the SPS Agreement, India requests us to complete the legal analysis and find that India's AI measures are consistent with that provision.<sup>241</sup>

5.2. In its appeal, India contends that the Panel erred in its interpretation and application of Article 2.2 of the SPS Agreement in finding India's AI measures to be inconsistent with that provision solely as a consequence of its finding that they are inconsistent with Articles 5.1 and 5.2. India points out that, before the Panel, the United States claimed that India's AI measures violate Article 2.2: (i) as a consequence of the fact that they are inconsistent with Articles 5.1 and 5.2; as well as (ii) independently, because they are not based on scientific principles and are maintained without sufficient scientific evidence. The Panel, however, reached its finding under Article 2.2 solely on the basis of the former of these arguments, and ignored that the obligation under Article 2.2 can, in principle, be independently fulfilled without recourse to Articles 5.1 and 5.2. For India, the Panel should, therefore, have begun its analysis under Article 2.2. India also alleges that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU, by: (i) disregarding the arguments and evidence presented by India to establish that its AI measures are consistent with Article 2.2 because they are based on scientific principles and sufficient scientific evidence; (ii) ruling on a claim that was broader than the one put forward by the United States in its written submissions; and (iii) failing to consider India's argument that, because its AI measures are based on scientific principles and are not maintained without sufficient scientific evidence, and are thus consistent with Article 2.2, India was not required to conduct a separate risk assessment under Articles 5.1 and 5.2.<sup>242</sup>

5.3. The United States requests us to uphold the Panel's findings under Articles 2.2, 5.1, and 5.2 of the SPS Agreement. For the United States, the Panel correctly found that India's AI measures are inconsistent with Articles 5.1 and 5.2, as India failed to base them on a risk assessment. The Panel also correctly found that, as a result of this failure, India's measures can be presumed to breach Article 2.2.<sup>243</sup> The United States stresses that there is no support for India's assertion that compliance with Article 2.2 obviates the need for a Member to comply with Articles 5.1 and 5.2. Rather, Article 2.2 is a general obligation that encompasses the obligations in Articles 5.1 and 5.2.<sup>244</sup> The Panel's assessment under Article 2.2 was limited to assessing the United States' "consequential" claim based on the violation of Articles 5.1 and 5.2, and did not address the United States' separate, "independent" claim under Article 2.2.<sup>245</sup> In any event, there may be multiple bases for breaching Article 2.2. The fact that the United States contended that Article 2.2 had been violated, not only consequentially, but also for another independent reason, cannot change the fact that India's measures are inconsistent with Articles 5.1 and 5.2 and that, as a consequence, India has breached Article 2.2. For the United States, therefore, the Panel's analysis under Article 2.2 rightly focused on the question of whether India's AI measures are based on a "risk assessment".<sup>246</sup> India's assertion that an SPS measure found to be consistent with Article 2.2 cannot violate Articles 5.1 and 5.2 cannot be reconciled with the obligation in those provisions "to base an SPS measure on a risk assessment – that is, to ensure [that] the measure is rationally related to the scientific evidence underlying the assessment of risks."<sup>247</sup> Additionally, the United States also submits that India has failed to establish that the Panel acted inconsistently with Article 11 of the DSU in its analysis and findings with respect to Articles 2.2, 5.1, and 5.2.

5.4. We begin by recalling the Panel's findings under Articles 2.2, 5.1, and 5.2 of the SPS Agreement. Next, we consider the relationship between Article 2.2, on the one hand, and

<sup>239</sup> India's appellant's submission, para. 26 (referring to Panel Report, para. 7.332) and para. 58.

<sup>240</sup> India's appellant's submission, para. 63 (referring to Panel Report, paras. 7.318-7.319).

<sup>241</sup> India's appellant's submission, paras. 64-85.

<sup>242</sup> India's appellant's submission, para. 14 (referring to Panel Report, paras. 7.309-7.319 and 7.331-7.332).

<sup>243</sup> United States' appellee's submission, para. 44.

<sup>244</sup> United States' appellee's submission, para. 37.

<sup>245</sup> United States' appellee's submission, paras. 42 and 59.

<sup>246</sup> United States' appellee's submission, paras. 48-50.

<sup>247</sup> United States' appellee's submission, para. 35.

Articles 5.1 and 5.2, on the other hand. Subsequently, we address each of India's claims of error on appeal and its request to complete the legal analysis.

### 5.1.1 The Panel's findings

5.5. Before the Panel, the United States claimed that India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement because India failed to undertake a risk assessment, as required by these provisions. The United States further claimed that India's failure to conduct a risk assessment also resulted in a breach of Article 2.2 of the SPS Agreement.<sup>248</sup>

5.6. Before addressing the United States' claims, the Panel made a number of preliminary observations. First, the Panel rejected India's contention that the United States' claims under Articles 5.1, 5.2, and 2.2 of the SPS Agreement pertained only to fresh poultry meat and eggs. Recalling its Preliminary Ruling<sup>249</sup>, the Panel observed that the ten product categories listed in S.O. 1663(E) fall within the scope of the dispute.<sup>250</sup> Second, referring to its earlier findings that India's AI measures are not based on, and do not conform to, the OIE Code, the Panel observed that India cannot rely on the alleged conformity of its AI measures to the OIE Code in order to justify a presumption of consistency of its measures with Articles 5.1, 5.2, and 2.2.<sup>251</sup>

5.7. Third, in deciding the order in which it would analyse the United States' claims under the three provisions at issue, the Panel considered the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand. The Panel noted that Articles 2.2, 5.1, and 5.2 all deal with the scientific foundation of SPS measures and are "intimately related".<sup>252</sup> The Panel recalled the Appellate Body's observations that Article 5.1 constitutes a "specific application" of the basic obligations contained in Article 2.2; that Article 2.2 informs Article 5.1 because the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1; and, finally, that Articles 2.2 and 5.1 should "constantly be read together".<sup>253</sup> The Panel observed that the relationship between these provisions had led past panels and the Appellate Body to conclude that, when an SPS measure is not based on a risk assessment, in accordance with Articles 5.1 and 5.2, the measure can be presumed, more generally, not to be based on scientific principles or to be maintained without sufficient scientific evidence.<sup>254</sup> The Panel considered this to mean that, in practical terms, a violation of Articles 5.1 and 5.2 entails a violation of the more general Article 2.2. The Panel, however, noted that the opposite is not always true, given the broader scope of Article 2.2, and that not all instances of violation of Article 2.2 entail a violation of Articles 5.1 and 5.2.<sup>255</sup> For these reasons, the Panel stated that it would first examine the United States' claims under Articles 5.1 and 5.2, before proceeding to the "broader claim" under Article 2.2.<sup>256</sup>

5.8. In assessing the United States' claims under Articles 5.1 and 5.2, the Panel adopted the two-step approach of the panel in *US – Poultry (China)* and considered: (i) whether India has a risk assessment, appropriate to the circumstances, taking into account risk assessment techniques developed by the relevant international organizations and the elements listed in Article 5.2; and (ii) if so, whether India's AI measures are based on that risk assessment.<sup>257</sup>

5.9. Addressing the first of these two questions, the Panel noted that India had not identified any risk assessment on which its AI measures were based, but rather relied on its defence that, because its measures conform to the OIE Code, the absence of a risk assessment was "of no

<sup>248</sup> Panel Report, para. 7.276.

<sup>249</sup> The preliminary ruling by the Panel of 22 May 2013 was circulated as document WT/DS430/5 on 28 June 2013 and forms an integral part of the Panel Report. (Panel Report, paras. 1.16, 7.2, and 7.4)

<sup>250</sup> Panel Report, para. 7.278 (referring to Preliminary Ruling, paras. 3.27-3.30, 3.37, 3.92-3.93, and 3.140).

<sup>251</sup> Panel Report, para. 7.279.

<sup>252</sup> Panel Report, para. 7.281.

<sup>253</sup> Panel Report, para. 7.281 (quoting Appellate Body Reports, *EC – Hormones*, para. 180; and *Australia – Apples*, para. 209).

<sup>254</sup> Panel Report, para. 7.282 (quoting Panel Report, *Australia – Salmon*, para. 8.52; and Appellate Body Report, *Australia – Salmon*, para. 137).

<sup>255</sup> Panel Report, para. 7.282.

<sup>256</sup> Panel Report, para. 7.283.

<sup>257</sup> Panel Report, para. 7.307 (referring to Panel Report, *US – Poultry (China)*, para. 7.173).

consequence"<sup>258</sup> because it was "not required to conduct a risk assessment for measures which conform to the international standards".<sup>259</sup> The Panel observed that India had referred to a risk assessment undertaken by Australia, but it had not asserted that its AI measures are "based on" that assessment. The Panel then considered whether a document identified by the United States that India had provided to the SPS Committee in 2010<sup>260</sup> (Summary Document) constituted a risk assessment within the meaning of Article 5.1. Given that India did not contend that either of these documents served as its risk assessment, and considering that the Summary Document does not meet the definition of a risk assessment set out in Annex A, paragraph 4, to the SPS Agreement, the Panel concluded that India did not have a risk assessment within the meaning of Annex A, paragraph 4, and as required by Article 5.1.<sup>261</sup> In the absence of a risk assessment, the Panel concluded that India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement.<sup>262</sup>

5.10. Turning to the United States' claim under Article 2.2, the Panel recalled its understanding of the relationship between this provision and Articles 5.1 and 5.2 – i.e. where an SPS measure is not based on a risk assessment, as required by Articles 5.1 and 5.2, the measure is presumed not to be based on scientific principles and to be maintained without sufficient scientific evidence, in contravention of Article 2.2.<sup>263</sup> Referring to its finding that India's AI measures are not based on a risk assessment and that they are therefore inconsistent with Articles 5.1 and 5.2, the Panel further found that India's AI measures are inconsistent with Article 2.2 because they are not based on scientific principles and are maintained without sufficient scientific evidence.<sup>264</sup>

### 5.1.2 The relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand

5.11. India's appeal of the Panel's findings under Articles 2.2, 5.1, and 5.2 of the SPS Agreement focuses on the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand. Before addressing India's claims and arguments, we consider the relationship between these provisions, in the light of the customary rules of interpretation of public international law and relevant WTO jurisprudence.

5.12. Beginning with the general structure and logic of the SPS Agreement, we note that Article 2 sets out basic rights and obligations for WTO Members; several paragraphs of Article 5 elaborate upon many of the basic obligations set out in Article 2. The Appellate Body, in considering the relationships that exist between the basic obligations in Article 2 and several paragraphs of Article 5, has consistently emphasized the close link that exists not only between Article 2.2 and Articles 5.1 and 5.2<sup>265</sup>, but also between Articles 2.2 and 5.6<sup>266</sup>, and between Articles 2.3 and 5.5.<sup>267</sup> With respect to each of these sets of obligations, the Appellate Body has acknowledged that the relevant text of Article 2 serves as context for understanding the corresponding specific obligations in Article 5, and vice versa.<sup>268</sup> Given that the provisions of Article 5 set out "more specific elaborations" of the "basic" rights and obligations in Article 2<sup>269</sup>, we consider that the structure and logic of the SPS Agreement, as understood in the light of the relationship between the various provisions of Articles 5 and 2, is such that the preferred means for complying with the

<sup>258</sup> Panel Report, para. 7.309 (quoting India's opening statement at the first Panel meeting, para. 4; and first written submission to the Panel, para. 185).

<sup>259</sup> Panel Report, para. 7.312 (quoting India's responses to Panel question Nos. 31 and 59).

<sup>260</sup> Panel Report, para. 7.288 (referring to Panel Exhibit US-110, entitled "India's Risk Assessment on Avian Influenza for imposing ban on import of poultry and poultry products from Avian Influenza positive countries").

<sup>261</sup> Panel Report, paras. 7.316-7.317.

<sup>262</sup> Panel Report, paras. 7.318-7.319 and 7.333.

<sup>263</sup> Panel Report, para. 7.331 (referring to, *inter alia*, Appellate Body Report, *Australia – Salmon*, para. 138).

<sup>264</sup> Panel Report, paras. 7.332 and 7.334.

<sup>265</sup> Appellate Body Reports, *EC – Hormones*, para. 180; *US/Canada – Continued Suspension*, para. 674 (noting that the requirements in Article 2.2 are "made operative in other provisions of the SPS Agreement, including Article 5.1").

<sup>266</sup> Appellate Body Report, *Australia – Apples*, para. 339 (quoting Appellate Body Report, *EC – Hormones*, para. 180).

<sup>267</sup> Appellate Body Report, *EC – Hormones*, para. 212 (noting that "Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3").

<sup>268</sup> Appellate Body Reports, *EC – Hormones*, paras. 180 and 212; *Australia – Apples*, para. 339.

<sup>269</sup> Appellate Body Report, *Australia – Apples*, paras. 339-341.



basic obligations under Article 2 is through the "particular routes" or "specific obligations" set out in Article 5.<sup>270</sup>

5.13. Before considering the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand, we recall the content of the obligations set out in those provisions, as explained by the Appellate Body in previous disputes. Article 2 of the SPS Agreement is entitled "Basic Rights and Obligations". Its second paragraph reads as follows:

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.

5.14. Article 5 of the SPS Agreement is entitled "Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection". Articles 5.1 and 5.2 state that:

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

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

5.15. Article 2.2 requires Members to ensure, *inter alia*, that their SPS measures are "based on scientific principles and [are] not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5".<sup>271</sup> The obligation in Article 2.2 that an SPS measure not be "maintained without sufficient scientific evidence" requires "the existence of a sufficient or adequate relationship between two elements, *in casu*, between the SPS measure and the scientific evidence".<sup>272</sup> Further, the Appellate Body has identified Articles 5.1, 3.3, and 5.7 of the SPS Agreement as providing relevant context for interpreting the phrase "maintained without sufficient scientific evidence" in Article 2.2.<sup>273</sup> Based on these considerations, the Appellate Body has noted that "the obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence requires that there be a rational or objective relationship between the SPS measure and the scientific evidence."<sup>274</sup> Whether such a relationship exists "will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence".<sup>275</sup>

5.16. Using the mandatory "shall", Article 5.1 requires Members to "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". With respect to the term "based on" in Article 5.1, the Appellate Body in *EC – Hormones* noted that "'based on' is appropriately taken to refer to a certain *objective relationship* between two elements, that is to say, to an *objective situation* that

<sup>270</sup> Appellate Body Reports, *Australia – Apples*, para. 339; *EC – Hormones*, para. 212. See also Panel Report, *Australia – Salmon*, para. 8.52.

<sup>271</sup> Article 2.2 sets out several different requirements. The first requirement, namely, that an SPS measure must be applied only to the extent necessary to protect human, animal or plant life or health, is also elaborated through the more specific obligation in Article 5.6. The other requirements, namely, that an SPS measure be based on scientific principles and not be maintained without sufficient scientific evidence, are linked to the more specific obligations in Articles 5.1 and 5.2. For purposes of our analysis in this subsection of our Report, a reference to Article 2.2 does not relate to the first requirement under that provision, unless indicated otherwise.

<sup>272</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 73. The ordinary meaning of the term "sufficient" used by the Appellate Body was "of a quantity, extent, or scope adequate to a certain purpose or object".

<sup>273</sup> Appellate Body Report, *Japan – Agricultural Products II*, paras. 74-80.

<sup>274</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 84.

<sup>275</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 84.

persists and is observable between an SPS measure and a risk assessment."<sup>276</sup> Drawing upon the context provided by Article 2.2, the Appellate Body observed that:

Article 5.1, when contextually read as it should be, in conjunction with and as informed by Article 2.2 of the SPS Agreement, requires that the results of the risk assessment must sufficiently warrant – that is to say, reasonably support – the SPS measure at stake. The requirement that an SPS measure be "based on" a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment.<sup>277</sup>

5.17. A "risk assessment", as envisaged under Article 5.1, is defined in paragraph 4 of Annex A to the SPS Agreement as follows:

The 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; or the evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins or disease-causing organisms in food, beverages or feedstuffs.

5.18. Moreover, a list of factors that "shall" be taken into account in a risk assessment is provided in Article 5.2. The list begins with "available scientific evidence" and also includes: "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".<sup>278</sup>

5.19. In *EC – Hormones*, the Appellate Body described a "risk assessment" as "a process characterized by systematic, disciplined and objective enquiry and analysis, that is, a mode of studying and sorting out facts and opinions."<sup>279</sup> Science plays a "central role" in a risk assessment.<sup>280</sup> The Appellate Body has, however, cautioned against taking "too narrow" an approach to a risk assessment.<sup>281</sup> In *Australia – Apples*, the Appellate Body stated that "Article 5.2 requires a risk assessor to take into account the available scientific evidence, together with other factors."<sup>282</sup> In *EC – Hormones*, the Appellate Body further stated that:

[s]ome of the kinds of factors listed in Article 5.2 such as 'relevant processes and production methods' and 'relevant inspection, sampling and testing methods' are not necessarily or wholly susceptible of investigation according to laboratory methods of, for example, biochemistry or pharmacology. Furthermore, there is nothing to indicate that the listing of factors that may be taken into account in a risk assessment of Article 5.2 was intended to be a closed list. It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die.<sup>283</sup>

5.20. Article 5.1 may be viewed as a specific application of the basic obligations contained in Article 2.2 of the SPS Agreement.<sup>284</sup> In the light of the close relationship between Article 2.2 and Article 5.1, the Appellate Body has stated that the two provisions "should constantly be read together" and that Article 2.2 "informs" Article 5.1 as "the elements that define the basic

<sup>276</sup> Appellate Body Report, *EC – Hormones*, para. 189. (emphasis original)

<sup>277</sup> Appellate Body Report, *EC – Hormones*, para. 193.

<sup>278</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 527.

<sup>279</sup> Appellate Body Report, *EC – Hormones*, para. 187.

<sup>280</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 527; *Australia – Apples*, para. 207.

<sup>281</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 527.

<sup>282</sup> Appellate Body Report, *Australia – Apples*, para. 208.

<sup>283</sup> Appellate Body Report, *EC – Hormones*, para. 187.

<sup>284</sup> Appellate Body Report, *EC – Hormones*, para. 180 (referring to US Panel Report, *EC – Hormones*, para. 8.93; and Canada Panel Report, *EC – Hormones*, para. 8.96).

obligation set out in Article 2.2 impart meaning to Article 5.1".<sup>285</sup> Articles 2.2, 5.1, and 5.2 all reflect and reinforce the "important role that science plays throughout the SPS Agreement in maintaining 'the delicate and carefully negotiated balance in the SPS Agreement between the shared, but sometimes competing, interests of promoting international trade and of protecting the life and health of human beings'".<sup>286</sup>

5.21. While Articles 5.1 and 5.2 may be considered specific applications of the basic obligations in Article 2.2, this does not imply that the obligations in Articles 5.1 and 5.2 somehow serve to limit the scope of application of the obligations in Article 2.2, or vice versa. To the contrary, all of these obligations apply together. As a general matter, we note that Article 2.1 of the SPS Agreement, which states that Members have the right to adopt SPS measures "provided that such measures are not inconsistent with the provisions of this Agreement", makes explicit the principle that Members must ensure that their SPS measures comply with all of the obligations set out in all such provisions. At the same time, it is true that some provisions of the SPS Agreement themselves identify circumstances in which the obligations that they prescribe do not apply. For example, Article 3.1 expressly excludes from its scope of application the situations covered under Article 3.3.<sup>287</sup> Significantly, Article 2.2 itself contains express language limiting its scope of application to circumstances in which Article 5.7 does not apply.<sup>288</sup> Yet, neither Article 2.2, on the one hand, nor Articles 5.1 and 5.2, on the other hand, contain any language suggesting a similar limitation on the scope of their application *inter se*. Indeed, in previous disputes, the Appellate Body has found that no such limitations exist. For example, in *Japan – Agricultural Products II*, the Appellate Body rejected Japan's argument that, in situations when it is possible to apply Article 5.1, Article 2.2 cannot be directly applied, observing that "[t]here is nothing in the text of either Articles 2.2 or 5.1, or any other provision of the SPS Agreement, that requires or sanctions such limitation of the scope of Article 2.2."<sup>289</sup> Likewise, in *US/Canada – Continued Suspension*, the Appellate Body made clear that, other than in circumstances covered by Article 5.7, a WTO Member's SPS measures must conform with the obligations both in Article 5.1 and in Article 2.2.<sup>290</sup>

5.22. In considering the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand, it is also useful to recall that a panel's task under Article 5.1 is linked to, and is informed by, the requirements of Article 2.2. In *Australia – Apples*, the Appellate Body explained that, in *US/Canada – Continued Suspension*, it had identified:

... two aspects of a panel's scrutiny of a risk assessment, namely, scrutiny of the underlying *scientific basis* and scrutiny of the reasoning of the risk assessor based upon such *underlying science*. With respect to the first aspect, the Appellate Body saw the panel's role as limited to reviewing whether the scientific basis constitutes "legitimate science according to the standards of the relevant scientific community". The Appellate Body perceived the second aspect of a panel's review as involving an assessment of whether the reasoning of the risk assessor is objective and coherent, that is, whether the conclusions find sufficient support in the *scientific evidence* relied upon. Having done so, the panel must determine whether the results of the risk assessment sufficiently warrant the challenged SPS measures. We consider that this reasoning of the Appellate Body is consistent with the overarching requirement in Article 2.2 and reflected in Articles 5.1 and 5.2 of the SPS Agreement that there be a "rational or objective relationship" between the SPS measures and the *scientific evidence*.<sup>291</sup>

A panel's task under Articles 5.1 and 5.2, therefore, encompasses a scrutiny of the scientific basis underlying a risk assessment and, ultimately, the SPS measure at issue.

<sup>285</sup> Appellate Body Report, *EC – Hormones*, para. 180.

<sup>286</sup> Appellate Body Report, *Australia – Apples*, para. 364 (quoting Appellate Body Report, *EC – Hormones*, para. 177).

<sup>287</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>288</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 80.

<sup>289</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 82.

<sup>290</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 674.

<sup>291</sup> Appellate Body Report, *Australia – Apples*, para. 215 (referring to Appellate Body Reports, *US/Canada – Continued Suspension*, para. 591). (fn omitted; emphasis added)

5.23. The findings that a panel makes with respect to claims that an SPS measure is inconsistent with Articles 5.1 and 5.2 have an important role to play in that panel's assessment of a claim that the same SPS measure is inconsistent with Article 2.2 because it is not based on scientific principles and is maintained without sufficient scientific evidence. The panel in *Australia – Salmon* observed that "Articles 5.1 and 5.2 ... 'may be seen to be marking out and elaborating a particular route leading to the same destination set out in' Article 2.2."<sup>292</sup> Based on this reasoning, the panel went on to note 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."<sup>293</sup> The Appellate Body agreed with the panel in that dispute and found that, "by maintaining an import prohibition ... in violation of Article 5.1, Australia has, *by implication*, also acted inconsistently with Article 2.2 of the *SPS Agreement*."<sup>294</sup> In *Australia – Apples*, the Appellate Body referred to its statements in *Australia – Salmon* and explained that "there is a one-way, dependent relationship in law between the more specific provisions of Article 5.1 or Article 5.2, on the one hand, and the more general provisions of Article 2.2, on the other hand."<sup>295</sup> Thus, the Appellate Body explained that "a violation of Article 5.1 or Article 5.2 can be presumed to imply a violation of Article 2.2, but that the reverse does not hold true – that is, a violation of Article 2.2 does not imply a violation of Article 5.1 or Article 5.2."<sup>296</sup> In short, the Appellate Body has consistently held that an SPS measure found to be inconsistent with Articles 5.1 and 5.2 can be presumed, more generally, to be inconsistent with Article 2.2.

5.24. Nonetheless, we note that the terms used in Article 2.2 and Articles 5.1 and 5.2 are not identical, and that, therefore, their respective scopes may not be entirely coextensive. This in turn suggests that, although it may give rise to a *presumption of inconsistency* with Article 2.2, a finding of a violation of Articles 5.1 and 5.2 might not *invariably* lead to a finding of inconsistency with Article 2.2. This is consistent with the principle of effectiveness in treaty interpretation.<sup>297</sup> The textual differences between Article 2.2 and Articles 5.1 and 5.2, together with the general, as opposed to the specific, nature of the obligations set out in Article 2.2 as compared to the obligations in Articles 5.1 and 5.2, indicate that it cannot be excluded that there may be circumstances in which an SPS measure that violates the latter two provisions will not be inconsistent with the former provision. Put differently, these differences show that, although the relationship between these provisions creates a presumption that a finding of violation of Article 2.2 will flow from a finding of violation of Articles 5.1 and 5.2, such presumption cannot be irrebuttable.

5.25. Having said that, we wish to make clear that the rebuttability of the presumption of inconsistency under Article 2.2 arising from a violation of Articles 5.1 and 5.2 cannot have the effect of diluting the requirements under Articles 5.1 and 5.2 or undermining the structure and logic of the SPS Agreement, namely, that the preferred means for complying with the basic obligations under Article 2 is through the "particular routes" or "specific obligations" set out in Article 5.<sup>298</sup>

5.26. In this regard, we recall that Article 2.2 requires that there be a rational or objective relationship between the SPS measure and the scientific evidence, and that an assessment of whether such a relationship exists must be undertaken in the light of the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of

<sup>292</sup> Panel Report, *Australia – Salmon*, para. 8.52 (quoting Appellate Body Report, *EC – Hormones*, para. 212). (emphasis added)

<sup>293</sup> Panel Report, *Australia – Salmon*, para. 8.52. (emphasis added)

<sup>294</sup> Appellate Body Report, *Australia – Salmon*, para. 138. (emphasis added)

<sup>295</sup> Appellate Body Report, *Australia – Apples*, para. 340.

<sup>296</sup> Appellate Body Report, *Australia – Apples*, para. 340 (referring to Appellate Body Report, *Australia – Salmon*, para. 138).

<sup>297</sup> In *Japan – Alcoholic Beverages II*, the Appellate Body confirmed that the principle of effectiveness (*ut res magis valeat quam pereat*) is a "fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31" of the Vienna Convention. The Appellate Body recalled its observation in *US – Gasoline* that "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility". (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, p. 106)

<sup>298</sup> Appellate Body Reports, *Australia – Apples*, para. 339; *EC – Hormones*, para. 212. See also Panel Report, *Australia – Salmon*, para. 8.52.

the scientific evidence.<sup>299</sup> One key characteristic of SPS measures is that they seek to protect against identifiable risks. The term "sanitary or phytosanitary measure" found in the text of Article 2.2 is defined in Annex A(1) to the SPS Agreement.<sup>300</sup> Three of the four types of measures identified in that definition are measures applied, *inter alia*, to protect animal, human or plant life or health from various types of "risks". As Article 2.2 lays down requirements with which Members adopting SPS measures must comply, and given that the objective of ensuring protection against risks to human, animal or plant life or health is a "key" characteristic of SPS measures<sup>301</sup>, an assessment of the consistency of an SPS measure with Article 2.2 would, by definition, involve consideration of evidence relating to the specific risks against which the SPS measure seeks to protect.

5.27. We further consider that the language "a more objective assessment of risk" in Article 5.7, read together with the express reference to that provision contained in Article 2.2, also reinforces that an analysis of whether a measure is based on scientific principles or is not maintained without sufficient scientific evidence within the meaning of Article 2.2 should ordinarily focus on the assessment of the risks against which a measure seeks to protect. In our view, it follows that any assessment of whether an SPS measure is maintained without sufficient scientific evidence or is not based on scientific principles would encompass an inquiry into evidence adduced by the parties regarding the particular risks that such measure is said to protect against, and to whom the risk is posed (e.g. humans, animals, plants, and/or the environment).<sup>302</sup>

5.28. As to the quality and quantity of scientific evidence that needs to be taken into account in determining whether there is a rational and objective relationship between an SPS measure and the scientific evidence within the meaning of Article 2.2, given the close relationship between Articles 2.2 and 5.1 and the important role that science plays throughout the SPS Agreement, we consider relevant the Appellate Body's observations in the context of Article 5.1. The Appellate Body has stated that, in scrutinizing the underlying scientific basis under Article 5.1, the evidence presented must "have the necessary scientific and methodological rigour to be considered reputable science."<sup>303</sup> Thus, "while the correctness of the views need not have been accepted by the broader scientific community, the views must be considered to be legitimate science according to the standards of the relevant scientific community."<sup>304</sup>

5.29. In the light of the foregoing, even though the presumption of inconsistency under Article 2.2 flowing from a violation of Articles 5.1 and 5.2 is rebuttable, establishing that there exists a rational or objective relationship between the SPS measure and the scientific evidence for

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<sup>299</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 84. See also Appellate Body Report, *Japan – Apples*, para. 164.

<sup>300</sup> Annex A(1) to the SPS Agreement reads, in relevant part:

*Sanitary or phytosanitary measure – Any measure applied:*

(a) to protect animal or plant life or health within the territory of the Member from *risks* arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms;

(b) to protect human or animal life or health within the territory of the Member from *risks* arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs;

(c) to protect human life or health within the territory of the Member from *risks* arising from diseases carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or

(d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.

...

(emphasis added)

<sup>301</sup> Appellate Body Report, *Australia – Apples*, para. 364.

<sup>302</sup> We also note that a "risk" cannot usually be understood only in general terms as a disease or specified adverse effects that may result. Rather, identifying risk involves connecting the possibility of adverse effects with an antecedent or cause. (Appellate Body Report, *Japan – Apples*, fn 372 to para. 202)

<sup>303</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 591.

<sup>304</sup> Appellate Body Reports, *US/Canada – Continued Suspension*, para. 591. See also Appellate Body Report, *Australia – Apples*, para. 215.

purposes of Article 2.2 would, in most cases, be difficult without a Member demonstrating that such a measure is based on an assessment of the risks, as appropriate to the circumstances.<sup>305</sup>

### 5.1.3 Whether the Panel erred in its interpretation and application of Article 2.2

5.30. With these general considerations in mind, we turn to India's first claim of error, namely, that the Panel erred in interpreting and applying Article 2.2 of the SPS Agreement by failing to distinguish between Article 2.2 and Article 5.1 of the SPS Agreement as independent legal provisions setting out distinct obligations. India asserts that, by equating Article 2.2 with Articles 5.1 and 5.2, the Panel rendered Article 2.2 redundant. India considers that a proper interpretation of Article 2.2 and Article 5.1 establishes that a Member can *either* base its SPS measure under Article 2.2 by directly establishing a link between the SPS measure and the scientific principles and sufficient scientific evidence, or, alternatively, a Member can follow the process under Article 5.1 by conducting a risk assessment and thus also comply with Article 2.2.<sup>306</sup> India submits that, although the Panel correctly identified that an SPS measure that does not comply with Articles 5.1 and 5.2 is "presumed" to be inconsistent with Article 2.2, the Panel "incorrectly ignored that obligations under Article 2.2 ... can also be independently fulfilled without resorting to Article 5.1".<sup>307</sup> Noting that, in the present case, it had based its "defense" under Article 2.2, India submits that the Panel should therefore have started its analysis with Article 2.2.<sup>308</sup> Due to these errors, India requests us to reverse the Panel's finding under Article 2.2 of the SPS Agreement.<sup>309</sup>

5.31. The United States considers India's argument to be "a *non sequitur*", stressing that, before the Panel, it alleged that Article 2.2 was violated both as a consequence of the inconsistency of India's AI measures with Articles 5.1 and 5.2, and independently with respect to the requirements under Article 2.2.<sup>310</sup> According to the United States, there is nothing in the text of Article 2.2, 5.1, or 5.2 that suggests that, when a party asserts that Article 2.2 has been violated consequentially as a result of violating Articles 5.1 and 5.2, and also for another independent reason, the "consequential claims" are somehow converted into "subsidiary claims" dependent for their success on the "independent claim".<sup>311</sup> However, there is nothing in the text of Article 2.2 that precludes multiple bases for breaching that obligation, and the fact that the United States also advanced an independent claim cannot change the fact that India's measures are inconsistent with Articles 5.1 and 5.2 and that, as a consequence, India breached Article 2.2. The United States also asserts that India's contention that the Panel improperly "conflated" Articles 2.2 and 5.1 "lacks any basis in the record or logic".<sup>312</sup> Recalling the Panel's analysis, the United States submits that the Panel did not render these provisions "redundant" but, instead, correctly recognized that Article 2.2 could be breached even in the absence of a breach of Articles 5.1 and 5.2.<sup>313</sup> The United States contests India's argument that, because it based its defence on Article 2.2, "the relevant text before the Panel was Article 2.2 ... and not Article 5.1".<sup>314</sup> The United States points out that there is no basis in the DSU to support a view that India's preferred manner of stating its defence could bar the Panel from examining provisions cited by both parties.<sup>315</sup>

5.32. With respect to India's argument that a WTO Member whose SPS measure is found to be consistent with Article 2.2 is under no obligation to conduct a risk assessment, as required by Articles 5.1 and 5.2, we recall our discussion above, in paragraph 5.21, that SPS measures adopted by Members must comply with all of the requirements of Articles 2.2, 5.1, and 5.2. Thus, to the extent that India's claim of error on appeal is premised on an understanding that a Member adopting an SPS measure may elect either to base that measure on scientific principles and

<sup>305</sup> In cases where an SPS measure is found to be inconsistent with Articles 5.1 and 5.2 for reasons relating to the scientific basis underlying the relevant risk assessment, it would be all the more difficult for a Member to establish that such a measure is nonetheless based on scientific principles and is not maintained without sufficient scientific evidence, within the meaning of Article 2.2.

<sup>306</sup> India's appellant's submission, para. 18.

<sup>307</sup> India's appellant's submission, para. 21 (referring to Panel Report, *Australia – Apples*, para. 7.214).

<sup>308</sup> India's appellant's submission, para. 25.

<sup>309</sup> India's appellant's submission, para. 26.

<sup>310</sup> United States' appellee's submission, para. 41.

<sup>311</sup> United States' appellee's submission, para. 42.

<sup>312</sup> United States' appellee's submission, para. 43.

<sup>313</sup> United States' appellee's submission, para. 43 (referring to Panel Report, para. 7.282).

<sup>314</sup> United States' appellee's submission, para. 45 (quoting India's appellant's submission, para. 25).

<sup>315</sup> United States' appellee's submission, para. 45.

maintain it with sufficient scientific evidence in conforming with Article 2.2, or to base that measure on a risk assessment conducted in conformity with Articles 5.1 and 5.2, such premise is not correct. Furthermore, given that a WTO Member's compliance with the basic obligations in Article 2.2 cannot exclude the application of Articles 5.1 and 5.2, we also disagree with India that the Panel was required to start its analysis with Article 2.2, before proceeding to assess the United States' claims under Articles 5.1 and 5.2.

5.33. Turning to the alleged errors in the Panel's analysis, we recall the Panel's discussion of the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand. Before it turned to assess the claims made by the United States, the Panel set out its understanding of the relationship between Articles 5.1 and 5.2, on the one hand, and Article 2.2, on the other hand. The Panel recalled that Article 5.1 constitutes a specific application of the basic obligations contained in Article 2.2, and that Article 2.2 informs Articles 5.1 because the elements that define the basic obligations set out in Article 2.2 impart meaning to Article 5.1.<sup>316</sup> Referring to, *inter alia*, the Appellate Body reports in *Australia – Salmon, EC – Hormones*, and *Australia – Apples*, the Panel noted that the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand, has led panels and the Appellate Body to conclude that, when an SPS measure is not based on a risk assessment conducted according to the requirements in 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".<sup>317</sup> The Panel added that, "[i]n practical terms, this means that a violation of Articles 5.1 and 5.2 entails a violation of the more general Article 2.2".<sup>318</sup>

5.34. The Panel's understanding, namely, that SPS measures found to be inconsistent with Articles 5.1 and 5.2 can be presumed, more generally, not to be based on scientific principles and maintained without sufficient scientific evidence, within the meaning of Article 2.2, is consistent with the nature of the obligations under these provisions, as discussed above. While the subsequent use of the verb "entails" by the Panel might be seen as suggesting that the Panel was of the view that Article 2.2 would necessarily be violated whenever a measure is found to be inconsistent with Articles 5.1 and 5.2, we note that the Panel qualified its statement by using the language "[i]n practical terms". Moreover, this observation by the Panel immediately followed its citation to relevant jurisprudence and its correct reference to the "presumption" identified in previous disputes. We are therefore not convinced that, merely by using the verb "entails" in interpreting the relationship between Article 2.2 and Articles 5.1 and 5.2, the Panel equated the presumption of inconsistency under Article 2.2 with a consequential violation. Accordingly, we find that the Panel did not err in its interpretation of Articles 2.2, 5.1, and 5.2 of the SPS Agreement, in particular, in its understanding of the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand.

5.35. Turning to the Panel's application of Article 2.2 to India's AI measures, we note that, before the Panel, India presented arguments and scientific evidence to establish that its import prohibitions with respect to fresh meat of poultry and eggs from countries reporting LPNAI are not maintained without sufficient scientific evidence within the meaning of Article 2.2.<sup>319</sup> In applying Article 2.2 to India's AI measures, the Panel recalled the presumption of inconsistency under Article 2.2 flowing from a violation of Articles 5.1 and 5.2 that it had identified in its interpretation of these provisions.<sup>320</sup> The Panel stated that, "where an SPS measure is not based on a risk assessment as required by Articles 5.1 and 5.2 ..., this measure is presumed not to be based on scientific principles and to be maintained without sufficient scientific evidence, in contravention of

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<sup>316</sup> Panel Report, para. 7.281 (referring to Appellate Body Reports, *EC – Hormones*, para. 180; and *Australia – Apples*, para. 209).

<sup>317</sup> Panel Report, para. 7.282 (quoting Panel Report, *Australia – Salmon*, para. 8.52; and Appellate Body Report, *Australia – Salmon*, para. 137).

<sup>318</sup> Panel Report, para. 7.282.

<sup>319</sup> The Panel acknowledged the arguments and evidence presented by India in its summary of India's position. (Panel Report, para. 7.297 (referring to India's first written submission to the Panel, para. 186). See also India's first written submission to the Panel, paras. 175-182; and Panel Exhibits IND-68, IND-109, IND-110, IND-111, US-18, US-31, and US-20)

<sup>320</sup> Panel Report, para. 7.331.

Article 2.2".<sup>321</sup> Immediately following this statement, the Panel stated its "[c]onclusion on the United States' claim" pursuant to Article 2.2.<sup>322</sup> In that conclusion, the Panel recalled its findings that "India's AI measures are not based on a risk assessment and are inconsistent with Articles 5.1 and 5.2" and, solely on this basis, further found that "India's AI measures are inconsistent with Article 2.2 ..., because they are not based on scientific principles and are maintained without sufficient scientific evidence."<sup>323</sup>

5.36. Thus, in its brief analysis under Article 2.2, the Panel made no mention of the evidence and arguments put forth by India in support of its assertion that its import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI are based on scientific principles and are not maintained without sufficient scientific evidence, within the meaning of Article 2.2. Nor did the Panel consider the rebuttability of the presumption of inconsistency under Article 2.2 before proceeding to its final conclusion under Article 2.2 on the sole ground that it had already found India's AI measures to be inconsistent with Articles 5.1 and 5.2.<sup>324</sup> In other words, in applying Article 2.2 to India's AI measures, the Panel found that those measures violate Article 2.2 as an automatic consequence of its finding that those measures are inconsistent with Articles 5.1 and 5.2.

5.37. We note the contrast between this approach by the Panel and its approach under Articles 2.2 and 5.6.<sup>325</sup> In its analysis of the relationship between Articles 2.2 and 5.6, the Panel stated 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."<sup>326</sup> The Panel considered that such a presumption of inconsistency with the first requirement under Article 2.2 arises in the present case due to its finding that India's AI measures are inconsistent with Article 5.6 as they are significantly more trade restrictive than required to achieve India's appropriate level of protection for these products.<sup>327</sup> Observing that "India has not made arguments regarding why its measures are not inconsistent with Article 2.2", the Panel reasoned that "India has not adduced arguments to *rebut a presumption* that, as its measures are more trade-restrictive than required to achieve India's ALOP, those measures are also applied beyond the extent necessary to protect human and animal life or health" within the meaning of Article 2.2.<sup>328</sup> Having made these observations, the Panel found, on the basis of its finding under Article 5.6, that India's AI measures are also inconsistent with the first requirement under Article 2.2. Thus, the Panel proceeded to find that India's AI measures violate the first requirement in Article 2.2 only after having considered whether India had attempted to rebut the presumption and to establish that its AI measures were consistent with that requirement.

5.38. In short, in its analysis of the presumption of inconsistency with respect to the first requirement under Article 2.2 flowing from a violation of Article 5.6, the Panel considered the rebuttability of the presumption flowing from a violation of Article 5.6, and noted that India had presented no arguments to rebut such a presumption. By contrast, in its application of the other requirements under Article 2.2, the Panel simply reached a consequential finding of inconsistency that flowed directly from its findings that India's AI measures breach Articles 5.1 and 5.2. In doing so, the Panel, in effect, treated the presumption as irrebuttable, without providing any reasons for such an understanding.

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<sup>321</sup> Panel Report, para. 7.331 (referring to Appellate Body Report, *Australia – Salmon*, para. 138; Panel Reports, *Australia – Salmon*, para. 8.52; *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.85 and 7.161; *EC – Approval and Marketing of Biotech Products*, paras. 7.3396 and 7.3399; *US – Poultry (China)*, paras. 7.168 and 7.203-7.204; and *Australia – Apples*, paras. 7.212 and 7.905).

<sup>322</sup> Panel Report, heading 7.5.4.2.3.

<sup>323</sup> Panel Report, para. 7.332.

<sup>324</sup> We note that, as India did not present a risk assessment within the meaning of Articles 5.1 and 5.2 of the SPS Agreement, the Panel did not scrutinize the scientific basis for a risk assessment, and, ultimately, India's AI measures, in reaching its findings of inconsistency under Articles 5.1 and 5.2.

<sup>325</sup> We also note that neither party appeals the Panel's analysis of the presumption of inconsistency under Article 2.2 flowing from a violation of Article 5.6, and we, therefore, express no view as to its propriety. Rather, we refer to the Panel's analysis under Articles 2.2 and 5.6 solely for the purpose of contrasting it with the Panel's approach under Articles 2.2, 5.1, and 5.2.

<sup>326</sup> Panel Report, para. 7.614 (referring to Appellate Body Reports, *US/Canada – Continued Suspension*, para. 674; and *Australia – Apples*, para. 339). (emphasis added)

<sup>327</sup> Panel Report, para. 7.615 (referring to Panel Report, para. 7.597).

<sup>328</sup> Panel Report, para. 7.615. (emphasis added)



5.39. To recall, India presented evidence to the Panel with respect to two of the ten product categories covered by India's AI measures (i.e. fresh meat of poultry and eggs) from countries reporting LPNAI and argued that such evidence established the scientific basis for its import restrictions against these two product categories.<sup>329</sup> Yet, the Panel found India's AI measures to be inconsistent with Article 2.2 with respect to all ten product categories subject to import prohibitions. The Panel reached this conclusion solely on the basis that it had found those measures to be inconsistent with Articles 5.1 and 5.2, and did not consider at all the arguments and evidence presented by India in order to establish the consistency of its AI measures with Article 2.2, insofar as they relate to fresh meat of poultry and eggs from countries reporting LPNAI.

5.40. For these reasons, we find that, by failing to consider whether the presumption of inconsistency with Article 2.2 that flowed from its finding that India's AI measures are inconsistent with Articles 5.1 and 5.2 was rebutted by the arguments and evidence presented by India, the Panel erred in its application of Article 2.2 to India's AI measures with respect to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI. Therefore, we reverse, in part, the Panel's findings, in paragraphs 7.332, 7.334, and 8.1.c.v of the Panel Report, that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement, because they are not based on scientific principles and are maintained without sufficient scientific evidence, insofar as those findings concern India's import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI.

#### 5.1.4 Whether the Panel acted inconsistently with Article 11 of the DSU

5.41. In addition to alleging that the Panel erred in its interpretation and application of Article 2.2 of the SPS Agreement, India puts forth three claims of error under Article 11 of the DSU. First, India submits that the Panel failed to make an objective assessment of the matter by disregarding India's arguments and evidence that sought to establish that India's AI measures are based on scientific principles and are not maintained without sufficient scientific evidence, as required by Article 2.2.<sup>330</sup> Second, India asserts that the Panel failed to make an objective assessment of the matter because it ruled on a claim that was not argued by the United States, insofar as the Panel's finding of inconsistency under Article 2.2 covered the import prohibitions upon occurrence of both HPNAI and LPNAI for India's AI measures.<sup>331</sup> India clarifies that it is not arguing that the United States' claim under Article 2.2 is not within the Panel's terms of reference. Instead, India argues that merely impugning a measure in the panel request does not absolve the complaining party of presenting arguments and evidence with respect to that claim.<sup>332</sup> India highlights that the United States made arguments and presented evidence only with respect to import restrictions against eggs and fresh meat of poultry on account of occurrence of LPNAI under Article 2.2, and that, therefore, the United States accepted that the import prohibitions against the other eight product categories, and against all relevant product categories upon occurrence of HPNAI, are "legitimate".<sup>333</sup> Finally, India asserts that the Panel failed to make an objective assessment of the matter in its analysis under Articles 5.1 and 5.2 because it did not address India's argument that, because its AI measures are based on scientific principles and are not maintained without scientific evidence, they meet the requirements of Article 2.2, and India is therefore under no obligation to conduct a separate risk assessment under Article 5.1 in the present case.<sup>334</sup> On this basis, India requests us to reverse the Panel's findings under Articles 5.1 and 5.2.<sup>335</sup>

5.42. In response, the United States asserts, first, that India's claims under Article 11 of the DSU do not relate to the objectivity of the Panel's assessment of the matter, but, instead, go to the Panel's interpretation and application of Article 2.2. Recalling that claims under Article 11 and claims relating to errors in interpreting or applying provisions of the covered agreements are distinct and should not be pleaded in the alternative, the United States submits that India has

<sup>329</sup> India's appellant's submission, para. 67.

<sup>330</sup> India's appellant's submission, para. 27.

<sup>331</sup> India's appellant's submission, para. 47.

<sup>332</sup> India's appellant's submission, para. 47.

<sup>333</sup> India's appellant's submission, para. 51. India also recalls the United States' response to a question by the Panel wherein it stated that "India has independently breached Article 2.2 because it has maintained [its AI] measures without sufficient scientific evidence regarding LPNAI transmission in poultry meat and eggs". (India's appellant's submission, para. 52 (quoting United States' response to Panel question No. 3, para. 17))

<sup>334</sup> India's appellant's submission, para. 59 (referring to Panel Report, para. 7.297).

<sup>335</sup> India's appellant's submission, para. 63 (referring to Panel Report, paras. 7.318-7.319).

erred in claiming a breach of Article 11.<sup>336</sup> With respect to India's first claim under Article 11, the United States submits that India fails to explain how the evidence put forth by it is relevant, let alone so material as to call into question the objectivity of the Panel's analysis of whether India's measures are based on a risk assessment.<sup>337</sup> In response to India's second claim under Article 11, the United States argues, *inter alia*, that, since the Panel found a breach of Article 2.2 as a result of the violation of Article 5.1, it did not need to address the United States' additional argument alleging an independent breach of Article 2.2 at all.<sup>338</sup> Moreover, the United States' position has always been that India failed to base its AI measures on a risk assessment with respect to all products covered by the measure. Thus, the limitation on product scope under Article 2.2 that India asserts does not exist.<sup>339</sup> Finally, in respect of the third claim put forth by India under Article 11, the United States submits that the Panel did, in its analysis under Articles 5.1 and 5.2, acknowledge India's argument that it was not required to conduct a risk assessment, and India has therefore presented no basis for a claim under Article 11.<sup>340</sup>

5.43. We note that the first claim of error put forth by India under Article 11 of the DSU relates to the Panel's finding under Article 2.2 of the SPS Agreement and, in particular, the Panel's alleged failure to consider the arguments and evidence presented by India to establish that its AI measures are not maintained without sufficient scientific evidence with respect to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI. Having reversed that part of the Panel's ultimate finding under Article 2.2 relating to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI due to the Panel's failure to consider whether India's arguments and evidence could overcome the presumption that its AI measures are inconsistent with Article 2.2, we consider that it is not necessary for us to rule on India's first claim under Article 11 of the DSU. This is because, even if we were to agree with India, it would lead to the same result that we have reached after examining the Panel's application of Article 2.2 to India's AI measures.

5.44. With respect to India's second claim of error under Article 11 of the DSU, we do not see that the case made by the United States was limited in the way that India asserts. We recall that the Panel's finding of inconsistency with Article 2.2 flowed from its findings of inconsistency with Articles 5.1 and 5.2, which, as we have noted, concerned all ten product categories covered by India's AI measures.<sup>341</sup> Moreover, we note that India's AI measures, by virtue of paragraph (1)(ii) of S.O. 1663(E), impose prohibitions on the import of the relevant agricultural products from countries reporting NAI, that is, both HPNAI and LPNAI.<sup>342</sup> Accordingly, even though we have reversed the Panel's finding under Article 2.2 with respect to the prohibitions on imports of two categories of products upon occurrence of LPNAI, we do not consider that the Panel erred by virtue of the fact that the scope of its finding under Article 2.2 extended to the ten product categories listed in India's AI measures, as they apply both to the occurrence of HPNAI and LPNAI. We, therefore, reject this claim of error raised by India.

5.45. India's third claim of error under Article 11 of the DSU relates to the Panel's findings under Articles 5.1 and 5.2. We see India to be taking issue with the Panel's failure to engage with India's argument that, if an SPS measure is found to be consistent with Article 2.2, there is no obligation to conduct a risk assessment under Article 5.1. In other words, India faults the Panel for not addressing its argument that Article 2.2 creates an exception to the obligations under Article 5.1. We note that the Panel did, in fact, acknowledge this argument by India.<sup>343</sup> More importantly, we recall our discussion above that the understanding advanced by India would go against a proper interpretation of Articles 2.2 and 5.1 that gives effect to the terms of both provisions. As we see it, India's Article 11 claim is essentially a claim that the Panel erred in its interpretation and application of Articles 2.2, 5.1, and 5.2. This claim does not, therefore, go to the objectivity of the Panel's assessment of the matter before it. As the Appellate Body has explained, a claim that a panel failed to comply with its duties under Article 11 of the DSU "must stand by itself" and should

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<sup>336</sup> United States' appellee's submission, para. 34 (referring to Appellate Body Reports, *China – Rare Earths*, para. 5.173).

<sup>337</sup> United States' appellee's submission, para. 51.

<sup>338</sup> United States' appellee's submission, para. 59.

<sup>339</sup> United States' appellee's submission, para. 60.

<sup>340</sup> United States' appellee's submission, para. 63 (referring to Panel Report, para. 7.312).

<sup>341</sup> Panel Report, para. 7.278 (referring to Preliminary Ruling, paras. 3.27-3.30, 3.37, 3.92-3.93, and 3.140).

<sup>342</sup> Panel Report, paras. 2.32 and 7.271.

<sup>343</sup> Panel Report, para. 7.297.

not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements.<sup>344</sup> Accordingly, we reject this claim of error raised by India.

5.46. Having rejected these claims, we 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.

### 5.1.5 India's request to complete the legal analysis

5.47. Having reversed, in part, the Panel's finding that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement, insofar as that finding relates to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI, we turn to consider India's request to complete the legal analysis and find that its AI measures are consistent with Article 2.2.<sup>345</sup> India submits that the evidence that it presented to the Panel establishes the risks associated with trade in fresh meat of poultry and eggs from countries reporting LPNAI, and that, therefore, its AI measures are not maintained without sufficient scientific evidence within the meaning of Article 2.2 of the SPS Agreement.<sup>346</sup> While the United States maintains that India's AI measures are maintained without sufficient scientific evidence in breach of Article 2.2, it notes that the Panel did not examine the scientific evidence presented by India, and it is therefore not certain that the Panel made the necessary factual findings to support a legal conclusion. Consequently, the United States does not request us to complete the legal analysis in the event the Panel's finding under Article 2.2 is reversed.<sup>347</sup>

5.48. We note that India requests us to complete the legal analysis and find that its AI measures are based on scientific principles and maintained with sufficient scientific evidence and are therefore consistent with Article 2.2.<sup>348</sup> Based on our analysis above, India's request calls for us to determine whether, with respect to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI, the presumption of inconsistency with Article 2.2 that flows from the inconsistency of these import prohibitions with Articles 5.1 and 5.2 is rebutted by the evidence that India presented to the Panel.

5.49. The Appellate Body has, in the past, completed the legal analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.<sup>349</sup> However, we recall that the Appellate Body has been able to do so only when the panel's factual findings and the undisputed facts on the panel record have provided it with a sufficient basis for its own analysis.<sup>350</sup> Thus, the Appellate Body has not completed the legal analysis where there were insufficient factual findings in the panel report or a lack of undisputed facts on the panel record.<sup>351</sup>

5.50. India relies on a number of scientific studies on the Panel record. Referring, in particular, to a study by Post et al., India submits that this study "clearly establishes that LPAI viruses ... can cause systemic infection and can spread to internal organs of the bird"<sup>352</sup>, and that this study is

<sup>344</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.173 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 442).

<sup>345</sup> India's appellant's submission, paras. 64-85.

<sup>346</sup> India's appellant's submission, paras. 75-83.

<sup>347</sup> United States' appellee's submission, fn 88 to para. 66. We note that the United States also stresses that India has not explained the relationship between the studies it cites, on the one hand, and its AI measures and trade in the relevant products, on the other hand. (United States' appellee's submission, paras. 53 and 57)

<sup>348</sup> India's appellant's submission, para. 64 and section A(g), bullet 5.

<sup>349</sup> Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224 (referring to Appellate Body Reports, *Australia – Salmon*, paras. 117-118; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52).

<sup>350</sup> Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224 (referring to Appellate Body Reports, *Australia – Salmon*, paras. 209, 241, and 255; *Korea – Dairy*, paras. 91 and 102; *Canada – Autos*, paras. 133 and 144; and *Korea – Various Measures on Beef*, para. 128).

<sup>351</sup> Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224 (referring to, *inter alia*, Appellate Body Reports, *US – Section 211 Appropriations Act*, para. 343; and *EC – Asbestos*, para. 78).

<sup>352</sup> India's appellant's submission, para. 75 (referring to J. Post et al., "Systemic distribution of different low pathogenic avian influenza (LPAI) viruses in chicken" (2013) 10(23) *Virology Journal* (Panel Exhibit IND-68)).

scientifically more robust than the evidence relied upon by the United States.<sup>353</sup> By contrast, before the Panel, the United States relied on a statement by David Swayne that surveyed and summarized the results of a number of studies of the LPAI virus.<sup>354</sup> In the view of the United States, this evidence establishes that the LPAI virus is not present in fresh meat of poultry or inside eggs, and that LPAI cannot, therefore, be transmitted through these products.<sup>355</sup>

5.51. The parties, thus, presented competing evidence to the Panel in support of their positions. There are, therefore, no undisputed facts on the record that would assist us in completing the legal analysis. We further note that the Panel did not consider or address the evidence adduced by India in order to establish that its AI measures are not maintained without sufficient scientific evidence, within the meaning of Article 2.2 or the evidence to the contrary put forward by the United States. The Panel thus made no factual findings on the competing evidence before it that would provide us with a sufficient basis for our analysis. In these circumstances, we find that we are unable to complete the legal analysis and assess the consistency of India's AI measures with Article 2.2 of the SPS Agreement with respect to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI.

<sup>353</sup> India's appellant's submission, para. 76. India also refers to several studies that, in its view, establish the risk of the spread of the LPNAI virus through contaminated materials, equipment, and trays, via the surface of eggs laid by acutely infected hens or through hatching eggs. (India's appellant's submission, para. 81 (referring to Canada Food Inspection Agency, "Fact Sheet – Avian Influenza" (modified 22 December 2012) (Panel Exhibit US-20); T. van den Berg, "The role of the legal and illegal trade of live birds and avian products in the spread of avian influenza" (2009) 28(1) *Scientific and Technical Review of the Office International des Epizooties*, pp. 93-111 (Panel Exhibit IND-109); A.F. Ziegler et al., "Characteristics of H7N2 (nonpathogenic) avian influenza virus infections in commercial layers, in Pennsylvania, 1997-98" (1999) 43(1) *Avian Diseases*, pp. 142-149 (Panel Exhibit IND-110); D.E. Swayne and C. Thomas, "Trade and Food Safety Aspects for Avian Influenza Viruses", in D.E. Swayne (ed.) *Avian Influenza* (Blackwell Publishing, 2008), chapter 22 (Panel Exhibit US-31); S.P. Cobb, "The spread of pathogens through trade in poultry meat: overview and recent developments" (2011) 30(1) *Scientific and Technical Review of the Office International des Epizooties*, pp. 149-164 (Panel Exhibit IND-111); and D.E. Swayne and J.R. Beck, "Heat inactivation of avian influenza and Newcastle disease viruses in egg products" (2004) 33(5) *Avian Pathology*, pp. 512-518 (Panel Exhibit US-103)) India further points to evidence of the risk of infection for humans with both LPNAI and HPNAI viruses. (India's appellant's submission, para. 81 (referring to India's response to Panel question No. 4, p. 6)) For India, this evidence "clearly establishes that there exists risk[] of introduction of the LPNAI virus upon trade in poultry and poultry commodities and India's AI measures address the same by no[t] allowing the import of poultry and poultry commodities upon an outbreak of [the] LPNAI virus in the exporting country", until such time as the exporting country notifies to the OIE that it is free from the LPNAI virus. (India's appellant's submission, para. 82) India notes that other countries maintain similar measures. (India's appellant's submission, para. 83 (referring to India's first written submission to the Panel, paras. 167-174)) India refers, in this regard, to the risk assessment conducted by Australia, on the basis of which Australia prohibited imports of unprocessed meat and meat products from regions reporting the occurrence of LPNAI in poultry. (India's appellant's submission, paras. 78-79 (referring to Biosecurity Australia, *Generic Import Risk Analysis Report for Chicken Meat*, Final Report (October 2008), Parts A-C (Panel Exhibit IND-108)) India emphasizes that the United States does not contest Australia's assertion that its quarantine measures conform to the OIE Code, pursuant to which the products can be banned. India therefore concludes that "the risk assessment conducted by Australia and its quarantine measures have been accepted by both the parties and by the Panel". (India's appellant's submission, para. 80 (referring to United States' opening statement at the second Panel meeting, para. 22; and Panel Report, para. 7.313))

<sup>354</sup> Panel Report, para. 7.322 (referring to United States' first written submission to the Panel, para. 124, in turn referring to Expert statement of David E. Swayne (Panel Exhibit US-97, attached to United States' first written submission to the Panel), p. 1, in turn referring to A. Das et al., "Detection of H5N1 high-pathogenicity avian influenza virus in meat and tracheal samples from experimentally infected chickens" (2008) 52 *Avian Diseases*, pp. 40-48 (Panel Exhibit US-98); Y. Kobayashi et al., "Pathological studies of chickens experimentally infected with two highly pathogenic avian influenza viruses" (1996) 25 *Avian Pathology*, pp. 285-304 (Panel Exhibit US-99); Y.K. Kwon and D.E. Swayne, "Different routes of inoculation impact infectivity and pathogenesis of H5N1 high pathogenicity avian influenza virus infection in chickens and domestic ducks" (2010) 54 *Avian Diseases*, pp. 1260-1269 (Panel Exhibit US-100); L.E.L. Perkins and D.E. Swayne, "Pathobiology of A/Chicken/Hong Kong/220/97 (H5N1) avian influenza virus in seven Gallinaceous species" (2001) 38 *Veterinary Pathology*, pp. 149-164 (Panel Exhibit US-101); E. Spackman et al., "The pathogenesis of low pathogenicity H7 avian influenza viruses in chickens, ducks and turkeys" (2010) 7 *Virology Journal*, p. 331 (Panel Exhibit US-102); Panel Exhibit US-103; D.E. Swayne and J.R. Beck, "Experimental study to determine if low-pathogenicity and high-pathogenicity avian influenza viruses can be present in chicken breast and thigh meat following intranasal virus inoculation" (2005) 49 *Avian Diseases*, pp. 81-85 (Panel Exhibit US-104); D.E. Swayne et al., "Reduction of high pathogenicity avian influenza virus in eggs from chickens once or twice vaccinated with an oil-emulsified inactivated H5 avian influenza vaccine" (2012) 30 *Vaccine*, pp. 4964-4970 (Panel Exhibit US-105)).

<sup>355</sup> Panel Report, para. 7.322.

5.52. Finally, we wish to state that our reversal, in part, of the Panel's finding of inconsistency of India's AI measures with Article 2.2, in paragraph 5.40 above, is based on a failure by the Panel to consider the arguments and evidence presented by India to establish that its AI measures are consistent with Article 2.2. We neither examine, nor make any ruling on the issue of whether the arguments and the evidence that India presented with respect to fresh meat of poultry and eggs could have rebutted the presumption of inconsistency flowing from a violation of Articles 5.1 and 5.2 by establishing that, with respect to those two product categories, its AI measures are based on scientific principles and are not maintained without sufficient scientific evidence.

### 5.1.6 Conclusion

5.53. We have found that the Panel did not err in its interpretation of Articles 2.2, 5.1, and 5.2 of the SPS Agreement, and, in particular, in its understanding of the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand. However, we have also found that, by failing to consider whether the presumption of inconsistency with Article 2.2 that flowed from its finding that India's AI measures are inconsistent with Articles 5.1 and 5.2 was rebutted by the arguments and evidence presented by India, the Panel erred in its application of Article 2.2 to India's AI measures with respect to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI. Consequently, we have reversed, in part, the Panel's finding, in paragraphs 7.332, 7.334, and 8.1.c.v of the Panel Report, that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement because they are not based on scientific principles and are maintained without sufficient scientific evidence, insofar as those findings concern India's import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI. In addition, given the absence of uncontested evidence on the Panel record, or of relevant factual findings by the Panel, we have found that we are unable to complete the legal analysis and assess the consistency with Article 2.2 of the SPS Agreement of India's AI measures with respect to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI.

5.54. We have also found 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.<sup>356</sup> Having rejected India's claim under Article 11 of the DSU pertaining to the Panel's finding that India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement, and given that, in any event, compliance with the requirements of Article 2.2 cannot exclude the application of Articles 5.1 and 5.2, we uphold the Panel's findings, in paragraphs 7.318, 7.319, 7.333, 8.1.c.iii, and 8.1.c.iv of the Panel Report, that India's AI measures are inconsistent with Articles 5.1 and 5.2 of the SPS Agreement.

## 5.2 Articles 3.1 and 3.2 of the SPS Agreement

5.55. We now turn to address India's appeal of the Panel's findings that India's AI measures are inconsistent with Article 3.1 of the SPS Agreement and that India is not entitled to benefit from the presumption of consistency of its AI measures with the other relevant provisions of the SPS Agreement and the GATT 1994, as provided for under Article 3.2 of the SPS Agreement.<sup>357</sup> India claims that the Panel exceeded the permissible scope of consultation with the OIE as prescribed by Article 11.2 of the SPS Agreement and Article 13.2 of the DSU. India further claims that the Panel acted inconsistently with its duty to make an objective assessment of the matter within the meaning of Article 11 of the DSU by: (i) failing to conduct its own assessment of the meaning of the OIE Code, including by failing to do so in accordance with 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. India requests us to reverse the Panel's findings under Articles 3.1 and 3.2 of the SPS Agreement, and to complete the legal analysis in respect of these provisions.<sup>358</sup>

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<sup>356</sup> We did not consider it necessary to address India's claim that the Panel acted inconsistently with Article 11 of the DSU by not considering the arguments and evidence presented by India to establish that its AI measures are based on scientific principles and are not maintained without sufficient scientific evidence with respect to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI.

<sup>357</sup> Panel Report, paras. 7.274, 7.275, and 8.1.c.ii.

<sup>358</sup> India's Notice of Appeal, paras. 9-10.

5.56. In the subsections that follow, we outline the relevant findings of the Panel and provide an overview of the analysis required by Articles 3.1 and 3.2 of the SPS Agreement, before addressing India's claims on appeal.

### 5.2.1 The Panel's findings

5.57. Before the Panel, the United States claimed that India's AI measures are inconsistent with Article 3.1 of the SPS Agreement because they are not "based on" the relevant international standards, guidelines, or recommendations of the OIE, and are not in accordance with the requirements of Article 3.3.<sup>359</sup> India responded that its AI measures conform to the OIE Code in a manner consistent with Article 3.2, and that its measures must therefore be presumed to be consistent with the SPS Agreement and the GATT 1994.<sup>360</sup>

5.58. Referring to the Appellate Body report in *EC – Hormones*, the Panel explained that the paragraphs of Article 3 of the SPS Agreement define three separate scenarios.<sup>361</sup> The first scenario is where a Member adopts an SPS measure that embodies an international standard completely and thus "conforms to" such standard, as provided in Article 3.2. In this circumstance, the SPS measure benefits from a rebuttable presumption of compliance with the SPS Agreement and the GATT 1994.<sup>362</sup> The second scenario is where the SPS measure adopts some, but not all, of the elements of that standard. The SPS measure, in this circumstance, would not "conform to" the standard but, rather, would be "based on" it, as provided in Article 3.1. The Panel stated that such a measure would not benefit from a presumption of compliance but, as clarified by the Appellate Body, the burden of proof would still rest on the complainant to make a *prima facie* case of violation of Article 3.1.<sup>363</sup> Finally, as a third scenario, a Member may decide to deviate from the recommendations of an international standard and adopt an SPS measure that results in a higher level of protection than the one prescribed in the standard, as provided in Article 3.3. In order to do so, the Panel added, the Member must ensure that its measure is consistent with the other relevant provisions of the SPS Agreement, including, for instance, the requirement of having a risk assessment in accordance with Articles 5.1 and 5.2.<sup>364</sup>

5.59. The Panel further considered that the language of Article 3.1 establishes a less rigorous threshold than that contemplated in Article 3.2, and that a failure to meet the "based on" requirement in Article 3.1 would necessarily imply a failure to meet the more rigorous "conform to" threshold in Article 3.2. The Panel therefore began its analysis of the United States' claim under Article 3.1 on the understanding that, only if India's AI measures were found to meet the less rigorous requirement in Article 3.1, would the Panel proceed to examine whether such measures also meet the higher threshold set out in Article 3.2.<sup>365</sup>

5.60. The Panel thus set out to determine whether India's AI measures are "based on" an international standard.<sup>366</sup> The Panel first considered whether a relevant international standard exists for AI, noting the parties' agreement that the relevant international standard in this dispute is the OIE Code. The Panel noted that the SPS Agreement prescribes that the relevant international standards are those set by the international organizations listed in Annex A(3), which identifies the OIE as the relevant standard-setting organization for matters relating to animal health, including their effects on human health.<sup>367</sup> The Panel further noted that the set of standards embodied in the OIE Code includes, in Chapter 10.4, specific recommendations with

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<sup>359</sup> Panel Report, para. 7.161.

<sup>360</sup> Panel Report, para. 7.178.

<sup>361</sup> Panel Report, paras. 7.197-7.198 (referring to Appellate Body Report, *EC – Hormones*, paras. 170-172).

<sup>362</sup> Panel Report, para. 7.198.

<sup>363</sup> Panel Report, para. 7.199.

<sup>364</sup> Panel Report, para. 7.200.

<sup>365</sup> Panel Report, para. 7.203.

<sup>366</sup> Panel Report, para. 7.204.

<sup>367</sup> Panel Report, para. 7.206 (referring to Appellate Body Reports, *US/Canada – Continued Suspension*, para. 693).

respect to AI. The Panel, therefore, found that the relevant international standard for purposes of this dispute is the OIE Code.<sup>368</sup>

5.61. The Panel then examined each of the product-specific recommendations set out in Chapter 10.4 of the OIE Code that corresponds to the relevant product categories listed in India's AI measures. The Panel found that relevant OIE Code recommendations exist in respect of eight of the ten product categories covered by India's AI measures.<sup>369</sup> In respect of two product categories, however, the Panel was unable to identify a relevant international standard and found, therefore, that Articles 3.1 and 3.2 of the SPS Agreement do not apply in respect of those products.<sup>370</sup> For the remaining eight product categories subject to India's AI measures, the Panel observed that the content of the product-specific recommendations in Chapter 10.4 depends on the type of product concerned, as well as the disease status of the place of origin, and that the recommendations vary depending on whether the importation takes place from a country, zone, or compartment that is NAI free or HPNAI free, or, in some instances, regardless of the NAI status of the country of origin.<sup>371</sup>

5.62. According to the Panel, the parties have "diametrically opposed understandings"<sup>372</sup> with respect to two issues: (i) whether Chapter 10.4 of the OIE Code envisages the imposition of import prohibitions because of concerns relating to AI; and (ii) the meaning of references to "zones and compartments" in Chapter 10.4. The United States took the position that the product-specific recommendations provided in Chapter 10.4 illustrate that the importation of products from countries reporting LPNAI should be allowed, and that the choice of a relevant recommendation from the OIE Code must depend on the NAI status of an exporting country, zone, or compartment.<sup>373</sup> Thus, for the United States, Chapter 10.4 contains no suggestion that the relevant products should be categorically prohibited from trade.<sup>374</sup> By contrast, India considered that each product-specific recommendation in Chapter 10.4 contains a "condition of entry", thus allowing an importing country to choose whether to require NAI freedom or HPNAI freedom, and whether to extend such a requirement to an entire exporting country, or only to the zones or compartments from which the imported products originate. Accordingly, for India, under Chapter 10.4 of the OIE Code, importing countries may choose whether or not to allow the importation of products from countries reporting LPNAI.<sup>375</sup>

5.63. In considering the first of the issues on which the parties disagreed, the Panel began by examining the significance of the only provision in Chapter 10.4 of the OIE Code that makes express reference to import bans. That provision – Article 10.4.1.10 – states: "A Member should not impose immediate bans on the trade in poultry commodities in response to a notification, according to Article 1.1.3 of the [OIE] Code, of infection with HPAI and LPAI virus in birds other than poultry, including wild birds."<sup>376</sup> The United States argued that this provision provides only that notification of HPAI and LPAI in birds other than poultry should not be a basis to impose bans on poultry products. India, however, advanced an *a contrario* reading of this provision, understanding it to mean that, in all circumstances *other than* where there is infection with the HPAI and LPAI virus in non-poultry birds, countries can ban trade in poultry products.<sup>377</sup>

5.64. In response to a question from the Panel, the OIE explained that Article 10.4.1.10 was intended to discourage its members from imposing bans on trade in poultry in response to the reporting of HPAI with respect to wild birds and other birds not part of the commercial sector.<sup>378</sup> The OIE pointed to the need to avoid that any reporting in respect of pet or wild birds, which are

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<sup>368</sup> Panel Report, para. 7.206. The Panel further considered that it would rely on the 21st edition of the OIE Code (adopted in May 2012) for purposes of this dispute, as this was the edition that was in force when the Panel was established. (Ibid., para. 7.213)

<sup>369</sup> Panel Report, para. 7.220.

<sup>370</sup> Panel Report, para. 7.227. The Panel considered that these two product categories listed in India's AI measures – i.e. live pigs, and pathological material and biological products from birds – were not covered by Chapter 10.4 of the OIE Code. (Ibid., paras. 7.221 and 7.227)

<sup>371</sup> Panel Report, para. 7.229.

<sup>372</sup> Panel Report, para. 7.231.

<sup>373</sup> Panel Report, para. 7.240.

<sup>374</sup> Panel Report, para. 7.163.

<sup>375</sup> Panel Report, para. 7.233.

<sup>376</sup> Panel Report, para. 7.235.

<sup>377</sup> Panel Report, para. 7.236.

<sup>378</sup> Panel Report, para. 7.237 (referring to OIE's response to Panel question No. 10(a)).

not defined as poultry, would be relied upon as a rationale for introducing trade bans in the commercial sector, in particular given that such action would not serve to encourage the reporting of AI in all bird species. The Panel considered that the OIE's explanations were consistent with the United States' argument that, where the OIE Code recommends prohibitions, it does so explicitly.<sup>379</sup> On the basis of the wording of Article 10.4.1.10 of the OIE Code, as well as the explanations provided by the OIE, the Panel found that there was no basis for the *a contrario* interpretation advocated by India, and that Article 10.4.1.10 does not envisage the imposition of an import prohibition with respect to poultry products.<sup>380</sup>

5.65. The Panel then proceeded to examine whether the product-specific recommendations in Chapter 10.4 of the OIE Code envisage, either explicitly or implicitly, the imposition of import prohibitions. The Panel had also asked the OIE for guidance in respect of this question. The OIE explained that Chapter 10.4 prescribes risk mitigation measures that can be relied upon to prevent the introduction of AI via the importation of commodities from countries not free from LPNAI. According to the OIE, the recommendations in Chapter 10.4 provide that, even where an exporting country is not free from LPNAI, importation can take place from any country, zone, or compartment that is HPNAI free. According to the Panel, the OIE stressed that the OIE Code recommends measures for the continuation of trade in poultry products notwithstanding a finding of infection in poultry with an LPAI virus, and that this applied to several products covered by Chapter 10.4, including day-old live poultry, fresh poultry meat, poultry hatching eggs, eggs for human consumption, and poultry semen.<sup>381</sup>

5.66. On the basis of this examination, the Panel noted that the OIE's guidance corresponded with the understanding of Chapter 10.4 of the OIE Code advanced by the United States. The Panel further noted the OIE's agreement with the United States that, where the OIE Code recommends import prohibitions, it does so explicitly. The Panel then observed that it did not find any recommendations for import prohibitions in Chapter 10.4 of the OIE Code. The Panel added that, having examined the text of each of the product-specific recommendations in Chapter 10.4 applicable to this dispute, it found no basis for the interpretation of the product-specific recommendations advocated by India.<sup>382</sup> To the contrary, the Panel 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 NAI status, provided that appropriate risk mitigation conditions are fulfilled.<sup>383</sup> For these reasons, the Panel concluded that the product-specific recommendations in Chapter 10.4 of the OIE Code "do not envisage, either explicitly or implicitly, the imposition of import prohibitions with respect to poultry products".<sup>384</sup>

5.67. The Panel next addressed the second issue on which the parties disagreed, namely, whether Chapter 10.4 of the OIE Code envisages that countries can choose whether to import only from NAI-free or HPNAI-free countries, or also from NAI-free or HPNAI-free zones or compartments. The United States argued before the Panel that the OIE encourages countries to consider principles such as regionalization, and that India's country-wide application of its import ban is not based on the OIE Code recommendations, which provide for the application of trade restrictions at the zone or compartment level when appropriate surveillance, control, and biosecurity measures are in place. By contrast, India repeated its argument that the recommendations in Chapter 10.4 specify "conditions of entry", which allow an importing country not only to choose between requiring NAI freedom or HPNAI freedom, but also to decide whether to extend such a requirement to an entire exporting country, or only to its zones or compartments.<sup>385</sup>

5.68. The Panel observed that Articles 10.4.2 through 10.4.4 of the OIE Code recognize in general terms the possibility of differentiating the NAI status of a country, zone, or compartment based on

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<sup>379</sup> Panel Report, para. 7.238.

<sup>380</sup> Panel Report, para. 7.239.

<sup>381</sup> Panel Report, para. 7.249.

<sup>382</sup> Panel Report, para. 7.251.

<sup>383</sup> Panel Report, para. 7.252. Specifically, the Panel found that Articles 10.4.8, 10.4.11, 10.4.14, 10.4.17, and 10.4.19 provide for risk mitigation conditions necessary for the importation of products from an HPNAI-free country, zone, or compartment, which by definition might not be LPNAI free; and that Articles 10.4.6, 10.4.9, 10.4.12, 10.4.15, 10.4.18, 10.4.20, 10.4.21, 10.4.22, 10.4.23, and 10.4.24 contain risk mitigation conditions for the importation of products regardless of the NAI status of the country of origin.

<sup>384</sup> Panel Report, para. 7.253.

<sup>385</sup> Panel Report, para. 7.254.



certain criteria. The Panel further observed that such criteria are provided in Article 10.4.2, and that the conditions that must be met for a country, zone, or compartment to be considered either NAI free or HPNAI free are reflected in Articles 10.4.3 and 10.4.4, respectively. The Panel also found that Chapter 10.4 includes numerous product-specific recommendations identifying measures to be applied by importing countries depending on the NAI status of the country, zone, or compartment from which the products originate.<sup>386</sup> The Panel thus considered that "the text of Chapter 10.4 indicates that the recommendations contained therein are not only intended for country-wide purposes; rather, they are intended to also apply to zones and compartments".<sup>387</sup>

5.69. The Panel consulted the OIE on this issue as well. The OIE explained that zoning and compartmentalization are concepts promoted by the OIE, both to prevent and control diseases and to allow safe trade from countries that are not disease free, and that they are in general applicable to all listed diseases. The OIE affirmed that importing countries should take into consideration the zoning and compartmentalization principles, but that, if the exporting country does not apply zoning to reduce the size of the affected population, then the measures recommended in the OIE Code for a particular product should be applied for the entire country.<sup>388</sup> The Panel considered that Chapter 10.4 of the OIE Code envisages that importing countries, when adopting and applying their AI measures, should recognize that, even where an exporting country may not be entirely NAI free or HPNAI free, it may have zones or compartments that are NAI free or HPNAI free. The Panel therefore concluded that the OIE Code envisages that SPS measures relating to AI allow for the possibility of importing from NAI-free or HPNAI-free zones and compartments, and not only from NAI-free or HPNAI-free countries.<sup>389</sup>

5.70. The Panel then turned to assess whether India's AI measures are "based on" Chapter 10.4 of the OIE Code. The Panel recalled its finding that India's contention – that an importing country may choose as a "condition of entry" the NAI-free status of the exporting country and apply that condition only on a country-wide basis – runs contrary to Chapter 10.4 of the OIE Code.<sup>390</sup> The Panel found that India's AI measures contradict the product-specific recommendations in Chapter 10.4 of the OIE Code in two respects. First, S.O. 1663(E) prohibits importation of the relevant products from countries reporting HPNAI or LPNAI regardless of whether appropriate risk mitigation conditions are fulfilled. Second, S.O. 1663(E) prohibits importation of the relevant products from countries reporting NAI on a country-wide basis, thus not allowing importation from NAI-free or HPNAI-free zones or compartments.<sup>391</sup>

5.71. The Panel considered that India's AI measures amount to a "fundamental departure" from, and "contradict", the OIE Code. In the light of this contradiction, the Panel found that India's AI measures are not "based on" the relevant international standard within the meaning of Article 3.1 of the SPS Agreement, and are therefore inconsistent with that provision.<sup>392</sup> Having made this finding, the Panel also concluded that India's AI measures do not "conform to" the OIE Code within the meaning of Article 3.2 of the SPS Agreement. The Panel therefore found that India is not entitled to benefit from the presumption of consistency of its AI measures with the other relevant provisions of the SPS Agreement and the GATT 1994.<sup>393</sup>

5.72. Before proceeding to an overview of the analysis under Articles 3.1 and 3.2 of the SPS Agreement, we wish to make a preliminary observation regarding the Panel's focus on the question of whether the OIE Code "envisages the imposition of import prohibitions". It appears that the language used by the Panel created some ambiguity regarding its findings on the scope and meaning of the recommendations it examined in Chapter 10.4 of the OIE Code, and may have led to some misunderstanding between the parties on appeal. Under one possible reading of this

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<sup>386</sup> Panel Report, para. 7.258. Specifically, the Panel found that Articles 10.4.5, 10.4.7, 10.4.10, 10.4.13, 10.4.16, and 10.4.19 provide that the importation of the products concerned may take place not only from an NAI-free country, but also from an NAI-free zone or compartment; and that Articles 10.4.8, 10.4.11, 10.4.14, 10.4.17, and 10.4.19 provide that the importation of the products concerned may take place not only from a HPNAI-free country, but also from a HPNAI-free zone or compartment, which would mean a zone or compartment that is not necessarily free from LPNAI.

<sup>387</sup> Panel Report, para. 7.259.

<sup>388</sup> Panel Report, para. 7.261.

<sup>389</sup> Panel Report, para. 7.263.

<sup>390</sup> Panel Report, para. 7.270.

<sup>391</sup> Panel Report, para. 7.271.

<sup>392</sup> Panel Report, paras. 7.271-7.274.

<sup>393</sup> Panel Report, para. 7.275.

language, the Panel could be understood to have addressed whether the OIE Code precludes OIE members from restricting or banning the importation of products in circumstances where there is no applicable recommendation under the OIE Code, or where the risk mitigation conditions prescribed in the applicable recommendation have not been met. India raises arguments on appeal that appear premised on this reading of the Panel's language regarding the OIE Code.<sup>394</sup>

5.73. Alternatively, in using this language, the Panel could be understood to have addressed whether, in circumstances where the product-specific recommendations of the OIE Code apply, the OIE Code itself prescribes prohibitions on the importation of products. In our view, the Panel's analysis is consistent with this latter understanding, which reflects the nature of the comparative assessment it performed in seeking to determine whether the import prohibitions imposed by India's AI measures could be said to be "based on" the OIE Code within the meaning of Article 3.1 of the SPS Agreement.<sup>395</sup> As noted, the Panel identified a number of product-specific recommendations that allow for the importation of poultry products from countries reporting LPNAI, or even regardless of NAI status, when appropriate risk mitigation conditions are fulfilled. The Panel also concluded that the relevant recommendations of the OIE Code allow for the possibility of importing from NAI-free or HPNAI-free zones and compartments, and not only from NAI-free or HPNAI-free countries. Against these findings, the Panel juxtaposed India's AI measures, which prohibit on a country-wide basis the importation of the relevant product categories from countries reporting HPNAI and LPNAI even when appropriate risk mitigation conditions are fulfilled. Thus, when the Panel set out to determine whether the OIE Code "envisages the imposition of import prohibitions", it was, in our view, seeking to determine whether the product-specific recommendations, in circumstances where they apply to relevant poultry products, prescribe the imposition by OIE members of import prohibitions on a country-wide basis.

5.74. Therefore, notwithstanding any ambiguity that may have been generated by this part of the Panel's analysis, we do not consider that the Panel was opining on whether the OIE Code precludes OIE members from restricting or banning the importation of products in circumstances where there is no applicable recommendation under the OIE Code, or where the risk mitigation conditions prescribed in the applicable recommendation have not been met. In our view, the Panel did not, in its examination of the OIE Code, speak to what trade measures a country may permissibly adopt under these scenarios.

### 5.2.2 Overview of Article 3

5.75. Before turning to India's appeal, we consider it useful to set out certain preliminary observations regarding the analysis under Article 3 of the SPS Agreement.

5.76. Article 3 of the SPS Agreement encourages the harmonization of SPS measures on the basis of international standards, while at the same time recognizing the right of WTO Members to determine their appropriate level of protection.<sup>396</sup> As the Appellate Body observed in *EC – Hormones*:

In generalized terms, the object and purpose of Article 3 is to promote the harmonization of the SPS measures of Members on as wide a basis as possible, while recognizing and safeguarding, at the same time, the right and duty of Members to protect the life and health of their people. The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both

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<sup>394</sup> For instance, India argues that the Panel's finding that the OIE Code does not envisage the imposition of import prohibitions is not consistent with purported admissions by the OIE and the United States that countries may prohibit imports in a manner consistent with the OIE Code. (See *infra*, paras. 5.107-5.109)

<sup>395</sup> For a discussion of the requirements under Article 3.1 of the SPS Agreement, see *infra*, para. 5.77.

<sup>396</sup> The preamble of the SPS Agreement states that one of its objectives is "to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including ... the International Office of Epizootics".

"necessary to protect" human life or health and "based on scientific principles", and without requiring them to change their appropriate level of protection.<sup>397</sup>

5.77. We note that Article 3.1 of the SPS Agreement establishes that Members shall base their SPS measures on international standards, guidelines, or recommendations, where they exist. In *EC – Hormones*, the Appellate Body stated that "[a] thing is commonly said to be 'based on' another thing when the former 'stands' or is 'founded' or 'built' upon or 'is supported by' the latter".<sup>398</sup> The Appellate Body considered that, to be "based on" an international standard, a measure "may adopt some, not necessarily all, of the elements of the international standard".<sup>399</sup> In *EC – Sardines*, the Appellate Body remarked 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".<sup>400</sup> The Appellate Body thus stated that, where a technical regulation and the relevant international standard contradict each other, it cannot properly be concluded that the international standard has been used "as a basis for" the technical regulation.<sup>401</sup> As the Appellate Body recognized in *EC – Sardines*, the term "as a basis for" in Article 2.4 of the TBT Agreement is similar to the language used in Article 3.1 of the SPS Agreement.<sup>402</sup>

5.78. We further note that Article 3.2 provides that SPS measures that 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 the SPS Agreement and the GATT 1994. In addition, Article 3.3 identifies the circumstances in which Members may impose SPS measures resulting in a higher level of protection than would be achieved by measures based on the relevant international standards, guidelines, or recommendations. Finally, we observe that the relevant international standards, guidelines or recommendations referred to in Article 3 are those established by or developed under the auspices of the international organizations referred to in Annex A(3) to the SPS Agreement.<sup>403</sup>

5.79. The provisions of Article 3 establish a Member's obligations concerning harmonization with relevant international standards.<sup>404</sup> In determining whether a particular SPS measure is based on, conforms to, or results in a higher level of protection than a relevant international standard, a panel must engage in a comparative assessment between the challenged measure and that international standard. In this respect, because the international standard serves as the benchmark against which a Member's compliance under Article 3 is to be assessed, it is incumbent on a panel to discern the meaning of that standard. In conducting such an assessment, panels have various means available to them. A panel may be guided by any relevant interpretative principles, including relevant customary rules of interpretation of public international law. In addition, a panel may find additional sources to be useful in discerning the meaning of the international standard. For example, panels may wish to have recourse to the views of the relevant standard-setting body, as referred to in Annex A(3) to the SPS Agreement, through

<sup>397</sup> Appellate Body Report, *EC – Hormones*, para. 177.

<sup>398</sup> Appellate Body Report, *EC – Hormones*, para. 163.

<sup>399</sup> Appellate Body Report, *EC – Hormones*, para. 171.

<sup>400</sup> Appellate Body Report, *EC – Sardines*, para. 245.

<sup>401</sup> Appellate Body Report, *EC – Sardines*, para. 248.

<sup>402</sup> Appellate Body Report, *EC – Sardines*, para. 242. The Panel referred to this Appellate Body jurisprudence at paragraphs 7.265-7.269 of its Report.

<sup>403</sup> Annex A(3) to the SPS Agreement provides:

3. *International standards, guidelines and recommendations*

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

<sup>404</sup> Although the provisions of Article 3 and Annex A refer to "international standards, guidelines or recommendations", we will, for ease of reference, hereinafter use the terms "international standard" or "international standards".

evidence on the panel record or through direct consultation with that body, or with other experts in the relevant fields, pursuant to Article 11.2 of the SPS Agreement and Article 13 of the DSU.

5.80. In the circumstances of this dispute, Annex A(3)(b) provides that the relevant international standards for purposes of animal health and zoonoses (i.e. infectious diseases of animals transmissible to humans) are those developed under the auspices of the OIE.<sup>405</sup> With respect to AI, the relevant international standards are those set out in the OIE Code, in particular, Chapter 10.4.<sup>406</sup> Chapter 10.4 of the OIE Code therefore serves as the benchmark against which India's AI measures must be compared in order to determine whether they are "based on", or "conform to", that standard. Accordingly, in keeping with the guidance outlined above, it was incumbent on the Panel in this dispute to discern the meaning of relevant portions of the OIE Code in order to determine whether India's AI measures satisfy the elements under Articles 3.1 and 3.2 of the SPS Agreement.<sup>407</sup>

5.81. Having set out these general considerations, we proceed to examine India's specific claims on appeal.

### **5.2.3 Whether the Panel erred under Article 11.2 of the SPS Agreement and Article 13.2 of the DSU in its consultation with the OIE**

5.82. We begin with India's claim of error under Article 11.2 of the SPS Agreement and Article 13.2 of the DSU. India contends that Article 11.2 of the SPS Agreement limits the permissible scope of a panel's consultation with an international organization to scientific and technical issues.<sup>408</sup> India considers that the Panel's terms of reference and its questions to the OIE indicate that the Panel was consulting with the OIE not only concerning the evidence submitted by the parties, but also regarding the interpretation of the OIE Code. Thus, India asserts that, because the Panel posed interpretative, instead of scientific or technical, questions to the OIE, the Panel exceeded the permissible scope of questioning allowed under these two provisions.<sup>409</sup>

5.83. The United States considers that 11.2 of the SPS Agreement and Article 13.2 of the DSU afford considerable discretion to a panel to seek relevant information. In the United States' view, the present dispute involves scientific and technical issues regarding appropriate AI control measures, and "the OIE is clearly a relevant international organization on these matters".<sup>410</sup> Moreover, the United States argues that the authority of a panel under Article 13.2 of the DSU is not limited in an SPS dispute by Article 11.2 of the SPS Agreement. Thus, a panel in an SPS dispute does not commit error by posing questions relating to issues other than scientific and technical issues. According to the United States, once a dispute involves scientific or technical issues and the terms of Article 11.2 are met, that provision encourages seeking advice, and "does not limit the information a panel may seek generally or from an international organization".<sup>411</sup>

5.84. We first recall that, in the Panel proceedings, after having consulted with the parties and third parties, the Panel decided to seek expert advice, "albeit in a limited manner", through "a written consultation with the OIE on the interpretation of the [OIE Code]".<sup>412</sup> The Panel directed questions to the OIE relating to: the identification of the applicable standard with respect to AI; the levels of protection sought to be achieved by the OIE Code recommendations; and the rules

<sup>405</sup> Paragraph 3(b) of Annex A to the SPS Agreement defines the terms "international standards, guidelines, and recommendations" as "... for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics".

<sup>406</sup> Panel Report, para. 7.206.

<sup>407</sup> We recall that India's position before the Panel was that its AI measures are both based on, and conform to, international standards within the meaning of Articles 3.1 and 3.2 of the SPS Agreement. India did not rely on Article 3.3 or maintain that its AI measures result in a higher level of SPS protection than would be achieved by measures based on the relevant international standard. The Panel, therefore, focused solely on whether India's AI measures are consistent with Articles 3.1 and 3.2. The Panel decided, first, to conduct an analysis under Article 3.1 with the understanding that, should India's measures not be found to be "based on" the relevant international standard within the meaning of Article 3.1, they could not be found to "conform to" that standard within the meaning of Article 3.2. (Panel Report, para. 7.203) The Panel's articulation of the content and order of analysis under Article 3 is not appealed.

<sup>408</sup> India's appellant's submission, para. 95.

<sup>409</sup> India's appellant's submission, paras. 96 and 100.

<sup>410</sup> United States' appellee's submission, para. 76.

<sup>411</sup> United States' appellee's submission, para. 77.

<sup>412</sup> Panel Report, para. 1.23.

concerning the establishment of the AI disease status of an OIE member, including rules relating to self-declaration, official recognition, and notification. In addition, the Panel posed a series of questions to the OIE regarding the meaning of, and interaction among, the specific provisions of Chapter 10.4 of the OIE Code.<sup>413</sup>

5.85. We observe that the authority of a panel to consult with experts is, as a general matter, governed by Article 13 of the DSU, entitled "Right to Seek Information".<sup>414</sup> Article 13.1 provides that a panel "shall have the right to seek information and technical advice from any individual or body which it deems appropriate". Article 13.2 additionally provides that a panel "may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter".

5.86. In *US – Shrimp*, the Appellate Body described the broad discretion that Article 13 affords to panels:

The comprehensive nature of the authority of a panel to "seek" information and technical advice from "any individual or body" it may consider appropriate, or from "any relevant source", should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.<sup>415</sup>

5.87. In the SPS context, there are special or additional rules set forth in Article 11.2 of the SPS Agreement.<sup>416</sup> Article 11.2 of the SPS Agreement provides:

In a dispute under this Agreement involving scientific or technical issues, a panel should seek advice from experts chosen by the panel in consultation with the parties to the dispute. To this end, the panel may, when it deems it appropriate, establish an advisory technical experts group, or consult the relevant international organizations, at the request of either party to the dispute or on its own initiative.

5.88. The first sentence of Article 11.2 indicates that, in SPS cases "involving scientific or technical issues", a panel "should seek advice from experts". Since disputes implicating claims under the SPS Agreement would normally involve "scientific or technical issues", the use of the term "should" in Article 11.2 suggests that a panel would ordinarily be expected to consult with experts in SPS cases. As the Appellate Body stated in *Japan – Agricultural Products II*, Article 11.2

<sup>413</sup> Panel questions to the OIE, para. 1.2. In total, the Panel addressed 22 questions to the OIE.

<sup>414</sup> Article 13 of the DSU provides as follows:

*Right to Seek Information*

1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

<sup>415</sup> Appellate Body Report, *US – Shrimp*, para. 104. (emphasis original)

<sup>416</sup> Article 1.2 of the DSU states that the provisions of the DSU apply subject to special or additional rules and procedures identified in Appendix 2 thereto. Appendix 2 lists Article 11.2 of the SPS Agreement. Article 1.2 of the DSU further provides: "To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail."

of the SPS Agreement "explicitly *instructs* panels in disputes under this Agreement involving scientific and technical issues to 'seek advice from experts'".<sup>417</sup> The second sentence of Article 11.2 further provides that a panel may, as it considers appropriate, establish a group of experts or consult relevant international organizations, and that it may do so either on its own initiative or at the request of a party. This suggests that, while a panel may generally be expected to consult with experts in SPS cases, the panel still retains discretion regarding what experts it wishes to consult, and how it wishes to structure such consultations.

5.89. Although Article 11.2 indicates that the reason a panel "should seek advice from experts" is because the dispute "involve[es] scientific or technical issues", we consider this to be a reference to the types of issues common to SPS disputes, and not to suggest a limitation as to the scope or nature of questioning that would be permitted in such disputes. Thus, while the language of Article 11.2 indicates that experts should be consulted in disputes involving scientific or technical issues, it does not mandate that the advice sought be confined to such issues. This understanding is also consonant with the scope and nature of questioning permitted under Article 13 of the DSU, which grants panels "the right to seek information and technical advice from any individual or body which it deems appropriate", to "seek information from any relevant source", and to "consult experts to obtain their opinion on certain aspects of the matter". On the basis of the foregoing, we do not consider that either Article 11.2 of the SPS Agreement or Article 13 of the DSU imposes constraints on a panel's consultation with experts, including with any relevant international organizations, and we see no basis for understanding Article 11.2 of the SPS Agreement to circumscribe the authority or discretion a panel enjoys under Article 13 of the DSU in SPS disputes. For these reasons, we disagree that Article 11.2 of the SPS Agreement limits the permissible scope of a panel's consultations with an international organization in the manner suggested by India. To the contrary, these provisions apply cumulatively and harmoniously in SPS disputes, and reinforce the comprehensive nature of a panel's fact-finding powers.<sup>418</sup> We therefore find that the Panel did not act inconsistently with Article 11.2 of the SPS Agreement or Article 13.2 of the DSU in consulting with the OIE regarding the meaning of the OIE Code.

#### 5.2.4 Whether the Panel acted inconsistently with Article 11 of the DSU

5.90. We turn next to India's claims that the Panel committed errors inconsistent with its duty to make an objective assessment of the matter under Article 11 of the DSU. India maintains that the Panel failed to assess critically the OIE's answers to the Panel's questions, and instead adopted the OIE's interpretation of the OIE Code without addressing those submissions in which India highlighted its understanding of the OIE Code and pointed to inconsistencies in the OIE's answers.<sup>419</sup> Accordingly, India considers that the Panel "delegated the judicial function of making an objective assessment of the matter to the OIE" in a manner inconsistent with Article 11 of the DSU.<sup>420</sup> India also argues that the Panel failed to interpret the OIE Code in accordance with customary rules of treaty interpretation, as prescribed by Article 3.2 of the DSU.<sup>421</sup> In addition, India asserts that the Panel improperly disregarded arguments and evidence on several specific matters concerning the practice of other countries and previous positions taken by the United States.<sup>422</sup> Finally, India contends that the Panel's conclusions regarding the meaning of the OIE Code are not supported by evidence on the record.<sup>423</sup>

5.91. The United States maintains that the Panel correctly framed the question before it by asking whether India's measures are so divergent from the OIE Code that they are not based upon it, and that the Panel engaged fully with all the evidence on the record, including the text of the OIE Code itself, in reaching its conclusions.<sup>424</sup> The United States also considers that India has not

<sup>417</sup> Appellate Body Report, *Japan – Agricultural Products II*, para. 128. (emphasis original)

<sup>418</sup> The Appellate Body has explained that a treaty interpreter must read treaty provisions in a way that gives meaning to all of them in a harmonious fashion. (See e.g. Appellate Body Report, *US – Upland Cotton*, para. 549) We further note that, in *Japan – Agricultural Products II*, the Appellate Body underscored that both Article 11.2 of the SPS Agreement and Article 13 of the DSU confer "significant investigative authority" on panels. (Appellate Body Report, *Japan – Agricultural Products II*, para. 129)

<sup>419</sup> India's appellant's submission, paras. 103-107.

<sup>420</sup> India's appellant's submission, para. 107.

<sup>421</sup> India's appellant's submission, paras. 120-124.

<sup>422</sup> India's appellant's submission, paras. 109-119.

<sup>423</sup> India's appellant's submission, paras. 125-133.

<sup>424</sup> United States' appellee's submission, paras. 91-102.

demonstrated that the Panel acted inconsistently with Article 3.2 of the DSU.<sup>425</sup> In addition, the United States does not agree that the Panel disregarded certain arguments and evidence presented by India, and considers that, in any event, such information was irrelevant to the Panel's assessment of India's AI measures.<sup>426</sup> Finally, the United States considers that the Panel's conclusion is supported by evidence on the Panel record, and that none of the evidence to which India refers undermines the Panel's findings on the meaning of the OIE Code.<sup>427</sup>

5.92. Regarding the Panel's consultation with the OIE, India contends that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU because it "simply relied on the interpretation provided by the OIE".<sup>428</sup> India relies on the reasoning of the Appellate Body in *India – Quantitative Restrictions* as establishing that a panel may not delegate its judicial function to an international organization that it consults, but must instead critically assess the views of that international organization.<sup>429</sup> India asserts that the Panel in this dispute failed to assess critically the answers provided by the OIE with respect to the OIE Code.

5.93. Having reviewed the Panel's analysis and reasoning, we do not agree with India that the Panel simply relied on the views of the OIE regarding the meaning of the OIE Code. Although the Panel, in respect of each of the interpretative issues it addressed, referred to and accorded weight to the OIE's responses to its questions, it indicated in each instance that its conclusions were also based on an examination of the wording or text of the relevant recommendations of the OIE Code. After identifying the product-specific recommendations that were applicable to the product categories set out in S.O. 1663(E), the Panel assessed the meaning of various provisions of Chapter 10.4 of the OIE Code.<sup>430</sup> For example, in examining Article 10.4.1.10, the Panel stated that its conclusion was based on "the wording of Article 10.4.1.10 as well as the explanations provided by the OIE".<sup>431</sup> In examining the product-specific recommendations, the Panel also stated that its conclusion was reached after it had "examined the text of each of the product-specific recommendations in Chapter 10.4".<sup>432</sup> As we have noted, the Panel then identified specific provisions of Chapter 10.4 that, in its view, allowed the importation of poultry products from countries reporting LPNAI, or regardless of their NAI status.<sup>433</sup> In relation to the regionalization issue, the Panel itself assessed relevant provisions of Chapter 10.4, before concluding that the product-specific recommendations in Chapter 10.4 may apply not only country-wide, but also to zones and compartments.<sup>434</sup> In these circumstances, it is clear that the Panel's conclusions were founded on its own assessment of the meaning of relevant provisions of the OIE Code.

5.94. We also do not see that it was inconsistent with its duties under Article 11 of the DSU for the Panel to have consulted the OIE, or to have accorded weight to the OIE's views, regarding the meaning of the OIE Code. As we have explained, Annex A(3)(b) to the SPS Agreement provides that the relevant international standards for purposes of animal health and zoonoses are those developed under the auspices of the OIE. Because Chapter 10.4 of the OIE Code reflects the relevant international standard in respect of AI, and therefore serves as the benchmark against which India's AI measures had to be compared in order to determine whether they are "based on" or "conform to" that standard, it was incumbent on the Panel to discern the meaning of the OIE Code in order to determine whether India's AI measures satisfy Articles 3.1 and 3.2 of the SPS Agreement. In these circumstances, we do not see that the Panel, in connection with its own assessment of the meaning of the OIE Code, can be faulted for engaging in a consultation with, and according weight to the views of, the very international organization under whose auspices that international standard is developed. We would expect that, in discerning the meaning of an international standard, panels ordinarily would have recourse to the views of the relevant standard-setting body, as referred to in Annex A(3) to the SPS Agreement. While a panel may act inconsistently with Article 11 of the DSU by improperly delegating its adjudicative function to experts with whom it consults, it is not inconsistent with Article 11 for a panel to accord weight to

<sup>425</sup> United States' appellee's submission, paras. 90 and 109.

<sup>426</sup> United States' appellee's submission, paras. 103-108.

<sup>427</sup> United States' appellee's submission, paras. 110-115.

<sup>428</sup> India's appellant's submission, para. 101.

<sup>429</sup> India's appellant's submission, paras. 101-102 (referring to Appellate Body Report, *India – Quantitative Restrictions*, para. 149).

<sup>430</sup> Panel Report, paras. 7.228-7.274.

<sup>431</sup> Panel Report, para. 7.239.

<sup>432</sup> Panel Report, para. 7.251.

<sup>433</sup> Panel Report, para. 7.252.

<sup>434</sup> Panel Report, paras. 7.256-7.259 and 7.262.

the views of such experts in connection with its own assessment of the matter before it.<sup>435</sup> We therefore do not see that the Panel delegated its adjudicative function to the OIE in a manner inconsistent with its duties under Article 11 of the DSU.

5.95. India further argues that the Panel failed to conduct its assessment of the meaning of the OIE Code in accordance with customary rules of treaty interpretation. According to India, because the OIE Code is the international standard for the purposes of Article 3 of the SPS Agreement, it "forms the relevant context for interpretation of Article 3.1 and Article 3.2 of the SPS Agreement".<sup>436</sup> The OIE Code, India adds, must therefore be interpreted in accordance with customary rules of treaty interpretation, as prescribed by Article 3.2 of the DSU. India maintains that, although it repeatedly urged the Panel to interpret the OIE Code in accordance with customary principles of treaty interpretation, the Panel disregarded its argument and therefore acted inconsistently with Article 11 of the DSU.<sup>437</sup>

5.96. The United States argues that India has not demonstrated that the Panel acted inconsistently with Article 3.2 of the DSU by not interpreting the OIE Code in accordance with customary rules of interpretation of public international law, and that India has not explained why interpreting the OIE Code in accordance with customary rules would result in any different outcome than what the Panel found.<sup>438</sup> The United States argues that Article 3.2 provides that customary rules of interpretation apply to interpreting the covered agreements, which do not include the OIE Code. The United States adds that, in any event, determining the existence and content of international standards is a question of fact, not a question of law.<sup>439</sup>

5.97. We have some difficulty understanding the precise nature of this part of India's appeal. The arguments in India's appellant's submission are brief, and are both preceded and followed by arguments in support of its claim that the Panel failed to make an objective assessment of the matter under Article 11. Although India refers to Article 3.2 of the DSU, we understand India to assert that the Panel violated Article 11 of the DSU by disregarding India's contention that the Panel must interpret the OIE Code in accordance with customary rules of treaty interpretation. Thus, given the manner and context in which India presented its arguments, we consider this aspect of its claim as an allegation that the Panel acted inconsistently with Article 11 of the DSU by failing explicitly to address the applicability of customary rules of treaty interpretation when it assessed the meaning of relevant provisions of the OIE Code.

5.98. To begin with, we are not persuaded by India's contention that the Panel's failure to refer to India's argument that the OIE Code must be interpreted in accordance with customary rules of treaty interpretation leads to a violation of Article 11 of the DSU. A panel is not required to identify or address every argument advanced by a party.<sup>440</sup> Moreover, an appellant cannot simply reargue its case before the Appellate Body under the guise of a claim under Article 11, but rather must identify a specific error regarding the objectivity of the panel's assessment and explain why the alleged error is so material that it amounts to a breach of the panel's duties under Article 11.<sup>441</sup> Apart from noting that the Panel did not expressly address its argument, we do not see that India has explained how this alleged error is so material that it constitutes a breach of the Panel's duties

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<sup>435</sup> Appellate Body Report, *India – Quantitative Restrictions*, para. 149. See also Appellate Body Report, *Australia – Apples*, para. 384.

<sup>436</sup> India's appellant's submission, para. 121.

<sup>437</sup> India's appellant's submission, para. 124.

<sup>438</sup> United States' appellee's submission, para. 90.

<sup>439</sup> United States' appellee's submission, para. 82 (referring to Appellate Body Report, *EC – Hormones*, para. 132).

<sup>440</sup> Appellate Body Report, *EC – Poultry*, para. 135. (emphasis omitted)

<sup>441</sup> Appellate Body Reports, *China – Rare Earths*, paras. 5.178; *EC – Fasteners (China)*, para. 442.



under Article 11. We also do not consider that India has sufficiently defined the contours of this aspect of its claim.<sup>442</sup>

5.99. In addition, India has not demonstrated why or how the Panel's analysis departed from a proper application of the interpretative rules India relies upon, or how, if properly applied, such rules would have produced a different outcome regarding the meaning of the OIE Code. We note that the Panel rejected India's proposed interpretation of Chapter 10.4, whereby an importing country could choose the NAI-free status of the exporting country as a condition of entry, and apply that condition only on a country-wide basis.<sup>443</sup> We have also found that the Panel's conclusions regarding the meaning of the OIE Code were founded on its own assessment of the meaning of relevant provisions of Chapter 10.4, and that the Panel did not err in according weight to the views of the OIE. Thus, in assessing the Panel's reasoning and conclusions in connection with India's claims, we have not identified any legal error, and India has not, in our view, demonstrated what interpretative error the Panel allegedly committed that resulted in an incorrect understanding of Chapter 10.4 of the OIE Code.

5.100. In the light of the foregoing considerations, we reject India's claim that the Panel acted inconsistently with its duties under Article 11 of the DSU by failing to conduct its own assessment of the meaning of the OIE Code, including by failing to do so in accordance with customary rules of treaty interpretation.

5.101. India further contends that the Panel acted inconsistently with Article 11 of the DSU because it failed expressly to address India's arguments regarding inconsistencies in the OIE's answers in respect of the meaning of the OIE Code, and improperly disregarded other arguments and evidence submitted by India concerning the practice of other countries and previous positions taken by the United States.<sup>444</sup>

5.102. Regarding the purported inconsistencies in the OIE's answers, India cites portions of its submissions before the Panel, but does not explain why the Panel's failure expressly to address these arguments materially undermined the objectivity of the Panel's analysis. Rather, India seems to be rearguing before us the positions that it put to the Panel, but which the Panel did not accept. For instance, India points to various paragraphs in its submissions that presented to the Panel its views in respect of: Article 10.4.1.10; the product-specific recommendations in Chapter 10.4; and the references to "zones or compartments" in the recommendations in Chapter 10.4.<sup>445</sup> All of these arguments, however, relate to India's principal contention that the OIE Code allows importing countries, based on their appropriate level of protection, to choose whether to apply a recommendation pertaining to products from NAI-free or HPNAI-free territories, and whether to apply a recommendation on a country-wide basis, or on a zone or compartment basis. As we see it, however, the Panel expressly rejected India's understanding of the OIE Code when it stated that "India's interpretative approach, whereby Chapter 10.4 would allow an importing country to choose as a 'condition of entry' the NAI-free status of the exporting country and apply that condition only on a country-wide basis, runs contrary to Chapter 10.4 of the [OIE] Code".<sup>446</sup> We therefore do not see, and India has not explained in its submissions on appeal, how the absence of a more extensive or explicit treatment of India's argumentation was so material as to undermine the objectivity of the Panel's analysis.

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<sup>442</sup> It appears to us that India's position on appeal differs from its position before the Panel. India's principal position before the Panel was that the OIE Code was a treaty and therefore must be interpreted in accordance with the rules of the Vienna Convention. (India's appellant's submission, para. 124 (referring to letter from India to the Panel, dated 11 July 2013, pp. 2-3; India's comments on the OIE's and individual experts' responses to Panel questions, dated 28 November 2013, paras. 3 and 34-36; and India's closing statement at the second Panel meeting, para. 7)) At the oral hearing, India stated that it is not arguing on appeal that the OIE Code is itself a treaty subject to Vienna Convention rules, but rather that it serves as context for the interpretation of Articles 3.1 and 3.2 of the SPS Agreement. We further note that, although India makes reference on appeal to Articles 31(2) and 31(3) of the Vienna Convention, it advances no clear explanation as to how, and for what purpose, in India's view, the OIE Code meets the specific criteria for those provisions to apply. (India's appellant's submission, paras. 121-122)

<sup>443</sup> Panel Report, para. 7.270.

<sup>444</sup> India's appellant's submission, paras. 109-119.

<sup>445</sup> India's appellant's submission, paras. 104-106 (referring to India's first written submission to the Panel, paras. 123-146; second written submission to the Panel, paras. 6-24, 33-51, and 53; comments on OIE's responses to Panel's questions dated 28 November 2013, paras. 33-57; and opening statement at the first Panel meeting, paras. 16-18 and 32-37).

<sup>446</sup> Panel Report, para. 7.270.

5.103. India further maintains that the Panel ignored India's reference to the practice of other countries in support of India's interpretation of the OIE Code. Before the Panel, India had pointed to bans imposed by certain countries on poultry products from the United States that, in India's view, show that the OIE Code permits countries to prohibit imports on account of LPNAI.<sup>447</sup> India further contends that the Panel ignored statements by Australia that Australia's AI measures conform to the OIE Code.<sup>448</sup>

5.104. India has not explained why express consideration of the instances it identified before the Panel was necessary to ensure the objectivity of the Panel's assessment. The mere fact that one or several countries have adopted a particular measure does not mean that such a measure is based on, or conforms to, the relevant international standard. It may be, for instance, that these measures were adopted in a manner inconsistent with the relevant standard, or adopted so as to maintain a higher level of protection than would be achieved by basing them on the relevant standard, as provided for under Article 3.3 of the SPS Agreement. Indeed, the arguments and evidence advanced by India offer a limited account of the practice of these countries and do not identify or discuss the grounds upon which the various countries adopted their respective measures.<sup>449</sup> Moreover, although India asserts that Australia bans imports of chicken meat due to LPNAI and that this supports India's reading of the OIE Code, Australia rejected India's characterization of its practice, and the Panel took note of this.<sup>450</sup> For these reasons, even if the Panel did not expressly address all of India's arguments and evidence in this regard, we do not see that this was so material as to undermine the objectivity of the Panel's analysis.

5.105. In addition, India argues that the Panel disregarded its argument that the United States' position on Article 6 implies that it accepts that a trade restriction can be imposed upon the occurrence of HPNAI and LPNAI. In support of this argument, India refers to a statement from the United States' first written submission to the Panel, which pertains to the United States' claim under Article 6 of the SPS Agreement:

India's measures explicitly ban poultry from all parts of a country whenever NAI is detected anywhere in the country. Their wording leaves no room for deviation. This precludes the application of AI restrictions on a regionalized basis, as provided for in the [OIE Code], and as required under Article 6 of the SPS Agreement.<sup>451</sup>

5.106. In India's view, by acknowledging that the OIE Code provides for "the application of AI restrictions" upon detection of NAI, this statement implies the United States' agreement with what India characterizes as the Panel's conclusion that "the OIE Code prohibits import of poultry and poultry products upon occurrence of HPNAI/LPNAI".<sup>452</sup> India's reading of the United States' purported admission, and of the Panel's supposed conclusion, however, appears to us to be incorrect. First of all, the Panel did not, as India argues, conclude that the OIE Code prohibits the importation of poultry products upon the occurrence of HPNAI or LPNAI. Rather, as we noted, the Panel found that the OIE Code allows for such products to be imported from countries reporting LPNAI, or regardless of NAI status, when the applicable risk mitigation conditions are fulfilled. Moreover, we do not see that the United States' general reference to "AI restrictions on a regionalized basis" can be read as an admission that the OIE Code provides for import prohibitions, or that it does so in respect of both HPNAI and LPNAI. In addition, we do not understand how the Panel could be said to have disregarded India's argument regarding purported contradictions in the United States' position, since India, in its submissions before the Panel, appears not to have presented an argument concerning the above-quoted passage in the context of its argumentation

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<sup>447</sup> India's appellant's submission, para. 109.

<sup>448</sup> India's appellant's submission, para. 112.

<sup>449</sup> See India's appellant's submission, fn 198 to para. 109 (referring to India's second written submission to the Panel, paras. 33-34; and India's comments on OIE's responses to Panel questions dated 28 November 2013, para. 57).

<sup>450</sup> As a third participant in this appeal, Australia submits that the Panel correctly understood Australia's risk assessment, and contests India's arguments to the contrary. (Australia's third participant's submission, paras. 10-14 (referring to Panel Report, para. 7.313))

<sup>451</sup> India's appellant's submission, para. 115 (quoting United States' first written submission to the Panel, para. 142). (emphasis added by India)

<sup>452</sup> India's appellant's submission, para. 116.

concerning Article 3 of the SPS Agreement.<sup>453</sup> We therefore reject India's claim that the Panel's failure expressly to address these arguments and evidence in its Report somehow undermined the objectivity of the Panel's assessment.

5.107. Finally, we address India's claim that the Panel failed to make an objective assessment of the matter in accordance with Article 11 of the DSU by reaching findings regarding the meaning of the OIE Code that lack support in the evidence on the record. India points to three instances in which the Panel allegedly failed to base its conclusions on such evidence. First, India points to an exhibit on the Panel record containing a communication in which the United States requested India to limit its measures banning poultry and poultry products due to LPNAI incidents to the affected zone and not beyond the three months provided for in the OIE guidelines.<sup>454</sup> According to India, the language used by the United States in this communication indicates that it considers that import restrictions can be imposed on the occurrence of HPNAI and LPNAI, and, according to India, this contradicts the Panel's conclusion that no trade restriction can be imposed upon the occurrence of HPNAI or LPNAI. Second, India argues that, because the United States has acknowledged that a ban against HPNAI is a legitimate trade barrier, there was no factual basis for the Panel to conclude that the OIE Code does not provide for a ban against the import of poultry products upon the occurrence of HPNAI.<sup>455</sup> Third, India maintains that the Panel's conclusion is not supported by the OIE's own interpretation of the OIE Code, in which the OIE appeared to acknowledge that a country that is not free from HPNAI cannot export fresh poultry meat.<sup>456</sup> India thus maintains that the Panel's conclusion that the product-specific recommendations in the OIE Code do not provide for import prohibitions upon the occurrence of HPNAI lacks a factual basis.

5.108. We understand that, by invoking these three instances, and pointing to evidence on the Panel record submitted by the United States, India maintains that the Panel's conclusion that the OIE Code does not envisage import prohibitions is not supported by evidence on the Panel record. In raising this claim, India does not engage with the evidence the Panel did cite to and rely upon, but simply points to other evidence on the Panel record. However, the fact that particular pieces of evidence may not support, or may even contradict, the reasoning or conclusions of the Panel does not suffice to make out a claim that the Panel's findings lacked a sufficient basis in the factual record. Furthermore, an appellant must demonstrate that the error or omission is so material that it undermines the objectivity of the Panel's assessment of the matter before it. On the basis of its submissions on appeal, we do not see that India, by pointing to the above three instances, has demonstrated that the Panel failed to conduct an objective assessment of the matter under Article 11 of the DSU.

5.109. Moreover, India's contentions appear to be premised on a misreading of the Panel's conclusion. According to India, the Panel had no basis for its conclusion that the OIE Code does not envisage the imposition of import prohibitions with respect to poultry products, because the evidence, in fact, reflects a recognition that such import prohibitions can be imposed. As we have previously noted, when the Panel stated that the OIE Code does not envisage the imposition of import prohibitions, it was not stating that the OIE Code precludes OIE members from restricting or banning the importation of products in circumstances where the recommendations of the OIE Code *do not* apply, but rather was addressing whether the OIE Code itself prescribes prohibitions on the importation of products in circumstances where these recommendations *do* apply.<sup>457</sup> For these reasons, we reject India's claim that the Panel reached findings regarding the meaning of the OIE Code that lack support in the evidence on the record.

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

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<sup>453</sup> The paragraphs from India's first written submission to the Panel to which India refers addressed the United States' claim under Article 6 of the SPS Agreement. (India's appellant's submission, para. 115 (referring to India's first written submission to the Panel, paras. 271-275))

<sup>454</sup> India's appellant's submission, para. 126 (referring to Letter dated 20 October 2009 from M. Gilkey (Director, APHIS) to A. Kaushal (Joint Secretary, DAHD), regarding: "S.O. 2208(E) Notification published in the Gazette of India on August 28, 2009" (Panel Exhibit US-141), p. 3).

<sup>455</sup> India's appellant's submission, para. 129 (referring to, *inter alia*, Expert statement of David E. Swayne, attached to United States' first written submission to the Panel (Panel Exhibit US-97)).

<sup>456</sup> India's appellant's submission, para. 131 (referring to OIE's response to Panel question No. 7(b)).

<sup>457</sup> See *supra*, paras. 5.72-5.74.

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.

### 5.2.5 Conclusion

5.111. We have found that the Panel did not act inconsistently with Article 11.2 of the SPS Agreement and Article 13.2 of the DSU in consulting with the OIE regarding the meaning of the OIE Code. We also have found 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. Accordingly, we uphold the Panel's findings, in paragraphs 7.274, 7.275, and 8.1.c.ii of the Panel Report, that India's AI measures are inconsistent with Article 3.1 of the SPS Agreement, and that India is not entitled to benefit from the presumption of consistency of its AI measures with other relevant provisions of the SPS Agreement and the GATT 1994 as provided for under Article 3.2 of the SPS Agreement. Having upheld the Panel's findings, we need not address India's consequential request that we complete the legal analysis in respect of Articles 3.1 and 3.2 of the SPS Agreement.<sup>458</sup>

### 5.3 Article 6 of the SPS Agreement

5.112. India appeals certain findings by the Panel in the context of its analysis of the United States' claim under Article 6 of the SPS Agreement. India requests us to reverse the Panel's findings that India's AI measures are inconsistent with Articles 6.1 and 6.2 of the SPS Agreement. India argues that the Panel: (i) erred in its interpretation of the relationship between Article 6.1 and Article 6.3 of the SPS Agreement; (ii) erred its application of Article 6.2 of the SPS Agreement to India's AI measures; and (iii) failed to make an objective assessment of the matter, as required by Article 11 of the DSU.

5.113. We begin by summarizing relevant aspects of the Panel's findings. Then, we provide certain observations about the obligations in Article 6 in respect of the adaptation of SPS measures to regional conditions. Next, we examine India's claim that the Panel erred in its understanding of the relationship between Articles 6.1 and 6.3 of the SPS Agreement. We then turn to address India's claim that the Panel erred in its application of Article 6.2 of the SPS Agreement to the measures at issue. Finally, we analyse India's claims that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

#### 5.3.1 The Panel's findings

5.114. Before the Panel, the United States claimed that India's AI measures are inconsistent with Article 6.1, first sentence, of the SPS Agreement because they are not adapted to the sanitary characteristics of the area from which the imports originated. The United States also argued that India's AI measures fail to comply with the second sentence of Article 6.1 because India did not take into account disease-free areas, areas of low disease prevalence, the existence of an eradication or control programme, or the relevant OIE guidelines. With respect to Article 6.2, the United States claimed that India's AI measures are inconsistent with its first sentence because they do not recognize the concepts of disease-free areas or areas of low disease prevalence, and with its second sentence because, by precluding the recognition of disease-free areas with respect to AI, India's AI measures further preclude it from determining AI-free areas based on the factors mentioned in Article 6.2, second sentence.<sup>459</sup> Pointing to the fact that India's AI measures explicitly ban the importation of poultry products from all parts of a country whenever NAI is detected anywhere in that country, the United States emphasized that these measures, therefore, preclude the application of AI restrictions on a regionalized basis and preclude India from taking account of the SPS characteristics of different regions.

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<sup>458</sup> Accordingly, we also need not address India's request that, were we to complete the legal analysis and find India's AI measures to be consistent with Article 3 of the SPS Agreement, we also reverse the Panel's findings under Articles 2.2, 2.3, and 5.6 of the SPS Agreement. (India's appellant's submission, para. 204)

<sup>459</sup> Panel Report, para. 7.618.

5.115. In response, India contended, *inter alia*, that "Article 6.3 is critical to understanding Members' obligations under Articles 6.1 and 6.2 of the SPS Agreement because these provisions do not operate independently of Article 6.3 and do not impose any obligation upon the importing country in the absence of the triggering steps under Article 6.3."<sup>460</sup> Thus, for India, since the United States had not fulfilled its obligation under Article 6.3 of the SPS Agreement, the requirements under Articles 6.1 and 6.2 had not been triggered and India was under no obligation to modify its measure or to recognize areas within the United States "unilaterally".<sup>461</sup>

5.116. Noting that the parties disagreed on whether the obligations in Articles 6.1 and 6.2 of the SPS Agreement are contingent upon whether an exporting Member has discharged the steps provided for in Article 6.3, the Panel decided that its "first task" was to determine the relationship among the three paragraphs of Article 6 of the SPS Agreement.<sup>462</sup> The Panel made brief preliminary observations about each of the paragraphs of Article 6. The Panel then stated that, since "Article 6 does not provide an explicit indication of the manner in which its []paragraphs interact with one another", it would consider whether Article 6 or its paragraphs "suggest any kind of hierarchy or sequence to be followed in order to give proper effect to their terms".<sup>463</sup> In proceeding to analyse the relationship between Articles 6.1 and 6.2, on the one hand, and Article 6.3, on the other hand, the Panel made certain observations concerning: (i) the relationship between the first and second sentences of Article 6.1; (ii) the relationship between the first and second sentences of Article 6.2; and (iii) the meaning of the obligation to "recognize" the concepts of "pest- or disease-free areas" and "areas of low pest or disease prevalence" in the first sentence of Article 6.2.

5.117. With respect to the relationship between Articles 6.1 and 6.2, on the one hand, and Article 6.3, on the other hand, the Panel considered the first two paragraphs of Article 6, and began by observing certain differences between them. For instance, the Panel indicated that "the use of different wording in these paragraphs suggests that the paragraphs are intended to have distinctive effects."<sup>464</sup> In particular, whereas the obligation in Article 6.1 to ensure that SPS measures are "adapted" denotes that a Member must make certain that its SPS measures are suitable for the SPS characteristics of the area, the first sentence of Article 6.2 requires that a Member make a particular acknowledgement, namely, of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. The Panel also pointed out that the first sentences of these two paragraphs refer to different subjects: whereas Article 6.1 refers to "SPS measures", Article 6.2 refers to the "concepts" of "pest- or disease-free areas" and "areas of low pest or disease prevalence".<sup>465</sup> Moreover, the Panel expressed the view that, given that a "concept" is an "abstract idea", the obligation in the first sentence of Article 6.2 to recognize the specified "concepts" is "less exigent" than the obligation in the first sentence of Article 6.1 "of 'ensuring' that a measure is 'adapted' to the SPS characteristics of an area from which a product originated and to which it is destined".<sup>466</sup>

5.118. Next, the Panel noted that the words "in particular" in Article 6.2, read together with the title to Article 6, show that pest- or disease-free areas and areas of low pest or disease prevalence are a subset of all types of areas covered by Article 6, and that the first sentence of Article 6.2 deals with these types of areas.<sup>467</sup> The Panel explained, in this connection, that it viewed the manner in which a Member develops and maintains its SPS measures as a "logical continuum". In the Panel's view, "the 'adaptation' of a Member's SPS measures to the SPS characteristics of particular 'areas' presupposes that a Member has first 'recognized' the concept of such areas."<sup>468</sup> The Panel considered that it would be difficult to see how a WTO Member could ensure the adaptation of its SPS measures, as required by Article 6.1, "if the Member has not 'recognized' the 'concepts' of specific types of areas identified in Article 6.2 in the first place".<sup>469</sup> The Panel then turned to paragraph 3 of Article 6 and, in particular, to India's contention that a WTO Member's duty under Article 6.1 to adapt its SPS measures would arise only after those measures have

<sup>460</sup> Panel Report, para. 7.633.

<sup>461</sup> Panel Report, paras. 7.634 and 7.652.

<sup>462</sup> Panel Report, para. 7.648.

<sup>463</sup> Panel Report, para. 7.665.

<sup>464</sup> Panel Report, para. 7.669.

<sup>465</sup> Panel Report, para. 7.670.

<sup>466</sup> Panel Report, para. 7.670.

<sup>467</sup> Panel Report, para. 7.671.

<sup>468</sup> Panel Report, para. 7.672.

<sup>469</sup> Panel Report, para. 7.672.

entered into force and an exporting Member has made a fully documented request under Article 6.3. In this regard, the Panel first observed that the situation referred to in Article 6.3 is distinct from those referred to in the first two paragraphs of Article 6, in that Article 6.3 is addressed to, and puts the onus on, exporting Members, as opposed to WTO Members generally. For the Panel, Article 6.3 is "not directly linked" to the first two paragraphs of Article 6 or to "what WTO Members must do generally with respect to adapting measures to SPS characteristics of certain areas, or in particular to recognizing specific area concepts".<sup>470</sup>

5.119. In addition, the Panel expressed the view that a "plain reading" of Article 6.1 – including the absence of any conditional language and the fact that it is expressed in the present tense – shows that this provision creates a "free-standing" obligation requiring a Member to ensure that adaptation of its measure to the SPS characteristics of the area "is an element of the SPS measure *as such*".<sup>471</sup> Thus, the Panel considered that the language of the first sentence of Article 6.1 "negates" India's argument that adaptation involves an *ex post facto* "modification" of the SPS measure pursuant to an exporting Member's request.<sup>472</sup> As for the relationship between Articles 6.2 and 6.3, the Panel considered that "the recognition of the *concepts* of such areas must necessarily precede a request for recognition of a *specific* area within the territory of an exporting Member" since, "logically", "the importing Member must have already recognized in its SPS measures the concepts of pest- or disease-free areas and areas of low pest or disease prevalence, as required under Article 6.2, in order for it to receive and consider a request for recognition under Article 6.3."<sup>473</sup> Therefore, the Panel concluded that the obligations in Articles 6.1 and 6.2 are not triggered by an exporting Member submitting a claim to an importing Member under Article 6.3. Rather, in the Panel's view, these provisions establish obligations on all WTO Members with respect to their SPS measures, not just those that have received a request from an exporting Member for recognition of an area under Article 6.3.<sup>474</sup>

5.120. Nevertheless, the Panel acknowledged that, in certain circumstances, namely, when an importing Member receives a request for the recognition of a particular disease-free area in an exporting Member, there may be a link between Article 6.3 and Article 6.1. For the Panel, such link may exist between the information required for the assessment of the SPS characteristics of a relevant area listed in the second sentence of Article 6.1 and the obligation of an exporting Member to provide "the necessary evidence" under Article 6.3.<sup>475</sup> At the same time, the Panel stated that, "although Article 6.1 may inform the inquiry that an importing Member may conduct in order to determine whether an exporting Member has 'objectively demonstrated' that there is an area within its territory that is pest- or disease-free or is an area of low pest or disease prevalence, there is nothing in the language of either provision that requires this particular approach."<sup>476</sup>

5.121. Based on the above, the Panel explained its understanding of the relationship between Articles 6.1 and 6.2, on the one hand, and Article 6.3, on the other hand, as follows:

... the interplay between the three paragraphs of Article 6 is that Members must adapt their SPS measures to the SPS characteristics of an area from which goods originate or to which they are destined and, logically, they must already have recognized as per Article 6.2 the "concepts" of pest- or disease-free areas and areas of low pest or disease prevalence in order to do so. The steps in Article 6.3 are directed at exporting Members and presuppose that an importing Member from which they seek recognition that an area in its territory is pest- or disease-free or is an area of low pest or disease prevalence, is in compliance with its obligations under Articles 6.1 and 6.2. We thus

<sup>470</sup> Panel Report, para. 7.674.

<sup>471</sup> Panel Report, para. 7.675. (emphasis original) As additional support for its view that Articles 6.1 and 6.2 create "free-standing obligations rather than obligations contingent upon a request from a Member claiming that areas within its territory are pest- or disease-free, pursuant to Article 6.3", the Panel also referred to Article 4 of the SPS Agreement, which – in contrast to Article 6 – explicitly conditions the importing Member's actions upon an action by the exporting Member, as well as to the "Guidelines to Further the Practical Implementation of Article 6 of the Agreement on the Application of Sanitary and Phytosanitary Measures" adopted by the SPS Committee. (Ibid., para. 7.679)

<sup>472</sup> Panel Report, para. 7.675.

<sup>473</sup> Panel Report, para. 7.677. (emphasis original)

<sup>474</sup> Panel Report, para. 7.678.

<sup>475</sup> Panel Report, para. 7.676.

<sup>476</sup> Panel Report, para. 7.676.

conclude that the obligations in Articles 6.1 and Article 6.2 are not triggered by an invocation of Article 6.3, as argued by India.<sup>477</sup>

5.122. Next, the Panel turned to the second interpretative issue, namely, the relationship between the first and second sentences of Article 6.1, and between the first and second sentences of Article 6.2. In this connection, the Panel expressed the view that the meaning of "area" in the first sentence of Article 6.1 and of "region" in the second sentence of Article 6.1 are "sufficiently similar to warrant a conclusion" that the assessment referred to in the second sentence relates to the adaptation of measures to the areas referred to in the first sentence.<sup>478</sup> Accordingly, the Panel held that "a failure to ensure that SPS measures are adapted to the SPS characteristics of an area for the purpose of Article 6.1, first sentence, may warrant a concomitant finding that the Member has not taken into account the factors in Article 6.1, second sentence, in assessing the SPS characteristics of a region."<sup>479</sup>

5.123. In examining the relationship between the first and second sentences of Article 6.2, the Panel considered that the requirement, set out in the second sentence of that provision, to make a "determination" of pest- or disease-free areas and areas of low pest or disease prevalence "based on" the factors listed therein<sup>480</sup> "presupposes the 'recognition' of the 'concepts' of those areas", as required by the first sentence of Article 6.2.<sup>481</sup> In the Panel's view, "if a Member is to determine a pest- or disease-free area or area of low pest or disease prevalence based on the factors listed in Article 6.2, second sentence ... such Member must necessarily recognize the concept of those areas."<sup>482</sup> The Panel thus interpreted Article 6.2 such that "a finding that a Member has failed to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence as required by Article 6.2, first sentence, *leads inevitably* to a finding that such Member also has failed to determine those areas based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls"<sup>483</sup>, as required by the second sentence of Article 6.2.

5.124. All of the above led the Panel to the view that it should begin its analysis of the consistency of India's AI measures with Article 6 by focusing on the first sentence of Article 6.2. Since, in the Panel's view, a Member cannot ensure that its SPS measures are adapted to the SPS characteristics of an area without first recognizing the concept of "areas" (and, in particular for Article 6.2, pest- or disease-free areas and areas of low pest or disease prevalence), the Panel decided to first consider whether India has "recognized" the "concepts" of "disease-free areas" and "areas of low disease prevalence" in relation to AI. For the Panel, a finding that India has not recognized these concepts would "lead to" a finding that India has not ensured that its AI measures are adapted to the SPS characteristics of those areas pursuant to the first sentence of Article 6.1.<sup>484</sup>

5.125. The Panel dealt with the third interpretative issue – namely, the meaning of the obligation to "recognize" the concepts of pest- or disease-free areas and areas of low pest or disease prevalence – in a subsequent part of its analysis, when assessing the United States' claim that India's AI measures are inconsistent with Article 6.2 of the SPS Agreement. The Panel observed that the text of Article 6.2 is silent as to how WTO Members are to recognize the concepts referred to therein<sup>485</sup>, and that the definition of the word "recognize" does not answer the question of whether the recognition of the concepts found in Article 6.2 "must be done explicitly, and if so,

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<sup>477</sup> Panel Report, para. 7.680. See also para. 7.677.

<sup>478</sup> Panel Report, para. 7.684.

<sup>479</sup> Panel Report, para. 7.685.

<sup>480</sup> The Panel noted that the second sentence of Article 6.2 refers to factors "such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls". (Panel Report, para. 7.687)

<sup>481</sup> Panel Report, para. 7.688.

<sup>482</sup> Panel Report, para. 7.688.

<sup>483</sup> Panel Report, para. 7.689. (emphasis added)

<sup>484</sup> Panel Report, para. 7.690.

<sup>485</sup> Panel Report, para. 7.696.

whether it should be done in writing through a legislative or administrative act."<sup>486</sup> In the view of the Panel, "the format of such recognition will depend on the circumstances of each particular case", and the text of Article 6.2 did not give the Panel any mandate "to prescribe to India or any other Member the manner in which it should 'recognize' the concepts of pest- or disease-free areas and areas of low pest or disease prevalence."<sup>487</sup> The Panel nevertheless expressed the view that, in order to comply with Article 6.2, "SPS measures adopted by WTO Members must *at a minimum* not deny or contradict the recognition of the concepts of such areas when these concepts are relevant with respect to the disease at issue."<sup>488</sup>

5.126. Turning to examine India's AI measures, the Panel first noted that the Livestock Act is silent on the concepts of disease-free areas and areas of low disease prevalence and that there is broad discretion inherent in the general powers conferred by Sections 3 and 3A of the Livestock Act. However, the Panel pointed out that there is no evidence on the record of this dispute that India has used its discretion either to recognize, or to deny or contradict the recognition of, the concept of such areas.<sup>489</sup> Next, in examining S.O. 1663(E), the Panel recalled that this instrument, which was issued pursuant to Sections 3 and 3A of the Livestock Act, prohibits the importation of the relevant products on a country-wide basis. The Panel found nothing on the face of this instrument that allows for the recognition of disease-free areas and/or areas of low disease prevalence within a country that notifies NAI to the OIE. To the contrary, the Panel considered that S.O. 1663(E) "reflects the opposite"<sup>490</sup>, and that it does so in "clear and unequivocal language".<sup>491</sup> Therefore, the Panel held that, "by imposing a prohibition on a country-wide basis, [S.O. 1663(E)] contradicts the requirement to recognize the concept of disease-free areas and areas of low disease prevalence".<sup>492</sup>

5.127. Accordingly, the Panel concluded that, taken together, India's AI measures do not recognize the concepts of disease-free areas and areas of low disease prevalence with respect to AI and are therefore inconsistent with Article 6.2, first sentence, of the SPS Agreement.<sup>493</sup> As a consequence, the Panel found that India's AI measures are also inconsistent with Article 6.2, second sentence, because the failure to recognize the concepts of disease-free areas and areas of low disease prevalence leads inevitably to a finding that India has also failed to determine those areas based on the factors enumerated in Article 6.2, second sentence.<sup>494</sup>

5.128. As a consequence of its finding that India's AI measures fail to recognize the concepts of disease-free areas and areas of low disease prevalence, the Panel also found that India's AI measures are not adapted to the SPS characteristics of the areas from which the products originate and to which they are destined, and are thus inconsistent with Article 6.1, first sentence. With respect to the United States' claim under the second sentence of Article 6.1, the Panel observed that India has not conducted the assessment of the SPS characteristics of a region, as envisaged in that provision. Therefore, the Panel found that India's AI measures are also inconsistent with Article 6.1, second sentence.<sup>495</sup>

### 5.3.2 Overview of Article 6

5.129. With respect to the Panel's interpretation of Article 6 of the SPS Agreement, India's appeal specifically challenges the Panel's understanding of the relationship between the first and third

<sup>486</sup> Panel Report, para. 7.698. The Panel adopted the meaning of "recognize" identified by the Appellate Body in the context of Annex 1.2 to the TBT Agreement, namely, to "[a]cknowledge the existence, legality, or validity of, [especially] by formal approval or sanction; accord notice or attention to; treat as worthy of consideration". (Ibid., para. 7.668 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 361, in turn referring to the *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007)))

<sup>487</sup> Panel Report, para. 7.698.

<sup>488</sup> Panel Report, para. 7.698. (emphasis added) The Panel observed that the concepts of pest- or disease-free areas and areas of low pest or disease prevalence are not relevant with respect to all pests or diseases, and pointed out that, for certain pests or diseases, the OIE Code does not recommend regionalization. (Ibid., fn 1217 to para. 7.698)

<sup>489</sup> Panel Report, paras. 7.700-7.701.

<sup>490</sup> Panel Report, para. 7.702.

<sup>491</sup> Panel Report, para. 7.703.

<sup>492</sup> Panel Report, para. 7.702.

<sup>493</sup> Panel Report, paras. 7.706-7.707. See also para. 7.713.

<sup>494</sup> Panel Report, para. 7.708. See also para. 7.713.

<sup>495</sup> Panel Report, paras. 7.709 and 7.712. See also paras. 7.714-7.715.



paragraphs of this provision. Before addressing this interpretative issue, we seek to situate the relationship between Articles 6.1 and 6.3 within the broader scheme of Article 6. We think it useful to begin by considering the content and structure of Article 6 as a whole, and the relationship among its three paragraphs.

5.130. Article 6 of the SPS Agreement provides:

*Article 6*

*Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas  
and Areas of Low Pest or Disease Prevalence*

1. 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.
2. Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.
3. Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

5.131. Article 6 of the SPS Agreement establishes, through its three paragraphs, a series of obligations regarding the adaptation of SPS measures to regional conditions. We start by noting that both the title of this provision and the first sentence of Article 6.1 refer to the requirement to "adapt" SPS measures to certain regional conditions. Whereas the title speaks more generally of "Adaptation to Regional Conditions", the first sentence of Article 6.1 imposes on WTO Members a specific obligation to ensure that their SPS measures are "adapted" to the "sanitary or phytosanitary characteristics" of the areas from which the product originated and to which the product is destined. Moreover, we observe that, among the regional conditions in respect of which adaptation is envisaged, the title to Article 6 refers to "Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence". We see a link between this language and the second sentence of Article 6.1, which identifies the "level of prevalence of specific diseases or pests" as one of the relevant SPS characteristics of a region in respect of which adaptation is envisaged. Similarly, the reference to "Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence" in the title of Article 6 is also directly connected with the second and third paragraphs of this provision, which deal explicitly with these types of areas.

5.132. The first sentence of Article 6.1 stipulates that "Members shall ensure that their sanitary or phytosanitary measures are adapted to the sanitary or phytosanitary characteristics of the area ... from which the product originated and to which the product is destined." The verb "ensure" is defined as to make certain the occurrence of a situation or outcome.<sup>496</sup> In turn, the term "adapt" means "fit, adjust, (*to*); make suitable (*to* or *for*)".<sup>497</sup> Two areas are relevant to the obligation in the first sentence of Article 6.1: the area from which the product originated and the area to which

<sup>496</sup> Relevant definitions of the term "ensure" are "guarantee, warrant" and "make certain the occurrence of (an event, situation, outcome, etc.) (Foll. by *that*)". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 840)

<sup>497</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 24.

the product is destined. Article 6.1 indicates that the term "area" encompasses "all of a country, part of a country, or all or parts of several countries". The "areas" that are relevant for purposes of Article 6.1 can therefore vary, and may entail a territory that can be smaller than, the same size as, or bigger than, a country. We observe that, pursuant to the first sentence of Article 6.1, a Member's obligation to ensure adaptation applies in respect of "SPS measures" in the plural, suggesting that it applies generally, as well as in connection with each specific SPS measure maintained by a Member. Furthermore, the use of the present tense "are adapted", and the absence of any language limiting the temporal scope of application of this obligation, suggest that the obligation in Article 6.1 does not apply only at one specific point in time (e.g. when an SPS measure is adopted), but is, instead, an ongoing one. Indeed, both the notion of "adaptation", as well as the fact that the relevant SPS characteristics of regions may fluctuate<sup>498</sup>, point to an obligation that is not static, but rather ongoing, requiring that SPS measures be adjusted over time so as to establish and maintain their continued suitability in respect of the relevant SPS characteristics of the relevant areas. We also see the use of the verb "ensure" in connection with the adaptation of "SPS measures" in the plural as indicating something that should be done consistently and systematically by Members.

5.133. The first sentence of Article 6.2 establishes that "Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence."<sup>499</sup> We observe that the use of the words "in particular" in the first sentence of Article 6.2 underscores the link between Articles 6.1 and 6.2. Similarly, the title to Article 6, which refers to "Adaptation to Regional Conditions *Including* Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence"<sup>500</sup>, read together with the first sentence of Article 6.1, indicates that "pest- or disease-free areas" and "areas of low pest or disease prevalence" are a subset of all the SPS characteristics of an area that may call for the adaptation of an SPS measure. We read the words "in particular", together with the title to Article 6, as underlining the interlinkages between the first and second paragraphs of Article 6. More specifically, we consider that these elements point to the particular saliency of "pest- or disease-free areas" and "areas of low pest or disease prevalence" as factors to be taken into account in assessing the SPS characteristics of a region, pursuant to the second sentence of Article 6.1. These considerations, in our view, indicate that, together, Articles 6.1 and 6.2 accord prominence to the content of Article 6.2 as one particular way through which a Member can ensure that its SPS measures are "adapted", as required by Article 6.1.

5.134. Moreover, we note that the structure of the first two paragraphs of Article 6 is similar in certain respects. Each has two sentences, and in each paragraph the nature of the obligation under the first sentence is more general than under the second sentence. The first sentence of Article 6.2 establishes the obligation to recognize "the concepts of pest- or disease-free areas and areas of low pest or disease prevalence". Neither of the first sentences of Article 6.1 or Article 6.2 is explicitly linked to a specific assessment or determination. Rather, the first sentence of Article 6.1 speaks of an obligation to "ensure" adaptation in respect of SPS measures generally, and the first sentence of Article 6.2 refers to a general obligation to "recognize" the "concepts" listed therein.

5.135. In turn, the second sentences of Articles 6.1 and 6.2 both identify how a specific action is to be taken. The second sentence of Article 6.1 specifies, in a non-exhaustive manner, the elements that Members must take into account in assessing the SPS characteristics of a region. These elements include: the level of prevalence of specific diseases or pests; the existence of eradication or control programmes; and appropriate criteria or guidelines that may be developed by the relevant international organizations. The second sentence of Article 6.2 indicates how the specific action of determining the existence of "such areas" (that is, pest- or disease-free areas and areas of low pest or disease prevalence) is to be taken. This sentence establishes that the

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<sup>498</sup> Thus, for example, a pest may be introduced into an area where it was not previously present, or there may be an outbreak of a disease in an area that was previously disease free. Alternatively, pests or diseases may be eradicated in specific areas.

<sup>499</sup> Paragraph 6 of Annex A to the SPS Agreement defines the term "pest- or disease-free area" as "[a]n area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease does not occur." Paragraph 7 of Annex A, in turn, defines the term "area of low pest or disease prevalence" as "[a]n area, whether all of a country, part of a country, or all or parts of several countries, as identified by the competent authorities, in which a specific pest or disease occurs at low levels and which is subject to effective surveillance, control or eradication measures."

<sup>500</sup> Emphasis added.

following factors must be used as a basis for making such a determination: geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls. Thus, the second sentences of Article 6.1 and of Article 6.2, respectively, identify how a Member is required to "assess" the SPS characteristics of a region and "determine" pest- or disease-free areas and areas of low pest or disease prevalence.

5.136. Furthermore, we attach some significance to the fact that Article 6 does not specify any particular manner in which a Member must "ensure" adaptation of its SPS measures within the meaning of Article 6.1 or "recognize" the concepts set out in Article 6.2. Indeed, the first sentence of Article 6.1 does not establish precise steps that a Member must take in order to ensure that its SPS measures are adjusted, or made suitable, to the sanitary or phytosanitary characteristics of the area from which the product originated and the area to which the product is destined. Similarly, and as the Panel observed<sup>501</sup>, the first sentence of Article 6.2 does not prescribe whether a Member's recognition of the relevant concepts must be done in writing through a formal governmental act, or whether it may be accomplished in some other manner.

5.137. We consider that the fact that Article 6 does not prescribe the particular manner by which Members must "ensure" adaptation of their SPS measures or "recognize" the relevant concepts suggests that Members enjoy a degree of latitude in determining how to do so within their domestic SPS regime. Accordingly, assessing whether or not a Member has complied with the obligations in Articles 6.1 and 6.2 will necessarily be a function of the nature of the claims raised by the complainant and the circumstances of each case. This may involve scrutiny of the specific steps and acts that the Member has or has not taken in the light of the SPS characteristics of the relevant areas, which may include pest- or disease-free areas or areas of low pest or disease prevalence, as well as of broader aspects of the importing Member's regulatory regime, if any, governing SPS matters. The second sentence of Article 6.1 also points to the relevance of appropriate criteria and guidelines developed by relevant international organizations to the obligation set out in that paragraph. We note, in this regard, that the Panel appears rightly to have acknowledged that the fact that a relevant international organization has determined that the concepts of pest- or disease-free areas and areas of low pest or disease prevalence are, or are not, relevant with respect to a specific pest or disease may have a bearing on the assessment of a Member's compliance with Article 6 with respect to such pest or disease.<sup>502</sup> This, too, underscores the case-specific nature of assessing whether a Member has complied with its Article 6 obligations.

5.138. While the assessment of the consistency of a Member's SPS measure with Articles 6.1 and 6.2 will be a function of the claims brought by the complainant and the circumstances of each particular case, it is nevertheless clear that compliance with the obligations in Articles 6.1 and 6.2 will be facilitated in circumstances where WTO Members put in place a regulatory scheme or structure that accommodates adaptation of SPS measures on an ongoing basis.<sup>503</sup> Furthermore, notwithstanding the circumstance-specific nature of the inquiries under Articles 6.1 and 6.2, we agree with the Panel's observation that SPS measures or regulatory schemes that explicitly foreclose the possibility of recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence cannot, when these concepts are relevant with respect to the diseases addressed by such SPS measures, be found to be consistent with Article 6.2.<sup>504</sup>

5.139. The interlinkages between Articles 6.1 and 6.2 of the SPS Agreement, in turn, illuminate the close nexus between a Member's satisfaction of the obligation to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence set out in Article 6.2, on the one hand, and its satisfaction of the obligation to ensure that its SPS measures are adapted to the relevant SPS characteristics within the meaning of Article 6.1, on the other hand. More specifically, in a situation where pest- or disease-free areas or areas of low pest or disease prevalence are relevant, a Member may be required to recognize the concepts of these areas not only by virtue of the express obligation in Article 6.2, but also so as to be in a position properly to "assess" the SPS characteristics of relevant areas under the second sentence of Article 6.1, and

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<sup>501</sup> Panel Report, para. 7.698.

<sup>502</sup> Panel Report, fn 1217 to para. 7.698.

<sup>503</sup> This would be the case, for example, where a Member has established a mechanism for recognition of specific pest- and disease-free areas and areas of low pest and disease prevalence upon a properly substantiated request being made by an exporting Member seeking such recognition and allowing verification of the same.

<sup>504</sup> Panel Report, para. 7.698.

ultimately ensure, as required under the first sentence of Article 6.1, that its SPS measures are adapted accordingly.

5.140. Turning to paragraph 3 of Article 6, we note that it relates to a specific situation, namely, where an exporting Member is *claiming* that an area within its territory is a pest- or disease-free area or an area of low pest or disease prevalence. In particular, Article 6.3 specifies what must be objectively demonstrated by a Member seeking recognition of a specific area within its territory as a pest- or disease-free area or an area of low pest or disease prevalence. Through the phrase "[f]or this purpose", Article 6.3 stipulates, as well, that such Member must allow the importing Member adopting or maintaining an SPS measure to have access to its territory for the purpose of verifying such demonstration. Like Article 6.2, Article 6.3 relates to pest- or disease-free areas and areas of low pest or disease prevalence, which are a subset of the SPS characteristics that are relevant under Article 6.1.

5.141. In sum, the considerations above show the existence of important common elements throughout Article 6, which reveal the interlinkages that exist among the paragraphs of this provision. As noted above, all three paragraphs of Article 6 are interconnected, addressing different aspects of the obligation to adapt SPS measures to regional conditions. The main and overarching obligation under Article 6 for a Member to ensure that its SPS measures are adapted to regional SPS characteristics is set out under the first sentence of Article 6.1. In turn, the remainder of Article 6 elaborates on the specific aspects of such obligation, notably, with respect to pest- or disease-free areas and areas of low pest or disease prevalence, as well as the respective duties that apply to importing and exporting Members in this connection.

5.142. Before turning to the specific interpretative issue raised by India's appeal, we wish to express certain concerns as to whether some of the Panel's statements accord with our understanding of the content and structure of Article 6 of the SPS Agreement. We note, for example, that the Panel separately found that India's AI measures are inconsistent with *each* sentence of Article 6.1, and with *each* sentence of Article 6.2 of the SPS Agreement. Furthermore, the Panel seemed to consider that the second sentence of each of these paragraphs will inevitably be violated in situations where, respectively, no assessment of the SPS characteristics of a region has been conducted, and no specific determination has been made in respect of a specific area that is potentially pest or disease free or an area of low pest or disease prevalence.<sup>505</sup> We note that these aspects of the Panel's analysis have not been appealed. Consequently, we neither endorse nor reject the Panel's understanding of Article 6 in this regard. However, we consider it important to emphasize that what constitutes an appropriate order of analysis and approach by a panel examining a claim under Article 6 may, at least in part, be a function of the nature of the claim and the circumstances of the case.

5.143. In addition, we observe that, while the Panel seems to have correctly understood the nexus between Articles 6.1 and 6.2 insofar as this was relevant in the context of the specific claims raised by the United States in this dispute, we are not persuaded that all of the statements made by the Panel would have the same resonance in every case. We recall, for example, that, in the Panel's view, "the 'adaptation' of a Member's SPS measures to the SPS characteristics of particular 'areas' presupposes that a Member has first 'recognized' the concept of such areas."<sup>506</sup> To the extent that the Panel was suggesting that the obligation to ensure that a Member's SPS measures are "adapted" within the meaning of Article 6.1 *always* presupposes that a Member must have

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<sup>505</sup> We recall that the Panel interpreted Article 6.2 such that "a finding that a Member has failed to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence as required by Article 6.2, first sentence, *leads inevitably* to a finding that such Member also has failed to determine those areas based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls". (Panel Report, para. 7.689 (emphasis added)) Furthermore, although the Panel's language with respect to the second sentence of Article 6.1 was somewhat more nuanced – i.e. the Panel found that "a failure to ensure that SPS measures are adapted to the SPS characteristics of an area for the purpose of Article 6.1, first sentence, *may warrant* a concomitant finding that the Member has not taken into account the factors in Article 6.1, second sentence, in assessing the SPS characteristics of a region" (ibid., para. 7.685 (emphasis added)) – the Panel's finding that India's AI measures are inconsistent with the second sentence of Article 6.1 flowed directly from its finding that India has not undertaken an assessment of the SPS characteristics of relevant areas. (Ibid., paras. 7.712 and 7.715)

<sup>506</sup> Panel Report, para. 7.672. (emphasis added) The Panel also made the general statement that "[it did] not consider that a Member can, logically, ensure that its SPS measures are adapted to the SPS characteristics of an area without first recognizing the concept of areas (and, in particular for Article 6.2, 'pest- or disease-free areas' and 'areas of low pest or disease prevalence')." (Ibid., para. 7.690)

recognized the concepts mentioned in Article 6.2, we disagree. This is because, as explained above, we see pest- or disease-free areas and areas of low pest or disease prevalence as a *subset* of all the SPS characteristics of an area that may call for the adaptation of an SPS measure. In other words, "pest- or disease-free areas" and "areas of low pest or disease prevalence" are not the *only* SPS characteristics that are relevant for the adaptation obligation under Article 6.1. As a result, under certain circumstances, the SPS characteristics that are relevant in a specific case may *not* be related to the level of pest or disease prevalence in a particular area. In such circumstances, a panel assessing whether a Member has complied with the obligation to ensure that its SPS measures are adapted within the meaning of Article 6.1 may not need to inquire as to whether that Member has previously recognized the concepts contained in Article 6.2. In addition, we also question the Panel's statement that "adaptation" of an SPS measure "presupposes" that a Member has first "recognized" the concepts of such areas, inasmuch as such statement may suggest that recognition of the concepts must consist of an affirmative act that is *distinct from* and *taken prior to* the adoption of an SPS measure. In our view, this does not seem entirely consistent with the Panel's statement that there is no prescribed format for the recognition of the concepts and that it is the prerogative of Members to decide how to do so. Moreover, we question the Panel's statement to the extent that it may be read as excluding that recognition of the concepts could be done through and upon adoption of the very SPS measure that is adapted to the SPS characteristics of the relevant areas.

5.144. Similarly, and as discussed further below, we have concerns about the Panel's statement that Article 6.3 is "not directly linked to the first two paragraphs of Article 6, or to what WTO Members must do generally with respect to adapting measures to SPS characteristics of certain areas, or in particular to recognizing specific area concepts".<sup>507</sup> This is since, as noted above, we view Article 6.3, like Article 6.2, as addressing pest- or disease-free areas and areas of low pest or disease prevalence, and consider that both of these provisions are linked to, and interact with, the overarching obligation to ensure that a Member's SPS measures are adapted to the SPS characteristics of the relevant areas under Article 6.1.<sup>508</sup>

### 5.3.3 Whether the Panel erred in its understanding of the relationship between Articles 6.1 and 6.3

5.145. Having examined the three paragraphs in Article 6, we now turn to address India's claim on appeal regarding the relationship between Article 6.1 and Article 6.3 of the SPS Agreement. India argues that the Panel committed legal error in interpreting the relationship between the first sentence of Article 6.1 and the first sentence of Article 6.3. For India, an importing Member's obligation, under Article 6.1, to adapt its SPS measures to the sanitary or phytosanitary characteristics of the area of the exporting Member arises only after an exporting Member makes a formal proposal under Article 6.3.<sup>509</sup> Absent such a proposal, an importing country is not required to recognize an exporting country's pest- and disease-free areas. According to India, a contrary interpretation, such as that of the Panel, renders Article 6.3 redundant. In India's view, "unless an exporting country makes a formal proposal under Article 6.3 of the SPS Agreement, an importing country cannot adapt its sanitary or phytosanitary measures to the sanitary or phytosanitary characteristics of the area of the exporting country."<sup>510</sup>

5.146. In response, the United States argues that the Panel correctly concluded that a request under Article 6.3 is not a prerequisite to the existence of obligations under Article 6.1 of the SPS Agreement. The Panel noted that Article 6.3 refers to a situation that is distinct from those in Articles 6.1 and 6.2 and that it is not directly linked to the first two paragraphs of Article 6.<sup>511</sup> Similarly, the Panel recognized that Article 6.1 does not foresee that the obligations under that provision arise only after an exporting Member requests recognition of specific pest- or disease-free areas or areas of low pest or disease prevalence pursuant to Article 6.3. In this regard, the United States points to the Panel's observation that, where the SPS Agreement

<sup>507</sup> Panel Report, para. 7.674.

<sup>508</sup> As to how Articles 6.2 and 6.3 are linked to, and interact with, the first sentence of 6.1 of the SPS Agreement, see *supra*, para. 5.155.

<sup>509</sup> India's appellant's submission, para. 237.

<sup>510</sup> India's appellant's submission, para. 235.

<sup>511</sup> United States' appellee's submission, para. 187 (referring to Panel Report, para. 7.674).

contemplates that an importing Member's obligation will arise only upon action by another (e.g. Article 4 of the SPS Agreement), it explicitly so states.<sup>512</sup>

5.147. On appeal, India's challenge focuses on paragraph 7.711 of the Panel Report, which is found in the context of the Panel's application of Article 6.1 to India's AI measures. We note, however, that the Panel provided its interpretation of the relationship among the paragraphs of Article 6 earlier in its Report. The main thrust of this interpretation – which is summarized above – was explained by the Panel in the following terms:

[O]ur understanding of the interplay between the three paragraphs of Article 6 is that Members must adapt their SPS measures to the SPS characteristics of an area from which goods originate or to which they are destined and, logically, they must already have recognized as per Article 6.2 the "concepts" of pest- or disease-free areas and areas of low pest or disease prevalence in order to do so. The steps in Article 6.3 are directed at exporting Members and presuppose that an importing Member from which they seek recognition that an area in its territory is pest- or disease-free or is an area of low pest or disease prevalence, is in compliance with its obligations under Articles 6.1 and 6.2. We thus conclude that the obligations in Articles 6.1 and Article 6.2 are not triggered by an invocation of Article 6.3, as argued by India.<sup>513</sup>

5.148. Then, in the context of the application of Article 6.1 to India's AI measures, the Panel made the following finding in paragraph 7.711 of its Report:

To our knowledge, India has not conducted the assessment of the SPS characteristics of a region as envisaged in Article 6.1, second sentence. We acknowledge India's argument that the obligation under Article 6.1 would have been triggered only if the United States had complied with the "steps" in Article 6.3. As discussed in paragraph 7.676 above, under certain circumstances, a link may be made between the information required for the assessment of SPS characteristics envisaged by Article 6.1, second sentence, and the obligation of an exporting Member to provide "the necessary evidence" under Article 6.3, first sentence, that an area within its territory is pest- or disease-free or is an area of low pest or disease prevalence. Although Article 6.1 may inform the inquiry that an importing Member may conduct in order to determine whether an exporting Member has "objectively demonstrated" that there is an area within its territory that is pest- or disease-free or is an area of low pest or disease prevalence, there is nothing in the language of either provision that requires this particular approach.

5.149. India considers the Panel's analysis in paragraph 7.711 to be "incorrect and inconclusive".<sup>514</sup> In India's view, the Panel concluded that no relationship exists between the second sentence of Article 6.1 and Article 6.3 due to the language of both provisions. Contrary to the Panel's observation regarding the relationship between Articles 6.1 and 6.3, India alleges that, "unless an exporting country makes a formal proposal under Article 6.3 of the SPS Agreement, an importing country cannot adapt its sanitary or phytosanitary measures to the sanitary or phytosanitary characteristics of the area of the exporting country."<sup>515</sup> Furthermore, India considers that, as a result of the interpretative error regarding the relationship between Articles 6.1 and 6.3, "the Panel incorrectly concluded that India's AI measures are inconsistent with Article 6.1, first sentence and consequently with Article 6.1, second sentence".<sup>516</sup>

5.150. In assessing India's claim on appeal, we begin by noting that India characterizes the Panel's finding in paragraph 7.711 of the Panel Report as a finding that *no* relationship exists between the second sentence of Article 6.1 and Article 6.3. As is clear from the passage quoted above, however, the Panel made no such finding. Rather, the Panel indicated that a "link may be made" between the information required for the assessment of SPS characteristics envisaged by the second sentence of Article 6.1 and the obligation of an exporting Member to provide "the necessary evidence" under Article 6.3, first sentence, that an area within its territory is pest or

<sup>512</sup> United States' appellee's submission, para. 192 (referring to Panel Report, para. 7.679).

<sup>513</sup> Panel Report, para. 7.680. See also paras. 7.674-7.678.

<sup>514</sup> India's appellant's submission, para. 240.

<sup>515</sup> India's appellant's submission, para. 235.

<sup>516</sup> India's appellant's submission, para. 210. See also India's Notice of Appeal, para. 11.

disease free or is an area of low pest or disease prevalence. The Panel explained that, even though Article 6.1 may "inform the inquiry" that an importing Member may conduct in order to determine whether an exporting Member has "objectively demonstrated" that there is an area within its territory that is pest or disease free or is an area of low pest or disease prevalence, there is nothing in the language of either provision that requires this particular approach.<sup>517</sup> What the Panel found is that "the obligations in Articles 6.1 and Article 6.2 are not triggered by an invocation of Article 6.3, as argued by India."<sup>518</sup>

5.151. Having said that, we now turn to examine whether the Panel's findings are consistent with a proper understanding of the relationship among the various paragraphs of Article 6 of the SPS Agreement.

5.152. As foreshadowed in the preceding section of this Report, we view some of the Panel's statements as overly broad. For example, we have reservations about the sweeping nature of the Panel's statements that Article 6.1, first sentence, creates a "free-standing obligation", and that there is "no conditional language" linking such obligation to Article 6.3 or to an extraneous event such as the request of an exporting Member to recognize a specific area as disease free.<sup>519</sup> These statements by the Panel may be seen as problematic to the extent that they suggest that each of the paragraphs of Article 6 are to be read in isolation. To the contrary, as noted in the previous section, there are important common elements and interlinkages among the paragraphs of Article 6. All three paragraphs of Article 6 are interconnected, addressing different aspects of the obligation to adapt SPS measures to regional conditions. The main and overarching obligation under Article 6 for a Member to ensure that its SPS measures are adapted to regional SPS characteristics is set out under the first sentence of Article 6.1. In turn, the remainder of Article 6 elaborates specific elements of this obligation, notably, with respect to pest- or disease-free areas and areas of low pest or disease prevalence, as well as the respective duties that apply to importing and exporting Members in this regard.

5.153. We also have concerns with the Panel's statement that "[t]he steps in Article 6.3 ... *presuppose* that an importing Member from which [exporting Members] seek recognition that an area in its territory is pest- or disease-free or is an area of low pest or disease prevalence, is in compliance with its obligations under Articles 6.1 and 6.2."<sup>520</sup> This statement by the Panel can be considered questionable inasmuch as it suggests that an exporting Member will be in a position to make the objective demonstration provided for in Article 6.3 only once the Member adopting or maintaining the SPS measure at issue has already ensured that such measure is "adapted" to the SPS characteristics of the relevant areas pursuant to Article 6.1.

5.154. Moreover, in disagreeing with India's submission that adaptation involves an *ex post facto* "modification" of the SPS measure pursuant to an exporting Member's request, the Panel stated that it "[did] not see how an SPS measure can be 'adapted' to the SPS characteristics of an area where that adaptation occurs only *after* a measure is taken pursuant to a specific request for recognition made by an exporting Member."<sup>521</sup> To us, this reasoning by the Panel seems to assume that the "adaptation" of an SPS measure can only occur a single time, and that this must be at the time that such measure is adopted. We, however, see the obligation to ensure that a Member's SPS measures are "adapted" to the relevant areas as a *continuing* obligation. In our view, the requirement to ensure the adaptation of an SPS measure to the SPS characteristics of the relevant areas implies that such measures may need to be modified if the relevant SPS characteristics change.<sup>522</sup> As explained above, the very notion of "adaptation" implies a certain degree of flexibility in order to respond, on an ongoing basis, to changes in the relevant circumstances. Therefore, the general "adaptation" obligation in Article 6.1 may well encompass both a requirement to adapt appropriately at the time the SPS measure is adopted, as well as a requirement to adapt appropriately if and when relevant SPS characteristics in relevant areas in the territory of the importing or exporting Member change or are shown to warrant an adaptation of a specific SPS measure. This would be the case, for instance, where, after an SPS measure has been adopted, an exporting Member objectively demonstrates the existence of a pest- or

<sup>517</sup> Panel Report, para. 7.711.

<sup>518</sup> Panel Report, para. 7.680.

<sup>519</sup> Panel Report, para. 7.675.

<sup>520</sup> Panel Report, para. 7.680. (emphasis added)

<sup>521</sup> Panel Report, para. 7.675. (emphasis original)

<sup>522</sup> For example, an exporting Member may eradicate a particular pest or disease within its territory that had been prevalent at the time that the importing Member adopted the relevant SPS measure.

disease-free area and allows reasonable access for verification of the same. Accordingly, insofar as the Panel seemed to exclude that adaptation may involve an *ex post facto* "modification" of the SPS measure pursuant to an exporting Member's request and objective demonstration of the elements set out in Article 6.3, we disagree.

5.155. Therefore, while we agree that there is no *explicit* conditional language linking Article 6.1 and Article 6.3, we emphasize that Article 6.1 and the remainder of Article 6 need to be read together. As we have explained, assessing whether a Member has complied with the obligations in Articles 6.1 and 6.2 will necessarily be a function of the nature of the claims raised by the complainant and the circumstances of each case. This may involve scrutiny of the specific steps and acts that the Member has or has not taken in the light of the relevant SPS characteristics of the relevant areas, as well as of broader aspects of the importing Member's regulatory regime, if any, governing SPS matters. For example, when a complaining Member challenges an SPS measure without a reference to a specific geographic area, it may, depending on the particular circumstances of the case, be sufficient to limit the assessment under Article 6 to the content and structure of that SPS measure, without further need to examine whether or how the SPS measure has been adapted in view of the level of prevalence of diseases or pests in a *specific* area.

5.156. However, and again depending on the nature of the claims raised and the circumstances of the case, a panel may be called upon to scrutinize whether a Member has determined that a specific area is free of disease and adapted its SPS measures accordingly. This may involve examining whether the importing Member received a request from an exporting Member to recognize an area within its territory as "disease-free". In such cases, an exporting Member will be able to establish that the importing Member's failure to recognize and determine that disease-free area, and to adapt its SPS measure accordingly, is inconsistent with Articles 6.1 and 6.2 only if that exporting Member can also establish that it took the steps prescribed in Article 6.3. In other words, we understand the relationship of Article 6.3 with the remainder of Article 6 to mean that, in the context of WTO dispute settlement proceedings, an exporting Member claiming, for example, that an importing Member has failed to determine a specific area within that exporting Member's territory as "pest- or disease-free" – and ultimately adapt its SPS measures to that area – will have difficulties succeeding in a claim that the importing Member has thereby acted inconsistently with Articles 6.1 or 6.2, unless that exporting Member can demonstrate its own compliance with Article 6.3.

5.157. This is not to suggest, as India does, that a Member adopting or maintaining an SPS measure can *only* be found to have breached the obligation in the first sentence of Article 6.1 after an exporting Member has made the objective demonstration provided for in Article 6.3. Indeed, as noted above, even 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 in a situation where, for example, the concept of pest- and disease-free areas is relevant, but such Member's regulatory regime precludes the recognition of such concept. Moreover, as noted above, pest- or disease-free areas and areas of low pest or disease prevalence, which are specifically addressed in Articles 6.2 and 6.3, are only a subset of the SPS characteristics that may call for the adaptation of an SPS measure pursuant to the first sentence of Article 6.1. We also observe that Article 6.1 expressly identifies "criteria or guidelines" developed by relevant organizations as relevant for the assessment of the SPS characteristics of regions, which suggests that, under certain circumstances, the adaptation of an SPS measure to regional SPS characteristics may be accomplished by taking into account relevant criteria and guidelines developed by such organizations, if any. Finally, we recall that the overarching requirement under Article 6.1 to ensure the adaptation of SPS measures is an ongoing obligation that applies *upon* adoption of an SPS measure as well as thereafter.<sup>523</sup> All of these considerations reinforce that a Member may act inconsistently with the obligation under the first sentence of Article 6.1 absent the objective demonstration provided for in Article 6.3 by an exporting Member. For these reasons, we agree with the Panel that "the obligations in Articles 6.1 and 6.2 are not triggered by an invocation of Article 6.3, as argued by India".<sup>524</sup>

5.158. Turning to the Panel's reasoning in paragraphs 7.676 and 7.711 of the Panel Report, we recall that the Panel found that, "under certain circumstances, a link may be made between the information required for the assessment of SPS characteristics envisaged by Article 6.1,

<sup>523</sup> See *supra*, para. 5.132.

<sup>524</sup> Panel Report, para. 7.680.



second sentence, and the obligation of an exporting Member to provide 'the necessary evidence' under Article 6.3, first sentence".<sup>525</sup> The Panel explained that, while "Article 6.1 may inform the inquiry that an importing Member may conduct in order to determine whether an exporting Member has 'objectively demonstrated' that there is an area within its territory that is pest- or disease-free or is an area of low pest or disease prevalence, there is nothing in the language of either provision that requires this particular approach."<sup>526</sup>

5.159. The above statements by the Panel were made in response to India's argument that the obligations in Articles 6.1 and 6.2 are contingent upon whether an exporting Member has made the objective demonstration provided for in Article 6.3.<sup>527</sup> In our view, the Panel's reasoning in the above passages should be understood in the light of the United States' claim in this dispute, namely, that India's AI measures affirmatively preclude India from complying with the general obligations in Articles 6.1 and 6.2. Indeed, in the present case, neither the United States' claim nor the Panel's ruling was made in respect of India's treatment of a specific area within the territory of the United States alleged to be disease free. The United States did not claim that a *specific* area within its territory is AI free, and that India failed to adapt its SPS measures to the SPS characteristics of that area. Rather, the United States challenged India's AI measures on their face, because they preclude the recognition of the concept of disease-free areas in the context of AI.<sup>528</sup> We highlight that it was on the basis of its finding that India's AI measures fail to recognize the concepts of pest- or disease-free areas and areas of low pest and disease prevalence under Article 6.2 that the Panel found those measures to be inconsistent with Article 6.1. Therefore, the Panel statements that are contested by India on appeal were not directly related to the Panel's assessment of the particular claim raised by the United States.

5.160. Consequently, while we have some difficulties with certain statements made by the Panel discussed above with regard to the relationship between paragraphs 1 and 3 of Article 6, overall, we do not consider that they amount to a reversible error when understood in the context of this dispute. In this connection, we recall that we have rejected India's proposed interpretation of the relationship between Article 6.1 and Article 6.3 of the SPS Agreement. In the light of these considerations, we find that the Panel did not err in interpreting the relationship between Article 6.1 and Article 6.3 of the SPS Agreement.<sup>529</sup>

#### 5.3.4 Whether the Panel erred in its application of Article 6.2 to India's AI measures

5.161. India argues that the Panel committed legal error in its application of the first sentence of Article 6.2 of the SPS Agreement. India recalls that the legislative act at issue in this dispute is the Livestock Act, which empowers the Central Government of India to regulate, restrict, or prohibit, in such manner as it may think fit, the import into India of any livestock that may be liable to be affected by infectious or contagious disorders. India notes that S.O. 1663(E) was issued pursuant to Sections 3 and 3A of the Livestock Act.<sup>530</sup> According to India, the Panel itself admitted that, pursuant to Sections 3 and 3A of the Livestock Act, India *could recognize* the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. India highlights that, despite this finding, the Panel concluded that India's AI measures as a whole – i.e. Sections 3 and 3A of the Livestock Act and S.O. 1663(E) – are inconsistent with the first sentence of Article 6.2 on the basis that S.O. 1663(E) does not recognize these concepts. India submits that the Panel committed legal error by basing its conclusion on S.O. 1663(E). India contends that, given that the parent legislation – Sections 3 and 3A of the Livestock Act – could recognize the concepts set out in the first sentence of Article 6.2, the Panel should not have based its conclusion on S.O. 1663(E), which is the delegated legislation.<sup>531</sup> According to India, this is because, "pursuant to the Panel's own analysis", India is only required to "recognize" the concepts at issue and is not required to "implement" such concepts in its domestic measures.<sup>532</sup>

5.162. In response, the United States argues that the Panel correctly analysed its claim under Article 6 of the SPS Agreement. The Panel properly concluded that India does not recognize the

<sup>525</sup> Panel Report, para. 7.711. See also para. 7.676.

<sup>526</sup> Panel Report, para. 7.711. See also para. 7.676.

<sup>527</sup> Panel Report, para. 7.648.

<sup>528</sup> United States' appellee's submission, para. 172.

<sup>529</sup> Panel Report, para. 7.711. See also para. 7.676.

<sup>530</sup> India's appellant's submission, paras. 211-214.

<sup>531</sup> India's appellant's submission, paras. 216-217.

<sup>532</sup> India's appellant's submission, para. 218.

concepts of pest- or disease-free areas and areas of low pest or disease prevalence and thus breaches Articles 6.1 and 6.2 of the SPS Agreement. The United States characterizes India's argument that the Panel erred under Article 6.2 by basing its conclusion on S.O. 1663(E) as "without merit", contending that it rests on a misunderstanding of Article 6.2 and the Panel's finding.<sup>533</sup> According to the United States, India takes the position that the content of S.O. 1663(E) is irrelevant to the analysis under Article 6.2 in the light of the Livestock Act. In the United States' view, India's reasoning is "illogical". Although the Panel found that there is no requirement under Article 6.2 to embody the concept of disease-free areas in any *particular* measure, S.O. 1663(E) is clearly a measure at issue in this dispute. The United States adds that, "as the Panel found, 'by imposing a prohibition on a country-wide basis, [S.O. 1663(E)] contradicts the requirement to recognize the concept of disease-free areas and areas of low disease prevalence.'"<sup>534</sup>

5.163. We understand India's claim on appeal to be, in essence, that the Panel erred in finding that India's AI measures are inconsistent with the first sentence of Article 6.2 by relying on S.O. 1663(E) *instead of* on Sections 3 and 3A of the Livestock Act. According to India, having established that the parent legislation recognizes the concepts as required under the first sentence of Article 6.2, the Panel should have relied on that legislation and not on the delegated legislation – S.O. 1663(E) – in reaching its findings under Article 6.2.<sup>535</sup> Because AI is a disease and there are no pests at issue in the present dispute, we refer only to "diseases" in our analysis below.<sup>536</sup>

5.164. In assessing this claim of error, we begin by recalling the Panel's definition of the measures at issue in this dispute. The Panel defined the measures at issue in this dispute as "India's AI measures, which are those measures that 'prohibit the importation of various agricultural products into India from those countries reporting [NAI]'."<sup>537</sup> The Panel also found that "India maintains its AI measures through, *inter alia*, the following legal instruments:

- a. the Live-Stock Importation Act 1898 (9 of 1898) (Livestock Act) published on 12 August 1898, as amended by the Live-Stock Importation (Amendment) Act 2001 (No. 28 of 2001) (Livestock Amendment Act), and published in the Gazette of India on 29 August 2001; and
- b. S.O. 1663(E), issued by India's Department of Animal Husbandry, Dairying, and Fisheries (DAHD) pursuant to the Livestock Act and published in the Gazette of India on 19 July 2011."<sup>538</sup>

5.165. We consider it important to highlight that the Panel defined the measures at issue *collectively* as those that prohibit importation of specified products from countries reporting NAI. The Panel did *not* consider either the Livestock Act or S.O. 1663(E), separately, as a discrete measure at issue. On appeal, India has not challenged the Panel's characterization of the measures at issue.

5.166. In assessing the conformity of India's AI measures with Article 6.2 of the SPS Agreement, the Panel held that "to comply with Article 6.2, SPS measures adopted by WTO Members must at a minimum not deny or contradict the recognition of the concepts of such areas when these concepts are relevant with respect to the disease at issue."<sup>539</sup> The Panel then turned to consider whether India's AI measures *deny* or *contradict* the recognition of the concepts of disease-free areas and areas of low disease prevalence in respect of AI.

<sup>533</sup> United States' appellee's submission, para. 163.

<sup>534</sup> United States' appellee's submission, para. 169 (quoting Panel Report, para. 7.702).

<sup>535</sup> India's appellant's submission, para. 217.

<sup>536</sup> We note that the Panel made a similar observation when it stated:

When examining the consistency of India's AI measures with Articles 6.1 and 6.2, we will bear in mind that although the definitions in Annex A(6) and Annex A(7) refer both to pests and diseases, we circumscribe our analysis to focus on disease on the basis that we are not dealing with a pest in this dispute.

(Panel Report, para. 7.692)

<sup>537</sup> Panel Report, para. 2.22 (quoting Preliminary Ruling).

<sup>538</sup> Panel Report, para. 2.22. (fns omitted)

<sup>539</sup> Panel Report, para. 7.698.

5.167. The Panel began its examination of India's AI measures with Sections 3 and 3A of the Livestock Act. The Panel noted that these provisions, and the Livestock Act generally, are silent on the concepts of disease-free areas and areas of low disease prevalence. While recognizing that the broad discretion inherent in the general powers conferred by Sections 3 and 3A of the Livestock Act might encompass an extensive range of activity, the Panel pointed out that there is no evidence on the record of this dispute that India has used such discretion either to recognize, or to deny or contradict the recognition of, the concepts of such areas.<sup>540</sup> Accordingly, the Panel found that "the Livestock Act may empower India's authorities to recognize the concepts of disease-free areas and areas of low disease prevalence, notwithstanding the fact that this discretion has not been exercised for this purpose."<sup>541</sup>

5.168. Turning to S.O. 1663(E), the Panel recalled that this instrument prohibits the importation of the relevant products on a country-wide basis.<sup>542</sup> The Panel observed nothing on the face of this instrument that allows for the recognition of disease-free areas and/or areas of low disease prevalence within a country that notifies NAI to the OIE. To the contrary, the Panel considered that S.O. 1663(E) "reflects the opposite".<sup>543</sup> Therefore, the Panel held that, by imposing a prohibition on a country-wide basis, S.O. 1663(E) contradicts the requirement to recognize the concepts of disease-free areas and areas of low disease prevalence, and that it does so in "clear and unequivocal language".<sup>544</sup>

5.169. Consequently, the Panel concluded that India's AI measures do *not* recognize the concepts of disease-free areas and areas of low disease prevalence with respect to AI and are therefore inconsistent with Article 6.2, first sentence, of the SPS Agreement.<sup>545</sup>

5.170. We recall that "India's AI measures" are those that prohibit the importation of the relevant products, as maintained through, *inter alia*, the Livestock Act and S.O. 1663(E). We consider that, having defined the measures at issue in this manner, the Panel could not have properly answered the question of whether India's AI measures "recognize" the concepts of AI-free or low AI prevalence areas with reference to the Livestock Act *alone*. Rather, answering this question required the Panel to scrutinize the AI measures as a whole, *including* the content of S.O. 1663(E). Moreover, we note that examining the United States' claim without taking into account S.O. 1663(E) would overlook a key component of India's AI regime, namely, the implementing measure enacted by India that specifies the operational details of India's AI measures, including the circumstances in which the import prohibitions are imposed and the products that are subject to them. While it is true that the Panel acknowledged the broad discretion inherent in the Livestock Act, the Panel eventually based its finding on what the AI measures actually do, rather than on what one of the instruments constituting such measures, considered alone, could potentially do. The Panel committed no error in adopting this approach, which ultimately led to its finding that "[t]aken together ... India's AI measures do not recognize the concept of disease-free areas and areas of low disease prevalence with respect to AI."<sup>546</sup> Therefore, we disagree with India's argument that, given that the parent legislation – Sections 3 and 3A of the Livestock Act – could recognize the concepts set out in the first sentence of Article 6.2, the Panel should not have based its conclusion on S.O. 1663(E), which is the delegated legislation.<sup>547</sup>

5.171. India additionally argues that the Panel should not have relied on the delegated legislation because, "pursuant to the Panel's own analysis", India is only required to "recognize" the concepts at issue and is thus not required to "implement" such concepts in its domestic measures.<sup>548</sup> India contends that, given that it is not required to implement these concepts domestically, it implemented S.O. 1663(E) on a country-wide basis. In India's view, "S.O. 1663(E) is only an implementing measure and a review of it would also entail the fulfilment of requirements under Article 6.3 of the SPS Agreement and Chapter 4.3 of the OIE Code."<sup>549</sup>

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<sup>540</sup> Panel Report, paras. 7.700-7.701.

<sup>541</sup> Panel Report, para. 7.701.

<sup>542</sup> Panel Report, para. 7.702.

<sup>543</sup> Panel Report, para. 7.702.

<sup>544</sup> Panel Report, para. 7.703.

<sup>545</sup> Panel Report, paras. 7.706-7.707.

<sup>546</sup> Panel Report, para. 7.706.

<sup>547</sup> India's appellant's submission, paras. 216-217.

<sup>548</sup> India's appellant's submission, para. 218.

<sup>549</sup> India's appellant's submission, para. 219.

5.172. We consider that, in making this contention, India is merely recasting two of its previous arguments with which we have already disagreed. Indeed, we understand India to be arguing that, since "recognition" of the concepts under Article 6.2 does not require the implementation of such concepts, and given that S.O. 1663(E) is an implementing measure, the Panel should not have examined S.O. 1663(E). This, in our view, is a recasting of India's argument that the Panel should have examined the United States' claim under Article 6.2 based on the Livestock Act alone. We have already rejected this argument by India.<sup>550</sup> India also argues that, because S.O. 1663(E) is an implementing measure, the Panel could only have found a violation of Article 6.2 after establishing that the United States satisfied the conditions under Article 6.3. We read this allegation as another iteration of India's argument, which we have rejected above, that the obligations in Articles 6.1 and 6.2 are only triggered after the exporting Member has demonstrated compliance with Article 6.3 of the SPS Agreement.

5.173. In further addressing India's additional argument, we consider it useful to set out the Panel's analysis with respect to the interpretation of the term "recognize" in Article 6.2:

[The definition of "recognize"] does not clarify whether the recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence must be done explicitly, and if so, whether it should be done in writing through a legislative or administrative act. In our view, the format of such recognition will depend on the circumstances of each particular case. Given the text of Article 6.2, we do not think that it is the prerogative of this Panel to prescribe to India or any other Member the manner in which it should "recognize" the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. However, in our view, to comply with Article 6.2, SPS measures adopted by WTO Members must at a minimum not deny or contradict the recognition of the concepts of such areas when these concepts are relevant with respect to the disease at issue.<sup>551</sup>

5.174. To us, the above passage from the Panel Report shows that the Panel did not understand the obligation to "recognize" the concepts in Article 6.2 as an obligation to "implement" any particular domestic law or framework. The Panel explicitly stated that the definition of the term "recognize" in Article 6.2 "does not clarify whether the recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence must be done explicitly, and if so, whether it should be done in writing through a legislative or administrative act".<sup>552</sup> Moreover, the Panel did not find that India acted inconsistently with the first sentence of Article 6.2 because it failed to "implement" the concepts in its domestic measures. Rather, on the basis of its interpretation of Article 6.2, the Panel examined "whether India's AI measures deny or contradict the recognition of the concepts of disease-free areas and areas of low disease prevalence with respect to the disease at issue".<sup>553</sup> In this regard, the Panel found that, by imposing a prohibition on a country-wide basis, S.O. 1663(E) contradicts the requirement to recognize the concepts of disease-free areas and areas of low disease prevalence.<sup>554</sup> Therefore, the Panel held that, "[t]aken together ... India's AI measures do not recognize the concept of disease-free areas and areas of low disease prevalence with respect to AI."<sup>555</sup>

5.175. The above passages from the Panel Report show, in our view, that the distinction between the obligation to "recognize" and the obligation to "implement" is one created by India, and not one that is reflected in the Panel's findings. To reiterate, the Panel did not opine on whether the obligation to "recognize" under Article 6.2 requires the implementation of a legal instrument in domestic law. Nor did the Panel find an inconsistency with Article 6.2 on the basis that India had failed to "implement" the concept of disease-free areas. Rather, the Panel correctly found that, since S.O. 1663(E) *contradicts* the requirement to recognize the concepts of disease-free areas and areas of low disease prevalence India's AI measures, "taken together", do not recognize these concepts with respect to AI, as required by Article 6.2 of the SPS Agreement.<sup>556</sup>

<sup>550</sup> See *supra*, para. 5.170.

<sup>551</sup> Panel Report, para. 7.698. (fn omitted)

<sup>552</sup> Panel Report, para. 7.698.

<sup>553</sup> Panel Report, para. 7.699.

<sup>554</sup> Panel Report, para. 7.702.

<sup>555</sup> Panel Report, para. 7.706.

<sup>556</sup> Panel Report, para. 7.706.

5.176. For the foregoing reasons, we find that the Panel did not err in its application of Article 6.2 of the SPS Agreement by not relying solely on Sections 3 and 3A of the Livestock Act in assessing whether India recognizes the concepts of disease-free areas and areas of low disease prevalence in respect of AI.

### 5.3.5 Whether the Panel acted inconsistently with Article 11 of the DSU

5.177. We now turn to examine the two challenges to the Panel's findings brought by India under Article 11 of the DSU. First, India argues that the Panel acted inconsistently with this provision by ruling on a claim not argued by the United States. In particular, India contends that, while the United States' claim referred to the "non-recognition" of the concepts under Article 6.2, the Panel based its conclusion on the fact that S.O. 1663(E) fails to "implement" the concepts set out in Article 6.2. Moreover, India argues that the issue of non-implementation would involve consideration of Article 6.3 of the SPS Agreement, but that this provision is not within the scope of the Panel request. Therefore, India argues that the Panel acted inconsistently with Article 11 of the DSU by basing its conclusion on the "non-implementation" of the concepts listed in Article 6.2.<sup>557</sup>

5.178. The United States contests India's assertion. In the United States' view, "the Panel found that India had breached the first sentence of Article 6.2 because it did not recognize 'the *concept* of disease-free areas and areas of low disease prevalence with respect to AI'"<sup>558</sup>, which was precisely the claim made by the United States.

5.179. We begin by noting that this claim of error under Article 11 of the DSU is raised and argued by India in a single paragraph of its appellant's submission<sup>559</sup>, without "clearly articulat[ing] and substantiat[ing] with specific arguments" why the alleged error has a bearing on the objectivity of the Panel's assessment, as is required when an appellant makes the "serious allegation" that a panel has failed to conduct an objective assessment of the matter before it.<sup>560</sup> Moreover, this claim of error by India rests on the premise that the Panel's finding of inconsistency with Article 6.2 was based on a failure by India to "implement" the concepts listed in that provision. This assertion was also made by India in its claim that the Panel erred in applying Article 6.2 to India's AI measures. Yet, as established by the Appellate Body, a claim that a panel failed to comply with its duties under Article 11 of the DSU "'must stand by itself' and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements".<sup>561</sup> For these reasons, we reject India's first claim of error under Article 11 of the DSU.

5.180. In its second claim under Article 11 of the DSU, India argues that the Panel acted inconsistently with this provision by disregarding critical evidence submitted by India. India recalls the Panel's observation that "there is no evidence" that the discretion to recognize pest- or disease-free areas under the Livestock Act has been exercised to date. According to India, the Panel's observation "is not based on the factual evidence available"<sup>562</sup>, since, in Panel Exhibit IND-121<sup>563</sup>, India submitted evidence to the Panel showing that it had informed the United States in 2010 of its willingness to consider the issue of compartmentalization for the purpose of trade with the United States. Despite this communication, the United States never reverted to India with a proper proposal under Article 6.3 of the SPS Agreement.<sup>564</sup> According to India, the Panel's analysis did not reflect Panel Exhibit IND-121, and therefore cannot be considered to amount to an

<sup>557</sup> India's appellant's submission, para. 222.

<sup>558</sup> United States' appellee's submission, para. 173 (quoting Panel Report, para. 7.706). (emphasis added by the United States)

<sup>559</sup> India's appellant's submission, para. 222.

<sup>560</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.227 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; *US – Tyres (China)*, para. 321; and *EC – Fasteners (China)*, paras. 499-500).

<sup>561</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.173 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442, in turn referring to Appellate Body Reports, *US – Steel Safeguards*, para. 498; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>562</sup> India's appellant's submission, para. 230.

<sup>563</sup> Letter dated 28 January 2010 from Assistant Commissioner, DAHD, to US Minister-Counsellor for Agricultural Affairs regarding: "India's comments on US proposed certificates for export of poultry, pork, pet food and feather to India" (Panel Exhibit IND-121).

<sup>564</sup> India's appellant's submission, paras. 226-227 (referring to Panel Report, para. 7.622).

unbiased and even-handed treatment of the evidence.<sup>565</sup> For these reasons, India submits that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU.

5.181. The United States disagrees with India's argument that the Panel acted inconsistently with Article 11 of the DSU by allegedly disregarding a statement in Panel Exhibit IND-121 that, according to India, constitutes evidence of its compliance with the first sentence of Article 6.2 of the SPS Agreement. The United States emphasizes that "India has not established that this evidence was 'so material' to its case that the Panel was required to deal more explicitly with it."<sup>566</sup> The United States adds that, in any event, India cannot establish that the evidence was "material" to its case because Panel Exhibit IND-121 does not show that India recognizes the concepts of disease-free areas or areas of low disease prevalence with respect to AI. In fact, the text cited by India does not indicate that it recognizes the concept of disease-free areas or that it would entertain a proposal to recognize a specific area. Therefore, the United States concludes that it was perfectly consistent with Article 11 of the DSU, and eminently reasonable, for the Panel not to have found that this exhibit was evidence of any recognition by India of the concepts of disease-free areas or areas of low disease prevalence.

5.182. We recall that the Appellate Body has observed that Article 11 of the DSU requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence".<sup>567</sup> Panels may not "make affirmative findings that lack a basis in the evidence contained in the panel record".<sup>568</sup> Within these parameters, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings"<sup>569</sup>, and the mere fact that a panel did not explicitly refer to each and every piece of evidence in its reasoning is insufficient to establish a claim of violation under Article 11.<sup>570</sup> Rather, in order to succeed in a claim that a panel's failure to engage with a specific piece of evidence amounted to a violation of Article 11 of the DSU, an appellant must explain why such evidence is *so material* to its case that the panel's failure to address explicitly and rely upon such evidence has a bearing on the objectivity of the panel's factual assessment.<sup>571</sup>

5.183. The "critical evidence" that India claims was disregarded by the Panel is a statement in Panel Exhibit IND-121 made by a DAHD official to a US official in a letter dated 28 January 2010.<sup>572</sup> During the Panel proceedings, India designated this exhibit as "strictly confidential information". The United States has contested the implications that India draws from the statement in question both before the Panel and on appeal, including by pointing to other statements in the same letter that, in its view, contradict the statement relied upon by India.<sup>573</sup>

5.184. We note that India has not explained why the Panel's failure explicitly to discuss the content of Panel Exhibit IND-121 is so material that it has a bearing on the objectivity of the Panel's factual assessment.<sup>574</sup> Moreover, we observe that the letter, and thus the statement in question, pre-date the issuance of S.O. 1663(E), which, as found by the Panel, requires the

<sup>565</sup> India's appellant's submission, paras. 232-233.

<sup>566</sup> United States' appellee's submission, para. 175 (referring to Appellate Body Report, *Argentina – Import Measures*, para. 5.176).

<sup>567</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.178 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 185; *EC – Hormones*, paras. 132-133; *Australia – Salmon*, para. 266; *EC – Asbestos*, para. 161; *EC – Bed Linen (Article 21.5 – India)*, paras. 170, 177, and 181; *EC – Sardines*, para. 299; *EC – Tube or Pipe Fittings*, para. 125; *Japan – Apples*, para. 221; *Japan – Agricultural Products II*, paras. 141-142; *Korea – Alcoholic Beverages*, paras. 161-162; *Korea – Dairy*, para. 138; *US – Carbon Steel*, para. 142; *US – Gambling*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews*, para. 313; and *EC – Selected Customs Matters*, para. 258).

<sup>568</sup> Appellate Body Report, *US – Carbon Steel*, para. 142 (referring to Appellate Body Report, *US – Wheat Gluten*, paras. 161-162).

<sup>569</sup> Appellate Body Report, *EC – Hormones*, para. 135.

<sup>570</sup> Appellate Body Reports, *EC – Fasteners (China)*, paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.

<sup>571</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>572</sup> Letter dated 28 January 2010 from Assistant Commissioner, DAHD, to US Minister-Counsellor for Agricultural Affairs regarding: "India's comments on US proposed certificates for export of poultry, pork, pet food and feather to India" (Panel Exhibit IND-121).

<sup>573</sup> Panel Report, para. 7.622 (referring to United States' second written submission to the Panel, para. 70, in turn referring to Panel Exhibit IND-121; and United States' response to Panel question No. 48); United States' appellee's submission, para. 175.

<sup>574</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 442.

imposition of the import prohibitions on a country-wide basis.<sup>575</sup> Even if the statement in that letter could be understood as "recognition" of the concepts listed in Article 6.2 of the SPS Agreement – a point that the United States strongly contests – we have difficulty conceiving of how such a statement by an individual official of the DAHD could have any impact on the Panel's assessment of a regulatory instrument (i.e. S.O. 1663(E)) that was subsequently issued pursuant to the Livestock Act, in particular given that the Panel considered the language of S.O. 1663(E) to be "clear and unequivocal" on its face. For these reasons, we reject India's second claim of error under Article 11 of the DSU.

5.185. For the foregoing reasons, we 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 analysis of the consistency of India's AI measures with Article 6.2.

### 5.3.6 Conclusion

5.186. We have found that the Panel did not err in interpreting the relationship between Article 6.1 and Article 6.3 of the SPS Agreement. We have also found that the Panel did not err in its application of Article 6.2 by not relying solely on Sections 3 and 3A of the Livestock Act in assessing whether India's AI measures recognize the concepts of disease-free areas and areas of low disease prevalence in respect of AI. Finally, we have found that India has not established that the Panel failed to conduct an objective assessment of the matter pursuant to Article 11 of the DSU.

5.187. Having found that India has not demonstrated that the Panel erred in its assessment of the United States' claims under Article 6 of the SPS Agreement, we uphold the Panel's findings, in paragraphs 7.707-7.709, 7.712-7.715, 8.1.c.ix, and 8.1.c.x of the Panel Report, that India's AI measures are inconsistent with Articles 6.1 and 6.2 of the SPS Agreement.

## 5.4 Articles 5.6 and 2.2 of the SPS Agreement

5.188. India appeals certain findings made by the Panel in the context of its analysis of the United States' claims under Article 5.6 and Article 2.2 of the SPS Agreement. India argues that the Panel erred in its application of Article 5.6 of the SPS Agreement to India's AI measures. Additionally, India claims that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU. For these reasons, India requests us to reverse the Panel's finding that India's AI measures are significantly more trade restrictive than required to achieve India's appropriate level of protection and are therefore inconsistent with Article 5.6 of the SPS Agreement. India also requests us to reverse the Panel's finding that India's AI measures are consequentially inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect human and animal life or health.

5.189. We begin by summarizing the relevant findings by the Panel. Next, we examine India's claims that the Panel erred in its application of Article 5.6 of the SPS Agreement to India's AI measures. We conclude by analysing India's claims that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

### 5.4.1 The Panel's findings

5.190. Before the Panel, the United States claimed that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement because they are more trade restrictive than required to achieve India's appropriate level of protection. In order to establish its claim, the United States argued that "there is a clear, scientifically based alternative to India's AI measures that is reasonably available, namely, measures based on the [OIE] Code."<sup>576</sup> The United States submitted that India had failed to specify its appropriate level of protection, and that certain statements made by India could not be understood as "true" appropriate levels of protection. The United States contended, in this regard, that India's appropriate level of protection should be discerned from its domestic surveillance and control measures, that is, India's National Action Plan for 2012 (NAP 2012). The United States considered such appropriate level of protection to be "quite low"<sup>577</sup> or "relatively

<sup>575</sup> Panel Report, para. 7.703.

<sup>576</sup> Panel Report, para. 7.484.

<sup>577</sup> Panel Report, para. 7.555 (quoting United States' first written submission to the Panel, para. 136).

modest with respect to HPNAI and negligible with respect to LPNAI since surveillance is unlikely to detect it".<sup>578</sup> The United States further argued that measures based on the OIE Code recommendations would achieve India's appropriate level of protection. The United States expressed the view that the appropriate level of protection that would be achieved by measures based on the OIE Code recommendations would be higher than the one inferred from India's domestic measures, and that, even assuming *arguendo* that India's appropriate level of protection is extremely high – to prevent any infection by LPNAI subtypes – the control measures in the OIE Code would be sufficient to achieve it.<sup>579</sup>

5.191. India argued before the Panel that the United States' claim under Article 5.6 is "inherently devoid of any merit on account of the identification of an incorrect ALOP".<sup>580</sup> India submitted that "the United States has identified the 'wrong ALOP' because it refers to India's domestic surveillance and control measures instead of the measure being challenged, namely S.O. 1663(E)".<sup>581</sup> India also asserted that, having identified an incorrect appropriate level of protection, the United States still bore the burden of establishing a *prima facie* case of inconsistency under Article 5.6.

5.192. At the outset, the Panel examined whether the United States had identified one or more alternative measures for the purposes of Article 5.6 of the SPS Agreement.<sup>582</sup> The Panel considered that, for eight of the ten product categories covered by India's AI measures<sup>583</sup>, the United States had identified measures based on the recommendations in Chapter 10.4 of the OIE Code as reasonably available alternatives to India's AI measures for purposes of Article 5.6. In so finding, the Panel rejected India's argument that the alternative measures proposed by the United States lacked clarity.<sup>584</sup> The Panel also determined that measures based on the recommendations of the OIE Code would be technically and economically feasible and reasonably available alternatives to India's AI measures.<sup>585</sup>

5.193. In assessing whether measures based on the recommendations of the OIE Code would achieve India's appropriate level of protection, the Panel set out to: (i) identify India's appropriate level of protection; (ii) identify the level of protection that would be achieved by alternative measures based on the recommendations of the OIE Code; and (iii) compare the level of protection that would be achieved by such alternative measures with India's appropriate level of protection.<sup>586</sup>

5.194. The Panel requested India to identify its appropriate level of protection. In its Report, the Panel reproduced a number of statements in which India alluded to its appropriate level of protection. For instance, in response to questions from the Panel, India indicated that "India's level of protection *as reflected in S.O. 1663(E)* is to *prevent ingress of LPNAI and HPNAI* from disease notifying countries through imports of products that are clearly identified as risk factors even by the OIE".<sup>587</sup> Similarly, in response to another question from the Panel, India stated that its "*current level of protection is achieved by maintaining import restrictions against countries notifying HPNAI or LPNAI ... [t]his is reflected in S.O. 1663(E)*".<sup>588</sup> Based on its review of India's written and oral submissions, the Panel identified two appropriate levels of protection referred to by India: the "prevention of ingress of LPNAI and HPNAI", and "country freedom from NAI".<sup>589</sup>

<sup>578</sup> Panel Report, para. 7.555 (quoting United States' second written submission to the Panel, para. 55).

<sup>579</sup> Panel Report, para. 7.487.

<sup>580</sup> Panel Report, para. 7.493 (quoting India's first written submission to the Panel, para. 236).

<sup>581</sup> Panel Report, para. 7.497.

<sup>582</sup> Panel Report, para. 7.525.

<sup>583</sup> The Panel found that, as Chapter 10.4 of the OIE Code does not include product-specific recommendations regarding live pigs and pathological material and biological products from birds, the United States had not proposed any alternative measure in relation to these product categories for the purposes of Article 5.6 of the SPS Agreement. (Panel Report, para. 7.533)

<sup>584</sup> Panel Report, para. 7.532.

<sup>585</sup> Panel Report, para. 7.546.

<sup>586</sup> Panel Report, para. 7.549.

<sup>587</sup> Panel Report, para. 7.553 (quoting India's responses to Panel question Nos. 35(a), 35(c), and 62(a)). (emphasis added by the Panel)

<sup>588</sup> Panel Report, para. 7.553 (quoting India's response to Panel question No. 62(b)). (emphasis added by the Panel)

<sup>589</sup> Panel Report, para. 7.554.



5.195. With regard to the first of these appropriate levels of protection, the Panel was unable to discern the intensity, extent, or amount of protection or risk that India will tolerate or that it considers suitable. Therefore, the Panel concluded that India's characterization did not meet the definition of "appropriate level of protection" in Annex A(5) to the SPS Agreement.<sup>590</sup> With regard to the second appropriate level of protection referred to by India, the Panel did not consider that this statement "truly reflects" India's appropriate level of protection because India's objective is not the NAI-freedom of its trading partners.<sup>591</sup> Accordingly, the Panel interpreted India as saying that its appropriate level of protection can only be met by products that originate in NAI-free countries, not by products from countries that are only HPNAI free, where LPNAI may exist.

5.196. The Panel explained that, rather than substituting its own reasoning for the express statements made by India with regard to its appropriate level of protection, it would "instead examine the record of evidence (including the measures at issue) in order to determine whether India has provided information that allows us to understand India's ALOP with any greater precision".<sup>592</sup> The Panel noted India's statement that its "current level of protection is *achieved by* [and] *is reflected in* S.O. 1663(E)"<sup>593</sup>, and observed that S.O. 1663(E) imposes import prohibitions. The Panel acknowledged that an import prohibition has, in other disputes, been equated with a "zero-risk" level of protection.<sup>594</sup> However, in the circumstances of this dispute, notably "the particularities of India's AI situation and the manner in which AI is transmitted", the Panel expressed "doubt that an import ban can achieve a zero-risk level of protection with regard to AI ... because the disease is transmitted not only through commercial channels of trade, but also by wild birds and informal and illicit trade."<sup>595</sup> Accordingly, the Panel found that India's appropriate level of protection is not zero-risk. Taking account of India's assertion that its appropriate level of protection is "achieved by" and "reflected in S.O. 1663(E)"<sup>596</sup>, as well as India's particular AI situation and the manner in which AI is transmitted, the Panel concluded that India's appropriate level of protection is "*very high or very conservative*".<sup>597</sup> The Panel further expressed the view that "this formulation of India's ALOP is sufficiently precise to enable the application of the SPS Agreement (including the provisions of Article 5.6)."<sup>598</sup>

5.197. Having identified India's appropriate level of protection, the Panel then turned to determine the level of protection that would be achieved by alternative measures based on the OIE Code's recommendations. The Panel concluded that the OIE Code provides for an optimal level of security under which safe trade may be facilitated in order to prevent AI from being introduced into an importing country.<sup>599</sup>

5.198. The Panel then compared India's appropriate level of protection with the level of protection that would be achieved by measures based on the recommendations of the OIE Code, particularly Chapter 10.4 thereof. In the Panel's view, measures based on the OIE Code's recommendations would achieve a level of protection that is at least as high as India's "very high" or "very conservative" level of protection. Thus, the Panel concluded that the United States had discharged its burden of identifying an alternative measure that would achieve India's appropriate level of protection.<sup>600</sup>

5.199. The Panel further recalled that the OIE Code does not envisage the imposition of import prohibitions with respect to poultry products, but, rather, identifies conditions under which products may be safely traded even if their country of origin is affected by NAI. Therefore, the

<sup>590</sup> Panel Report, para. 7.565.

<sup>591</sup> Panel Report, para. 7.574.

<sup>592</sup> Panel Report, para. 7.566.

<sup>593</sup> Panel Report, para. 7.568 (quoting India's response to Panel question No. 62(b)). (emphasis added by the Panel)

<sup>594</sup> Panel Report, para. 7.567 (referring to Appellate Body Report, *Australia – Salmon*, para. 197).

<sup>595</sup> Panel Report, para. 7.569.

<sup>596</sup> Panel Report, para. 7.570 (quoting India's response to Panel question No. 62(b)).

<sup>597</sup> Panel Report, para. 7.570. (emphasis original) See also paras. 7.571 and 7.575.

<sup>598</sup> Panel Report, para. 7.570.

<sup>599</sup> Panel Report, para. 7.581. The Panel noted that, although the OIE had indicated that the OIE Code does not contain specific or general recommendations about the level of protection provided by the recommendations in disease chapters or other Code texts, the OIE had also pointed out that "the OIE Code establishes measures that are proportional to risk, with the *objective of facilitating safe trade* and avoiding unjustifiable trade barriers". (Panel Report, para. 7.577 (quoting OIE's response to Panel question No. 11). (emphasis added by the Panel))

<sup>600</sup> Panel Report, para. 7.586.

Panel concluded that the alternative proposed by the United States, namely, measures based on the OIE Code's recommendations, would be significantly less trade restrictive than India's AI measures with respect to the products covered by Chapter 10.4.<sup>601</sup>

5.200. For the foregoing reasons, the Panel found that India's AI measures are significantly more trade restrictive than required to achieve India's appropriate level of protection with respect to the products covered by Chapter 10.4 of the OIE Code and are therefore inconsistent with Article 5.6 of the SPS Agreement.<sup>602</sup> The Panel considered that this finding, in turn, raised a presumption that India's AI measures are inconsistent with the requirement in Article 2.2 to ensure that SPS measures are applied only to the extent necessary to protect human, animal or plant life or health. The Panel noted that India had not adduced any arguments to rebut such presumption. Thus, having found that India's AI measures are inconsistent with Article 5.6, the Panel found that India's AI measures are consequentially inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect human and animal life or health.<sup>603</sup>

#### 5.4.2 Overview of Article 5.6 and Article 2.2

5.201. Before turning to the specifics of India's appeal of the Panel's findings under Articles 5.6 and 2.2 of the SPS Agreement, we consider it useful to recall certain Appellate Body jurisprudence regarding the nature of the analysis under Articles 5.6 and 2.2 of the SPS Agreement.

5.202. Article 5.6 of the SPS Agreement provides that:

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.[\*]<sup>3</sup>

[\* fn original] <sup>3</sup> 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.

5.203. In order to succeed in a claim under Article 5.6, a complainant must establish that there is an alternative measure that: (i) is reasonably available taking into account technical and economic feasibility; (ii) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (iii) is significantly less restrictive to trade than the contested SPS measure.<sup>604</sup> These elements are cumulative in nature such that, in order to establish an inconsistency with this provision, all three elements must be demonstrated. The alternative measure proposed by a complainant contesting another Member's SPS measure is a "conceptual tool" to be used for the purpose of the analysis under Article 5.6.<sup>605</sup> Consequently, a demonstration that an alternative measure meets the relevant Member's appropriate level of protection does not imply that the Member whose SPS measure is found to be inconsistent with Article 5.6 must adopt that alternative measure or that the alternative measure is the only option that would achieve the desired level of protection.<sup>606</sup>

5.204. Central to the second limb of the above test of inconsistency with Article 5.6 is the concept of the "appropriate level of protection", which is defined in Annex A(5) to the SPS Agreement as "[t]he level of protection deemed appropriate by the Member establishing a sanitary or phytosanitary measure to protect human, animal or plant life or health within its territory."<sup>607</sup> The Appellate Body has explained that a Member's appropriate level of protection is an "objective". As such, it is distinct from an SPS measure, which is an "instrument" chosen to achieve that

<sup>601</sup> Panel Report, paras. 7.595-7.596.

<sup>602</sup> Panel Report, para. 7.597.

<sup>603</sup> Panel Report, para. 7.615.

<sup>604</sup> Appellate Body Report, *Australia – Salmon*, para. 194.

<sup>605</sup> Appellate Body Report, *Australia – Apples*, para. 363.

<sup>606</sup> Appellate Body Report, *Australia – Apples*, para. 363.

<sup>607</sup> Annex A(5) indicates that this term is also known as the "acceptable level of risk".

objective.<sup>608</sup> Logically, the determination by a Member of its "appropriate level of protection" precedes the establishment or maintenance of an SPS measure, and it is the appropriate level of protection that determines the SPS measure to be introduced or maintained, and not the other way around.<sup>609</sup>

5.205. In principle, the determination of the appropriate level of protection "is a *prerogative* of the Member concerned and not of a panel or of the Appellate Body".<sup>610</sup> At the same time, several provisions of the SPS Agreement, including Article 5.6, make clear that Members adopting SPS measures are subject to an *implicit* obligation to determine their appropriate level of protection, and to do so with sufficient precision as to enable the application of the relevant provisions of the SPS Agreement.<sup>611</sup> Given that the determination of the appropriate level of protection that a Member must make logically precedes and is separate from its adoption of an SPS measure, the Appellate Body has explained that, "[t]o imply the appropriate level of protection from the existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member. That clearly cannot be the case."<sup>612</sup> Nevertheless, the Appellate Body has acknowledged that, "in cases where a Member does not determine its appropriate level of protection, or does so with insufficient precision, the appropriate level of protection may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied."<sup>613</sup>

5.206. In *Australia – Apples*, the Appellate Body stated that, in order to assess whether a significantly less trade-restrictive alternative measure that would meet the appropriate level of protection is available, "a panel must identify both the level of protection that the importing Member has set as its appropriate level, and the level of protection that would be achieved by the alternative measure put forth by the complainant."<sup>614</sup> Having identified these two levels of protection, a panel will be able to make the requisite comparison between the level of protection that would be achieved by the alternative measure and the importing Member's appropriate level of protection. The Appellate Body explained that, "[i]f the level of protection achieved by the proposed alternative meets or exceeds the appropriate level of protection, then (assuming that the other two conditions in Article 5.6 are met) the importing Member's SPS measure is more trade restrictive than necessary to achieve its desired level of protection."<sup>615</sup>

5.207. Article 2.2 of the SPS Agreement reads, in relevant part:

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 ....

5.208. As discussed in section 5.1 of this Report, the basic obligations set out in Article 2 of the SPS Agreement inform, impart meaning to, and are made operative in other provisions of the SPS Agreement, including through certain of the more specific obligations set out in Article 5. The element of Article 2.2 quoted above is closely linked to the specific obligation set out in Article 5.6.<sup>616</sup>

<sup>608</sup> Appellate Body Report, *Australia – Salmon*, para. 200.

<sup>609</sup> Appellate Body Report, *Australia – Salmon*, para. 201.

<sup>610</sup> Appellate Body Report, *Australia – Salmon*, para. 199. (emphasis original)

<sup>611</sup> Appellate Body Report, *Australia – Salmon*, paras. 205-206. See also Appellate Body Report, *Australia – Apples*, para. 343.

<sup>612</sup> Appellate Body Report, *Australia – Salmon*, para. 203.

<sup>613</sup> Appellate Body Report, *Australia – Salmon*, para. 207.

<sup>614</sup> Appellate Body Report, *Australia – Apples*, para. 344.

<sup>615</sup> Appellate Body Report, *Australia – Apples*, para. 344.

<sup>616</sup> In *Australia – Apples*, the Appellate Body explained that:

[A] violation of Article 5.1 or Article 5.2 can be presumed to imply a violation of Article 2.2, but ... the reverse does not hold true – that is, a violation of Article 2.2 does not imply a violation of Article 5.1 or Article 5.2. Whether a similar relationship exists between Article 2.2 and Article 5.6 has not yet been squarely decided, and is not an issue that is raised in this appeal, although it has been suggested that just such a relationship does exist.

(Appellate Body Report, *Australia – Apples*, para. 340 (fns omitted))

### 5.4.3 Whether the Panel erred under Article 5.6

5.209. We begin with a number of preliminary observations with respect to India's claims under Article 5.6 of the SPS Agreement. India requests us to reverse the Panel's findings in paragraphs 7.597, 7.616, and 7.617 of the Panel Report.<sup>617</sup> In paragraph 7.597 of its Report, the Panel found that India's AI measures are inconsistent with Article 5.6, as follows:

We have found that the United States identified measures based on the [OIE] Code as a reasonably available alternative to India's AI measures for the products that are within the scope of Chapter 10.4. We have also found that the alternative is technically and economically feasible, would achieve India's ALOP, and is significantly less restrictive to trade than India's AI measures. Therefore, we conclude that the United States has demonstrated that India's AI measures are significantly more trade-restrictive than required to achieve India's ALOP, in respect of these products. Accordingly, we find that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement, with respect to the products covered by Chapter 10.4 of the [OIE] Code.

5.210. In paragraphs 7.616 and 7.617 of its Report, the Panel reiterated its finding under Article 5.6 and made a consequential finding of inconsistency under Article 2.2 of the SPS Agreement, as follows:

The Panel therefore finds that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement because they are significantly more trade-restrictive than required to achieve India's ALOP, with respect to the products covered by Chapter 10.4 of the [OIE] Code.

Having found that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement, we find that India's AI measures are consequentially inconsistent with Article 2.2 of the SPS Agreement because they are applied beyond the extent necessary to protect human and animal life or health.

5.211. We note that the Panel's findings of inconsistency with Article 5.6 and consequently with Article 2.2 of the SPS Agreement rested upon three cumulative findings. First, the Panel found that measures based on the recommendations of the OIE Code would be technically and economically feasible and reasonably available alternatives to India's AI measures.<sup>618</sup> Second, the Panel found that the United States had identified alternative measures that would achieve India's appropriate level of protection.<sup>619</sup> Third, the Panel found that the proposed alternative measures would be significantly less trade restrictive than India's AI measures with respect to the product categories covered by Chapter 10.4 of the OIE Code.<sup>620</sup>

5.212. On appeal, India's claims of error under Article 5.6 of the SPS Agreement concern only the second intermediate finding reached by the Panel, namely, that the United States had identified alternative measures that would achieve India's appropriate level of protection. In this context, India first challenges certain aspects of the Panel's identification of India's appropriate level of protection. Second, India appeals a discrete aspect of the Panel's identification of alternative measures. Third, India advances two allegations that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU. We note that, on appeal, India's request for reversal of the Panel's finding that India's AI measures are inconsistent with the first requirement in Article 2.2 is entirely dependent upon the arguments advanced by India in support of its request for reversal of the Panel's finding of inconsistency with Article 5.6. This means that, if we do not accede to the latter request, we need not further consider the former one. We address each of India's claims in turn.

<sup>617</sup> India's Notice of Appeal, para. 15.

<sup>618</sup> Panel Report, para. 7.546.

<sup>619</sup> Panel Report, para. 7.586.

<sup>620</sup> Panel Report, para. 7.596.

#### 5.4.3.1 Whether the Panel erred under Article 5.6 in finding that the United States had identified alternative measures that would achieve India's appropriate level of protection

5.213. India argues that the United States failed to present a *prima facie* case to support its claim under Article 5.6 of the SPS Agreement. According to India, in order to discharge its burden of proof under this provision, a complainant must establish that the proposed alternative measure should be able to fulfil the appropriate level of protection of the respondent country. In doing so, the complaining party must first identify the measure that reflects the appropriate level of protection as sought by the responding country. In India's view, only once the correct measure is identified can a complaining party propose an alternative measure that would achieve a similar appropriate level of protection and thereby discharge its burden of proof. If, however, the complaining party identifies an incorrect measure, the appropriate level of protection reflected in the incorrect measure would not be the appropriate level of protection as sought by the respondent country. In such circumstances, India maintains, the alternative measure would not be able to fulfil the appropriate level of protection of the respondent country.<sup>621</sup>

5.214. India submits that, in the present case, any alternative measure has to fulfil the appropriate level of protection as reflected in the measure at issue (i.e. S.O. 1663(E)).<sup>622</sup> According to India, the United States identified India's appropriate level of protection based on India's domestic control measures, instead of on the measure at issue. Therefore, the United States ultimately did not fulfil its burden of presenting an alternative measure that fulfils India's appropriate level of protection and India asserts that, consequently, the United States failed to make a *prima facie* case.<sup>623</sup>

5.215. The United States responds that India does not and cannot explain how or why the United States' attempt to discern India's appropriate level of protection by examining India's domestic measures means that the United States did not make a *prima facie* case. Given that India's measures do not state India's appropriate level of protection, a *prima facie* case with respect to the identification of the appropriate level of protection had to be based on an inferred appropriate level of protection supported by the evidence on the record. This is precisely what the United States did in presenting its *prima facie* case. Moreover, the United States notes that the Panel ultimately agreed with India that its appropriate level of protection was higher than that presented in the United States' *prima facie* case.<sup>624</sup>

5.216. We recall that the application of Article 5.6 requires identifying a reasonably available and significantly less trade-restrictive alternative measure that would achieve the appropriate level of protection of the Member whose SPS measure is alleged to contravene Article 5.6.<sup>625</sup> Doing so involves, *inter alia*, identification of both the appropriate level of protection that the importing Member has set for itself, as well as of the level of protection that would be achieved by the alternative measure proposed by the complainant, so as to enable a comparison to be made between these two levels of protection.<sup>626</sup> Each WTO Member enjoys the right to specify its own appropriate level of protection, but is also subject to an implicit obligation to do so with sufficient precision as to enable the application of the provisions of the SPS Agreement, including Article 5.6. A WTO Member cannot, by failing to specify its appropriate level of protection, or by doing so in an insufficiently precise way, escape its obligations under the SPS Agreement.<sup>627</sup>

5.217. Before assessing the specific claim of error raised by India, we recall how the issue of the identification of India's appropriate level of protection developed during the Panel proceedings. Before the Panel, the United States argued, based on India's "domestic surveillance and control

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<sup>621</sup> India's appellant's submission, paras. 263-265.

<sup>622</sup> India's appellant's submission, para. 266 (referring to Appellate Body Report, *Australia – Salmon*, paras. 190-191, 197, and 207).

<sup>623</sup> India's appellant's submission, paras. 266 and 268.

<sup>624</sup> United States' appellee's submission, para. 199.

<sup>625</sup> Appellate Body Report, *Australia – Salmon*, para. 194. See also Appellate Body Report, *Australia – Apples*, para. 337.

<sup>626</sup> Appellate Body Report, *Australia – Apples*, para. 344.

<sup>627</sup> Appellate Body Report, *Australia – Salmon*, paras. 199 and 205-207. See also Appellate Body Report, *Australia – Apples*, para. 343.

measures" (particularly, India's NAP 2012<sup>628</sup>) that India's appropriate level of protection is "quite low".<sup>629</sup> In response, India submitted that the United States' claim had no merit because the United States had identified the wrong appropriate level of protection by referring to the NAP 2012 rather than S.O. 1663(E).<sup>630</sup> The Panel undertook a review of India's written and oral submissions, and noted that India had alluded to the "prevention of ingress of LPNAI and HPNAI" and to "country freedom from NAI" as its appropriate level of protection.<sup>631</sup> As it was not convinced that either of these represented India's appropriate level of protection, the Panel proceeded to examine other evidence on the record, including the measures at issue, in order to determine India's appropriate level of protection with greater precision.<sup>632</sup> Having done so, the Panel concluded that India's appropriate level of protection is "*very high or very conservative*".<sup>633</sup>

5.218. At this juncture, we highlight that India does *not* challenge on appeal the specific level of protection identified by the Panel as India's appropriate level of protection.<sup>634</sup> Nor does India contest the considerations that led the Panel to this identification of India's appropriate level of protection. We recall that the Panel found that India's appropriate level of protection is "very high or very conservative", on the basis of India's assertion that its appropriate level of protection is "achieved by" and "reflected in S.O. 1663(E)", as well as India's particular AI situation and the manner in which AI is transmitted.<sup>635</sup> We consider it important to point out that, in the reasoning that led it to identify India's appropriate level of protection, the Panel did *not* endorse, or even refer to, the United States' argument that India's appropriate level of protection, as reflected in the NAP 2012, was "quite low".<sup>636</sup>

5.219. On appeal, India argues, in essence, that the United States did not fulfil its burden of identifying an alternative measure that fulfils India's appropriate level of protection, because it sought to identify India's appropriate level of protection on the basis of India's domestic control measures, instead of on the measure at issue. India supports its position by arguing that "it is an accepted jurisprudence that the ALOP has to be discerned from the measure at issue".<sup>637</sup> India's arguments, in our view, raise two related questions. The first question is whether the United States is required to identify India's appropriate level of protection on the basis of the measures at issue in order to succeed in its claim under Article 5.6. More generally, India's arguments also raise the question of whether the fact that the United States, as complainant, bears the burden of proving a claim of inconsistency with Article 5.6 means that, in order to succeed in such claim, the Panel had to accept the United States' articulation of India's appropriate level of protection and use this characterization in the course of its reasoning.

5.220. We begin by pointing out that there is a distinction between the burden of proof borne by a complainant in establishing a claim under Article 5.6 of the SPS Agreement, on the one hand, and the analysis that must be undertaken by a panel in assessing such a claim, on the other hand. In order to establish a claim under Article 5.6, a complainant must put forth arguments and evidence in respect of all relevant elements under this provision, including the respondent's appropriate level of protection and the level of protection of the proposed alternative measure. At the same time, the panel examining such claim is charged with, *inter alia*, identifying the level of protection of the Member whose SPS measure is challenged and the level of protection of the proposed alternative measure. In conducting this examination, the panel is not constrained to verifying only whether or not the complainant's allegations in this regard are substantiated. This is particularly so with respect to a responding Member's appropriate level of protection.

<sup>628</sup> In 2006, India enacted a National Action Plan to deal with AI occurring in India. Following successive outbreaks of AI in 2008 and 2009, the National Action Plan was subsequently revised in 2012. The NAP 2012, comprising five chapters, was prepared by the DAHD to outline India's response to domestic AI outbreaks. (Panel Report, paras. 2.43-2.44)

<sup>629</sup> United States' first written submission to the Panel, para. 136. See also Panel Report, para. 7.487.

<sup>630</sup> Panel Report, para. 7.497.

<sup>631</sup> Panel Report, para. 7.554.

<sup>632</sup> Panel Report, para. 7.566.

<sup>633</sup> Panel Report, para. 7.570. (emphasis original) See also paras. 7.571 and 7.575.

<sup>634</sup> India's response to questioning at the oral hearing.

<sup>635</sup> Panel Report, para. 7.570 (referring to India's response to Panel question No. 62(b)). See also paras. 7.571 and 7.575.

<sup>636</sup> Panel Report, paras. 7.555, 7.565, and 7.574.

<sup>637</sup> India's appellant's submission, para. 266 (referring to Appellate Body Report, *Australia – Salmon*, paras. 190-191, 197, and 207).

5.221. We recall that the Appellate Body has established that the specification of such appropriate level of protection is both a prerogative and an obligation of the responding Member.<sup>638</sup> Moreover, we emphasize that, in the context of WTO dispute settlement proceedings, a responding Member is generally better placed than the complainant to know what objective it has set in terms of the level of SPS protection it wishes to achieve. For these reasons, typically a panel adjudicating a claim under Article 5.6 of the SPS Agreement would be expected to accord weight to the respondent's articulation of its appropriate level of protection. This will be particularly so in circumstances where that appropriate level of protection was specified in advance of the adoption of the SPS measure, where the appropriate level of protection is specified with sufficient precision, and where it has been consistently expressed by the responding Member. At the same time, this does not mean that a panel must defer completely to a respondent's characterization of its own appropriate level of protection. Rather, in examining a claim under Article 5.6 of the SPS Agreement, a panel is required to ascertain the respondent's appropriate level of protection on the basis of the totality of the arguments and evidence on the record. This duty applies equally when a claimant further contends that the appropriate level of protection expressed or identified by the respondent for purposes of WTO dispute settlement proceedings does not genuinely reflect that Member's appropriate level of protection.

5.222. We turn now to examine whether the Panel's approach is consistent with our considerations above regarding a panel's task in adjudicating a claim under Article 5.6 of the SPS Agreement. First, we recall that the Panel considered that it needed to identify India's appropriate level of protection in order to conduct an assessment of the United States' claims under the SPS Agreement.<sup>639</sup> This, in our view, suggests that the Panel correctly understood that it was required to identify India's appropriate level of protection in order to adjudicate the claims before it. Moreover, the Panel did not limit its analysis to the United States' argumentation regarding India's appropriate level of protection. Rather, in line with the understanding that a responding Member has an obligation to specify the level of SPS protection it wishes to achieve, the Panel requested India to identify its appropriate level of protection.<sup>640</sup> Moreover, we highlight that the Panel, correctly in our view, did not defer completely to India's characterization of its own appropriate level of protection, but, instead, decided to ascertain such level of protection on the basis of the totality of the evidence on the record.<sup>641</sup> In its analysis, the Panel took into account India's assertion that its appropriate level of protection is "achieved by" and "reflected in S.O. 1663(E)"<sup>642</sup>, as well as India's particular AI situation and the manner in which AI is transmitted, and concluded that India's appropriate level of protection is "*very high* or *very conservative*".<sup>643</sup> To us, these considerations show that the Panel adopted a proper approach in adjudicating the claim under Article 5.6 of the SPS Agreement.

5.223. Moreover, we consider that India's arguments overlook that, in adjudicating a claim under Article 5.6 of the SPS Agreement, the identification of the respondent's appropriate level of protection is not *per se* the ultimate aim of the analysis. Rather, the ultimate aim in conducting this analysis is to determine whether a significantly less trade-restrictive alternative measure that would meet the respondent's appropriate level of protection is available. A crucial element in this analysis is the comparison between the appropriate level of protection of the respondent and the level of protection that would be achieved by the proposed alternative measure.

5.224. We note that, in the context of identifying the level of protection afforded by the proposed alternative measures, the Panel found that the OIE Code "provides for an optimal level of security, under which safe trade may be facilitated in order to prevent AI from being introduced into an importing country".<sup>644</sup> Then, the Panel went on to compare India's appropriate level of protection with the level of protection of the proposed alternative measures, and found that "measures based on the recommendations of the [OIE] Code would achieve a level of protection that is at least as

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<sup>638</sup> Appellate Body Report, *Australia – Salmon*, paras. 199 and 205-206. See also Appellate Body Report, *Australia – Apples*, para. 343.

<sup>639</sup> Panel Report, para. 7.553.

<sup>640</sup> Panel Report, paras. 7.553-7.554.

<sup>641</sup> Panel Report, para. 7.566. We recall that the Panel concluded that India's first articulation of its appropriate level of protection did not correspond to the definition of this concept in Annex A(5), and that the Panel did not consider that the second level of protection referred to by India "truly reflects" India's appropriate level of protection. (*Ibid.*, paras. 7.565 and 7.574)

<sup>642</sup> Panel Report, para. 7.570 (quoting India's response to Panel question No. 62(b)).

<sup>643</sup> Panel Report, para. 7.570. (emphasis original) See also paras. 7.571 and 7.575.

<sup>644</sup> Panel Report, para. 7.581.

high as India's 'very high' or 'very conservative' level of protection."<sup>645</sup> We understand this as a finding that the level of protection embodied in Chapter 10.4 of the OIE Code meets or exceeds the "very high" or "very conservative" level of protection that the Panel found to be India's appropriate level of protection. This finding by the Panel has not been appealed by India and, to us, it further suggests that the Panel itself was of the view that the proposed alternative measures would meet India's appropriate level of protection, regardless of whether such level were "quite low" or "very high".

5.225. These considerations, in our view, indicate that, even though the United States had the burden of establishing its claim under Article 5.6 before the Panel, the success of such claim did not necessarily depend upon the Panel accepting and relying upon the United States' proposed articulation of India's appropriate level of protection. In examining the United States' claim under Article 5.6, the Panel's task was not limited to verifying whether or not the United States' characterization of India's appropriate level of protection was correct. Indeed, the Panel would have been remiss if it had examined only the United States' arguments in order to identify India's appropriate level of protection. In this regard, we recall the Appellate Body's finding that "[a] demonstration that an alternative measure meets the relevant Member's appropriate level of protection, is reasonably available, and is significantly less trade restrictive than the existing measure suffices to prove that the measure at issue is more trade restrictive than necessary."<sup>646</sup> Consequently, we consider that the United States' claim under Article 5.6 hinged on establishing that the level of protection achieved by the proposed alternative measures meets or exceeds India's appropriate level of protection, rather than on whether the Panel accepted and relied on the United States' proposed articulation of India's appropriate level of protection, as argued by India.

5.226. Furthermore, to the extent that India's arguments suggest that the Appellate Body has held that a complainant – and a panel – must identify the responding Member's appropriate level of protection on the basis of the SPS measure at issue, we do not consider this to be an accurate characterization of the Appellate Body's jurisprudence. To the contrary, the Appellate Body has explained that such an approach is not desirable because it may lead to a circular analysis<sup>647</sup>, even if it may be necessary to adopt such an approach in certain circumstances, in particular, "where a Member does not determine its appropriate level of protection, or does so with insufficient precision."<sup>648</sup> Therefore, India is *not* correct in arguing that "it is an accepted jurisprudence" that the appropriate level of protection must always be discerned from the measure at issue.<sup>649</sup>

5.227. In the light of the above considerations, we do not agree with India that the United States was required to identify India's appropriate level of protection on the basis of the measures at issue in order to succeed in its claim under Article 5.6 of the SPS Agreement. Accordingly, we find that the Panel did not err in finding that the United States had identified alternative measures that would achieve India's appropriate level of protection.

#### **5.4.3.2 Whether the Panel erred under Article 5.6 by failing to identify the proposed alternative measures with precision**

5.228. India argues that, since the Panel did not identify the proposed alternative measures with precision, it committed legal error under Article 5.6 of the SPS Agreement by concluding that the alternative measures would fulfil India's appropriate level of protection. India maintains that different product-specific recommendations in the OIE Code present different risks, and that it was therefore "incumbent upon the Panel to identify the product specific recommendation in the OIE Code for the corresponding product in S.O. 1663(E) and the applicability of the same in the event of the occurrence of HPNAI or NAI".<sup>650</sup> India further contends that, because India and the United States disagree on the applicability of the product-specific recommendations in Chapter 10.4 of the OIE Code, "the Panel should have identified the product specific recommendations in the OIE Code for the corresponding product in question and the applicability of the same in the event of the occurrence of HPNAI or NAI."<sup>651</sup> Moreover, India argues that,

<sup>645</sup> Panel Report, para. 7.582.

<sup>646</sup> Appellate Body Report, *Australia – Apples*, para. 363.

<sup>647</sup> See *supra*, para. 5.205.

<sup>648</sup> Appellate Body Report, *Australia – Salmon*, para. 207.

<sup>649</sup> India's appellant's submission, para. 266 (referring to Appellate Body Report, *Australia – Salmon*, paras. 190-191, 197, and 207). See also *supra*, para. 5.205.

<sup>650</sup> India's appellant's submission, para. 275.

<sup>651</sup> India's appellant's submission, para. 276.



although the United States and the Panel identified two product-specific recommendations in the OIE Code that could be applied upon occurrence of HPNAI, they did not identify the product-specific recommendations in the OIE Code that could be applied upon occurrence of LPNAI. Similarly, India notes that, for the other product categories covered by S.O. 1663(E), neither the United States nor the Panel identified the corresponding product-specific recommendations in the OIE Code or their applicability in the event of the occurrence of HPNAI or NAI.<sup>652</sup>

5.229. The United States disagrees with India that the Panel failed to identify precisely the alternative measures to India's AI measures. According to the United States, the Panel identified the precise OIE Code recommendations that serve as the proposed alternative measures on the basis of the evidence provided by the United States.<sup>653</sup> In the United States' view, India's assertion seems to rest on India's argument that the OIE Code achieves different levels of protection depending on the recommendation adopted. The United States highlights that the Panel properly rejected India's argument regarding the different levels of protection in the OIE Code, and found that the OIE Code achieves a high level of protection. Accordingly, the United States submits that India has presented no support for its argument that the alternative measures under Article 5.6 of the SPS Agreement were not sufficiently defined.<sup>654</sup>

5.230. We begin by noting that, when India asserts that the Panel failed to identify the proposed alternative measures "with precision", we understand India to be arguing that the Panel failed to specify the product-specific recommendations in the OIE Code that apply to each of the product categories for which importation is prohibited under S.O. 1663(E) upon the occurrence of HPNAI or LPNAI. With respect to this argument, we observe that the recommendations in the OIE Code that were identified by the United States as constituting the relevant alternative measures were reproduced by the Panel in paragraph 7.529 of its Report, as follows:

<b>S.O. 1663: Bans from all countries reporting NAI (including LPNAI and HPNAI)</b>	<b>[OIE Code recommendations proposed as the basis for alternative measures]</b>
Domestic and wild birds (including poultry and captive birds);	Articles 10.4.5 and 10.4.6
Day-old chicks, ducks, turkey, and other newly hatched avian species;	Articles 10.4.7 and 10.4.8
Unprocessed meat and meat products from Avian species, including domesticated, wild birds and poultry;	Articles 10.4.19 and 10.4.20
Hatching eggs;	Articles 10.4.10, 10.4.11, and 10.4.12
Eggs and egg products (except Specific Pathogen Free eggs);	Articles 10.4.13, 10.4.14, and 10.4.15
Unprocessed feathers;	Article 10.4.22 and Article 10.4.23
Products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use; and	Article 10.4.21
Semen of domestic and wild birds including poultry.	Articles 10.4.17 and 10.4.18

5.231. In the table above, the United States set out for the Panel the eight product categories in S.O. 1663(E) for which there are corresponding product-specific recommendations in Chapter 10.4 of the OIE Code.<sup>655</sup> In respect of each product category, the United States identified the specific recommendation or recommendations that are potentially applicable, depending on the specific product and the particular disease condition at issue. Thus, the references to the product-specific recommendations in this table cover all of the applicable recommendations from Chapter 10.4 of the OIE Code, whether the imports emanate from a country, zone, or compartment, and whether that country, zone, or compartment is NAI free, HPNAI free (meaning that LPNAI may be present), or regardless of its NAI status. In these circumstances, we do not see grounds for India's claim that the Panel did not identify the proposed alternative measures with precision.

<sup>652</sup> India's appellant's submission, paras. 277 and 279.

<sup>653</sup> United States' appellee's submission, para. 202 (referring to Panel Report, para. 7.533).

<sup>654</sup> United States' appellee's submission, para. 203 (referring to Panel Report, para. 7.580).

<sup>655</sup> We recall that the Panel found that Chapter 10.4 of the OIE Code does not include product-specific recommendations regarding the remaining two product categories in S.O. 1663(E) – live pigs, and pathological material and biological products from birds – and that the United States therefore did not propose alternative measures to S.O. 1663(E) in relation to these products. (Panel Reports, para. 7.533 and fn 1105 to para. 7.597)

5.232. In addition, we note that India's claim appears premised on its contention that the OIE Code allows India, based on its appropriate level of protection, to apply only NAI-free recommendations and only on a country-wide basis. As noted in our analysis under Article 3 of the SPS Agreement, however, the Panel expressly rejected India's understanding of the OIE Code when it stated that "India's interpretative approach, whereby Chapter 10.4 would allow an importing country to choose as a 'condition of entry' the NAI-free status of the exporting country and apply that condition only on a country-wide basis, runs contrary to Chapter 10.4 of the [OIE] Code".<sup>656</sup> We, therefore, consider that India's claim is premised on an understanding of the OIE Code that the Panel properly rejected.<sup>657</sup>

5.233. In the light of the above considerations, we disagree with India's contention that the Panel failed to identify the product-specific recommendations in the OIE Code for the corresponding product in question and the applicability of the same in the event of the occurrence of HPNAI or NAI.<sup>658</sup> Accordingly, we find that the Panel did not fail to identify the alternative measures with precision.

#### 5.4.4 Whether the Panel acted inconsistently with Article 11 of the DSU

5.234. Finally, we turn to examine two challenges to the Panel's findings raised by India under Article 11 of the DSU.

5.235. First, India argues that the Panel failed to analyse India's defence under Article 5.6 of the SPS Agreement and therefore failed to make an objective assessment of the matter. In particular, India alleges that the Panel disregarded its argument that the United States' claim under Article 5.6 was "inadequate" because the alternative measures proposed by the United States were based on the appropriate level of protection reflected in India's domestic control measures instead of on the one reflected in the measures at issue. In India's view, the Panel's dismissal of India's "critical defence" under Article 5.6 without providing any reasons shows that the Panel acted inconsistently with Article 11 of the DSU.<sup>659</sup>

5.236. Distinguishing a claim that a panel erred in applying a legal provision to the facts of the case from a claim that a panel failed to make an objective assessment of the matter as required by Article 11 of the DSU may, at times, prove to be a difficult task. However, we recall that the Appellate Body has stated that, "[i]n most cases ... an issue will *either* be one of application of the law to the facts or an issue of the objective assessment of facts, and not both".<sup>660</sup> The Appellate Body has also established that a claim that a panel failed to comply with its duties under Article 11 of the DSU "must stand by itself" and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements.<sup>661</sup>

5.237. We consider that India's first claim under Article 11 of the DSU is premised on its argument that the United States failed to establish a *prima facie* case under Article 5.6 of the SPS Agreement because the United States sought to identify India's appropriate level of protection as being "quite low" on the basis of the NAP 2012. We have already addressed and rejected that argument above. In our view, India's claim under Article 11 is indistinguishable from its claim with respect to the Panel's application of Article 5.6 to India's AI measures, and does not "stand by itself".<sup>662</sup> Therefore, India's claim under Article 11 of the DSU must be dismissed.

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<sup>656</sup> Panel Report, para. 7.270.

<sup>657</sup> See section 5.2 of this Report.

<sup>658</sup> India's appellant's submission, para. 276.

<sup>659</sup> India's appellant's submission, para. 269 (referring to India's first written submission to the Panel, paras. 243-244; and opening oral statement at the first Panel meeting, para. 51).

<sup>660</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.173 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872 (emphasis original)).

<sup>661</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.173 (referring to Appellate Body Reports, *EC – Fasteners (China)*, para. 442; *US – Steel Safeguards*, para. 498; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

<sup>662</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.173 (referring to Appellate Body Reports, *EC – Fasteners (China)*, para. 442; *US – Steel Safeguards*, para. 498; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 238).

5.238. In its second allegation, India argues that the Panel acted inconsistently with Article 11 of the DSU because it ruled on a claim that was not argued by the United States. According to India, the United States limited its arguments and evidence under Article 5.6 of the SPS Agreement to countries notifying LPNAI and did not challenge the application of S.O. 1663(E) to countries notifying HPNAI. Thus, in India's view, the Panel could not have concluded that India's AI measures, which include import restrictions on account of the occurrence of both HPNAI and LPNAI, are inconsistent with Article 5.6 of the SPS Agreement. Moreover, India argues that, since the United States never explicitly made arguments or presented evidence with respect to the application of S.O. 1663(E) to countries notifying HPNAI, India never had an opportunity to defend itself on this issue.<sup>663</sup>

5.239. In response, the United States contends that the Panel ruled on precisely the claim brought by the United States. According to the United States, the record in this dispute provides no basis for India's assertions that the scope of the United States' claim under Article 5.6 was limited to import restrictions imposed upon the notification of LPNAI alone. In the United States' view, India's position is inconsistent with India's own arguments in the context of its other claim under Article 11, where India argues that the United States' claim was with respect to two products and HPNAI.<sup>664</sup> Moreover, the United States argues that India does not reference or explain the precise language upon which it bases its assertion that the United States limited its claim under Article 5.6 to measures addressing occurrences of LPNAI.

5.240. We begin by noting that India clarifies that it is *not* arguing that the United States' claim under Article 5.6 is not within the Panel's terms of reference. Instead, India argues that merely impugning a measure in the panel request does not absolve the complaining party of presenting arguments and evidence with respect to that claim.<sup>665</sup>

5.241. We do not consider that India has substantiated its contention that the United States' claim under Article 5.6 with respect to India's AI measures was limited to the imposition of import prohibitions upon occurrence of LPNAI, and that the Panel erred under Article 11 of the DSU in finding otherwise. The United States challenged India's AI measures, which, as defined by the Panel, impose prohibitions on the importation of ten product categories from countries reporting NAI, that is, both HPNAI and LPNAI.<sup>666</sup> As indicated in the table reproduced above, the United States identified the recommendations in the OIE Code that apply with respect to eight of those ten product categories. Moreover, we recall that the product-specific recommendations in the OIE Code that the United States relied upon as reasonably available alternative measures included recommendations that apply not only in respect of occurrences of LPNAI, but also in respect of countries regardless of their NAI status, which could apply to imports from countries reporting HPNAI. Thus, these recommendations address situations in which both HPNAI and LPNAI may be present. We, therefore, do not see that the United States limited its claim in the way that India now argues on appeal. Accordingly, we do not accept India's allegation that the Panel ruled on a claim which was not argued by the United States.

5.242. For the foregoing reasons, we 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 analysis of the consistency of India's AI measures with Article 5.6 of the SPS Agreement.

#### 5.4.5 Conclusion

5.243. We have found that the Panel did not err in finding that the United States had identified alternative measures that would achieve India's appropriate level of protection. We have also found that the Panel did not fail to identify the alternative measures with precision. Finally, we have found 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 analysis of the consistency of India's AI measures with Article 5.6 of the SPS Agreement.

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<sup>663</sup> India's appellant's submission, paras. 257-258 (referring to Appellate Body Report, *Chile – Price Band System*, para. 164).

<sup>664</sup> United States' appellee's submission, para. 196 (referring to India's appellant's submission, paras. 278-279).

<sup>665</sup> India's appellant's submission, para. 254.

<sup>666</sup> Panel Report, paras. 2.32 and 7.271.

5.244. In the light of these findings, we uphold the Panel's finding, in paragraphs 7.616 and 8.1.c.vii of the Panel Report, that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement because they are significantly more trade restrictive than required to achieve India's appropriate level of protection, with respect to the products covered by Chapter 10.4 of the OIE Code. Having upheld the Panel's finding under Article 5.6, we find it unnecessary to address India's request for reversal of the Panel's finding that India's AI measures are consequentially inconsistent with Article 2.2 of the SPS Agreement.

## 5.5 Article 2.3 of the SPS Agreement

5.245. India appeals certain aspects of the Panel's assessment of the United States' claim under Article 2.3, first sentence, of the SPS Agreement. India requests reversal of the Panel's finding that there is insufficient evidence on the record to support a finding that LPNAI is exotic to India, as well as its finding that the discrimination that India maintains, through its AI measures, against foreign products on account of LPNAI is arbitrary or unjustifiable, contrary to Article 2.3, first sentence, of the SPS Agreement.<sup>667</sup> In particular, India asserts that the Panel acted inconsistently with Article 11 of the DSU in the consultations with individual experts on India's disease situation in respect of LPNAI.<sup>668</sup>

5.246. In its Notice of Appeal, India claims that the "Panel erred in its interpretation and application of Article 2.3 of the SPS Agreement and/or failed to make an objective assessment of the matter pursuant to Article 11 of the DSU".<sup>669</sup> However, in its appellant's submission, India's challenge to the Panel's assessment of the United States' claims under Article 2.3 consists only of three claims of error under Article 11 of the DSU. At the oral hearing, India clarified that its appeal is not directed at the Panel's interpretation or application of Article 2.3. Accordingly, we restrict our analysis to India's claims under Article 11 of the DSU.

5.247. We begin by recalling the relevant parts of the Panel's assessment of the United States' claim under Article 2.3, first sentence, before addressing India's claims of error on appeal.

### 5.5.1 The Panel's findings

5.248. Before the Panel, the United States claimed that India's AI measures are inconsistent with Article 2.3 of the SPS Agreement because India takes a "diametrically different approach" to the regulation of trade in domestic products on account of AI in comparison to its regulation of trade in imported products on account of AI. Thus India's AI measures arbitrarily or unjustifiably discriminate against imported products and constitute a disguised restriction on trade.<sup>670</sup> Specifically, the United States argued that India's AI measures reflect two different "forms" of discrimination that are inconsistent with Article 2.3, first sentence: (i) India maintains a total ban on imported products if there is an NAI outbreak anywhere in the exporting country, as compared with a ban only on domestic products originating within a limited 10 km zone of the outbreak<sup>671</sup>; and (ii) India imposes bans on imported products on account of LPNAI, while India itself does not even maintain surveillance requirements that would result in the detection of LPNAI.<sup>672</sup>

5.249. Although the Panel found that the United States had demonstrated that India's AI measures are inconsistent with Article 2.3, first sentence, in respect of both forms of discrimination<sup>673</sup>, India's appeal concerns only one part of the Panel's findings concerning the second form of discrimination alleged by the United States, i.e. whether India's prohibition on the importation of products on account of LPNAI, coupled with its lack of a domestic surveillance regime capable of reliably detecting LPNAI occurring in India's domestic poultry flocks, amounts to arbitrary or unjustifiable discrimination between Members where identical or similar conditions prevail. Given the limited nature of India's appeal under Article 2.3, first sentence, we focus below on the Panel's analysis with respect to the second form of discrimination alleged by the United States.

<sup>667</sup> India's Notice of Appeal, para. 18 (referring to Panel Report, paras. 7.454 and 7.457).

<sup>668</sup> India's appellant's submission, para. 284.

<sup>669</sup> India's Notice of Appeal, para. 17.

<sup>670</sup> Panel Report, para. 7.348.

<sup>671</sup> Panel Report, paras. 7.352-7.357.

<sup>672</sup> Panel Report, paras. 7.358-7.364.

<sup>673</sup> Panel Report, para. 7.472.

5.250. The Panel began its examination of Article 2.3, first sentence, by recalling the compliance panel's finding in *Australia – Salmon (Article 21.5 – Canada)* that three cumulative elements should be established to find a violation of that provision, namely, that:

- i. 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;
- ii. the discrimination is arbitrary or unjustifiable; and
- ii. identical or similar conditions prevail in the territories of the Members concerned.<sup>674</sup>

5.251. The Panel addressed each of the above three elements separately with regard to the second form of discrimination alleged by the United States. The Panel also indicated that it was for the United States, as the complainant, to demonstrate that all three elements are satisfied for purposes of its overall case under Article 2.3, first sentence.<sup>675</sup> India's appeal is mainly directed at the Panel's treatment of the second of the three elements. We nevertheless consider it useful to summarize briefly the Panel's analysis of all three of the above elements with respect to the second form of discrimination alleged by the United States in order to situate India's appeal within its context.

5.252. With regard to the first element, the Panel considered it appropriate to interpret "discrimination" in Article 2.3 in a manner similar to that adopted by the Appellate Body in interpreting similar language under the chapeau to Article XX of the GATT 1994.<sup>676</sup> In order to determine whether India discriminates against other WTO Members (including the United States) by maintaining an import prohibition on products coming from countries that have notified LPNAI, while not maintaining adequate surveillance to detect LPNAI within its territory (and therefore not taking steps necessary to restrict domestic products on account of LPNAI), the Panel set out to analyse India's surveillance regime for LPNAI.<sup>677</sup> Having surveyed the text of India's NAP 2012<sup>678</sup>, the Panel understood that "India maintains a surveillance regime for AI through the NAP 2012". The Panel therefore turned to consider whether "this surveillance regime is adequate to detect LPNAI".<sup>679</sup> To this end, the Panel asked the individual experts whether India's surveillance activities would reliably detect LPNAI in poultry.<sup>680</sup> Based on their written and oral responses, the Panel considered it "clear ... that all three individual experts are in agreement that India does not have in place a surveillance system capable of reliably detecting LPNAI".<sup>681</sup> The Panel thus could not conclude, on the basis of the evidence before it, that the surveillance regime that exists under the NAP 2012 is adequate to reliably detect LPNAI.<sup>682</sup> Having reached this factual conclusion, the Panel explained that:

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. In contrast, 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. Therefore, India treats domestic and imported products differently with respect to the risk of LPNAI, depending on whether that risk originates within India or in another Member.<sup>683</sup>

<sup>674</sup> Panel Report, para. 7.389 (referring to Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.111).

<sup>675</sup> Panel Report, paras. 7.391, 7.426, and 7.458.

<sup>676</sup> Panel Report, para. 7.400. The Panel also noted that the first element under Article 2.3, first sentence, contains both a national treatment obligation and a most-favoured nation obligation. (*Ibid.*, fn 760 to para. 7.391)

<sup>677</sup> Panel Report, para. 7.414.

<sup>678</sup> See *supra*, fn 628 to para. 5.217.

<sup>679</sup> Panel Report, para. 7.417.

<sup>680</sup> Panel Report, para. 7.418.

<sup>681</sup> Panel Report, para. 7.423.

<sup>682</sup> Panel Report, para. 7.423.

<sup>683</sup> Panel Report, para. 7.424.

5.253. With regard to the second element under Article 2.3, first sentence, the Panel began its analysis by noting that the United States had to demonstrate that the manner in which India's AI measures discriminate between the territory of India and the territories of other Members is arbitrary or unjustifiable.<sup>684</sup> The Panel considered the interpretation of "arbitrary or unjustifiable" in the context of Article XX of the GATT 1994 to be of "some utility" in its analysis under Article 2.3 of the SPS Agreement.<sup>685</sup> Referring to the Appellate Body's understanding of this term in *Brazil – Retreaded Tyres*, the Panel observed that the meaning of "arbitrary or unjustifiable discrimination" in Article 2.3 involves consideration of the "cause" or "rationale" put forward to explain the discrimination in question, and whether there is a "rational connection" between the reasons given for the discriminatory treatment and the objective of the measure.<sup>686</sup> The Panel noted that, according to the United States, the differential treatment accorded by India to imported and domestic products is arbitrary or unjustifiable because the risks posed by both sets of products is the same, but the lack of reliable surveillance for LPNAI means that, in practice, trade in domestic products is not restricted on account of LPNAI.<sup>687</sup> The Panel further observed that India, referring to the panel report in *Australia – Salmon*, argued that the risks relating to diseases present in the territory of a Member are different from those relating to diseases that are exotic, and asserted that LPNAI is exotic to India.<sup>688</sup>

5.254. In order to determine whether the differential treatment maintained by India is arbitrary or unjustifiable, the Panel focused on the cause of the discrimination and the rationale put forward by India to explain its existence, namely, that LPNAI is not present in – or is "exotic to" – India, and that this is a cause for greater concern in terms of the risk of introduction of LPNAI and its potential impact in India. The Panel recalled the Appellate Body's jurisprudence on the allocation of the burden of proof and the distinction between a complainant's burden of establishing a *prima facie* case of inconsistency with a provision of a covered agreement, and the principle that the party asserting a fact is responsible for providing proof thereof. Having done so, the Panel preliminarily observed that India had the burden of proving that LPNAI is exotic to India.<sup>689</sup>

5.255. The Panel sought the advice of the individual experts "in order to help it evaluate the parties' arguments and the evidence supporting the presence, or lack thereof, of LPNAI in India".<sup>690</sup> The Panel asked the experts the following questions: (i) whether the evidence provided by India supports India's statement that LPNAI is exotic to poultry in India; (ii) whether it is plausible that a country that has experienced multiple H5N1 HPNAI outbreaks, such as India, is free from LPNAI; and (iii) whether anything can be inferred about the LPNAI situation in India from a study, submitted by the United States, in which H5 and H7 antibodies were found in ducks in India (the Pawar et al. study).<sup>691</sup> In the light of the responses provided by the individual experts<sup>692</sup>, the Panel concluded that there was insufficient evidence on the record to support a finding that LPNAI is exotic to India.<sup>693</sup> In doing so, the Panel took particular account of the individual experts' observations that the documents submitted by India to support its assertion that LPNAI is exotic to India did not support this contention, and of their affirmation that the evidence on the record indicated that India's surveillance regime is not adequate to detect reliably LPNAI. The Panel also stressed that it was not making a finding on whether or not LPNAI is exotic to India. Rather, its conclusion was limited to a determination of whether the assertion that LPNAI is exotic to India was supported by the facts and the evidence presented.<sup>694</sup> Considering the burden of proof under the SPS Agreement and the fact that the alleged absence of LPNAI in India constitutes the rationale put forward by India in response to the United States' argument that India unjustifiably treats imported products differently from domestic products, the Panel found that India had not rebutted the United States' *prima facie* case of arbitrary or unjustifiable

<sup>684</sup> Panel Report, para. 7.426.

<sup>685</sup> Panel Report, para. 7.427.

<sup>686</sup> Panel Report, paras. 7.428-7.429 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 227).

<sup>687</sup> Panel Report, para. 7.428.

<sup>688</sup> Panel Report, para. 7.378.

<sup>689</sup> Panel Report, paras. 7.438-7.442 (referring to Appellate Body Reports, *EC – Hormones*, para. 98; and *Japan – Apples*, paras. 154-157). See also para. 7.426 (in that paragraph, the Panel set out the legal standard that the United States "must demonstrate that the manner in which India's AI measures discriminate between the territory of India and the territory of other Members is arbitrary or unjustifiable.")

<sup>690</sup> Panel Report, para. 7.443.

<sup>691</sup> Panel Report, para. 7.443.

<sup>692</sup> Panel Report, paras. 7.444-7.453.

<sup>693</sup> Panel Report, para. 7.454.

<sup>694</sup> Panel Report, paras. 7.454-7.455.

discrimination. Therefore, the Panel found the discrimination that India maintains, through its AI measures, against foreign products on account of LPNAI to be arbitrary or unjustifiable, contrary to Article 2.3 of the SPS Agreement.<sup>695</sup>

5.256. Finally, in respect of the third element of Article 2.3, first sentence, the Panel's understanding of the term "identical and similar conditions" was similar to that of the compliance panel in *Australia – Salmon (Article 21.5 – Canada)*. Specifically, the Panel noted: first, that the same facts that inform the assessment of whether or not discrimination is arbitrary or unjustifiable may also inform the assessment of whether or not identical or similar conditions prevail; and, second, that the relevant "conditions", for the purpose of a given analysis, may be the presence of a disease within a territory (and the concomitant risk associated with that disease).<sup>696</sup> The Panel thus agreed with India's contention that, if the relevant disease is present in one country but not in another, this may be an indication that identical or similar conditions do not exist. However, in view of the fact that India had not discharged its burden of proving that LPNAI is exotic to India, and the Panel's finding that India does not maintain a surveillance mechanism adequate to detect reliably the presence or absence of LPNAI within its territory, there was no foundation upon which the Panel could, in this dispute, take account of any such indication.<sup>697</sup>

5.257. Given that similar factors can be considered for the purpose of determining both whether a measure discriminates in a manner that is arbitrary or unjustifiable, and whether identical or similar conditions prevail under Article 2.3, first sentence<sup>698</sup>, the Panel observed that the risk against which India is protecting is LPNAI, and that there was no evidence before the Panel to suggest that the risks associated with LPNAI are in any way different on the basis of the origin of the relevant product. Thus, the Panel considered that India is protecting against an identical or similar risk when it takes measures to protect against LPNAI, regardless of whether the relevant product originates in India or in the United States or somewhere else. Therefore, the Panel found that the risks against which India is protecting in India constitute conditions that are similar to those in other Members, including the United States.<sup>699</sup>

5.258. Having thus found that all three elements to establish a violation of the first sentence of Article 2.3 were satisfied in respect of the second form of discrimination alleged by the United States, this finding, together with the same finding that it made in respect of the first form of alleged discrimination, led the Panel to conclude that India's AI measures are inconsistent with the first sentence of Article 2.3 because they arbitrarily and unjustifiably discriminate between India and other Members in which the same or similar conditions prevail.<sup>700</sup>

### 5.5.2 India's claims under Article 11 of the DSU

5.259. On appeal, India does not challenge any aspect of the Panel's interpretation of Article 2.3, first sentence, of the SPS Agreement or its application of that provision to India's AI measures. Instead, the three claims of error raised by India on appeal are all claims that the Panel failed to make an objective assessment, and thereby acted inconsistently with Article 11 of the DSU, in its analysis of the United States' claims under Article 2.3, first sentence, with respect to the second form of discrimination alleged by it, and, in particular, with respect to the Panel's analysis of whether such discrimination is "arbitrary or unjustifiable".

5.260. Before addressing India's claims under Article 11 of the DSU, we wish to make some preliminary observations. We begin by observing that, notwithstanding certain similarities between its language and that of the chapeau of Article XX of the GATT 1994, Article 2.3, first sentence, of the SPS Agreement, sets out an obligation and is not expressed in the form of an exception. Thus, a complainant raising a claim that a Member's SPS measure is inconsistent with Article 2.3, first sentence, bears the overall burden of establishing its *prima facie* case of inconsistency.<sup>701</sup>

<sup>695</sup> Panel Report, para. 7.457.

<sup>696</sup> Panel Report, para. 7.460.

<sup>697</sup> Panel Report, para. 7.467.

<sup>698</sup> Panel Report, para. 7.468.

<sup>699</sup> Panel Report, paras. 7.468-7.470.

<sup>700</sup> Panel Report, para. 7.472.

<sup>701</sup> See Panel Report, paras. 7.391, 7.426, and 7.458.

5.261. We also note that, in assessing the United States' claim under the first sentence of Article 2.3, the Panel followed the analytical approach adopted by the compliance panel in *Australia – Salmon (Article 21.5 – Canada)*. In so doing, the Panel analysed separately the three elements of a violation of the first sentence of Article 2.3 in a sequential order, beginning with an examination of whether India's AI measures discriminate against imported products, and concluding with an analysis of the issue of whether identical or similar conditions prevail in the territories of the United States and India. We observe that the three elements identified in the first sentence of Article 2.3 inform each other<sup>702</sup>, such that the analysis of each element cannot be undertaken in strict isolation from the analysis of the other two elements. While a sequential analysis of distinct elements may provide a useful framework within which to scrutinize a particular measure's conformity with the first sentence of Article 2.3, the use of such a framework does not, in itself, alter the content of the examination required or affect the overall burden of proof that is borne by a complainant under that provision. Indeed, the analytical approach adopted by a panel may vary as a function of, *inter alia*, the measure at issue, the nature of the alleged discrimination, and the particular circumstances of a case. We observe, in this connection, that the text of Article 2.3, first sentence, does not appear to mandate the particular order of analysing the requirements thereunder that was followed by the Panel in this dispute. Indeed, it seems to us that, logically, identifying the relevant conditions, and assessing whether they are identical or similar, will often provide a good starting point for an analysis under Article 2.3, first sentence.<sup>703</sup>

#### **5.5.2.1 Whether the Panel failed to make an objective assessment by setting "terms of reference" for individual experts that were beyond the scope of the OIE Code**

5.262. India alleges that the Panel acted inconsistently with Article 11 of the DSU because the "terms of reference" of the Panel's consultations with the individual experts went beyond the scope of the OIE Code.<sup>704</sup> India submits that Article 1.6.1 of Chapter 1.6 of the OIE Code recognizes five diseases and that, in order to receive official recognition of disease-free status from the OIE with respect to one of these diseases, a country has to submit documentary evidence that is evaluated by the OIE. By contrast, India stresses that this procedure is not applicable in respect of other OIE-listed diseases, including AI.<sup>705</sup> For such other diseases, an OIE member's claim of NAI freedom is not subject to evaluation. Thus, India's claim that it is free from LPNAI could not properly have been subject to any technical or scientific evaluation by the OIE, much less by any individual experts unaffiliated with the OIE.<sup>706</sup> For India, the Panel should itself have interpreted and applied Article 1.6.1 of the OIE Code when framing its "terms of reference" to the individual experts, and should have understood that this provision only requires self-certification for a country's AI status. Instead, the Panel required the experts to assess and review the evidence submitted by India to support its claim that it is free from LPNAI.<sup>707</sup> India alleges that, by doing so, the Panel incorrectly interpreted and applied Chapter 1.6 of the OIE Code, and, for India, wrongly placed AI on the same pedestal as the diseases listed in Article 1.6.1 for which members may request official recognition from the OIE, even though AI is not one of them.<sup>708</sup> On this basis, India seeks reversal of those Panel findings that were based upon the testimony provided by the individual experts.<sup>709</sup>

5.263. According to the United States, because Article 11 of the DSU requires a panel to assess whether the evidence on the record supports the assertions made by the parties, even if the

<sup>702</sup> Indeed, the Panel itself appears to have recognized this. (See Panel Report, paras. 7.460 and 7.468)

<sup>703</sup> For example, we regard the approach that the Appellate Body sought to take in *Australia – Salmon* as suggesting that the analysis under Article 2.3, first sentence, should begin by considering whether identical or similar conditions prevail in the relevant territories. Although the Appellate Body was ultimately unable to complete the analysis under Article 2.3 in that dispute, its reasoning suggests that it would have begun the analysis by examining the relevant conditions in the territories being compared, and assessing their similarity. (Appellate Body Report, *Australia – Salmon*, para. 255 ("In the context of an examination under Article 2.3, first sentence, it would *first of all* be necessary to determine the risk to Australia's salmonid population resulting from diseases ... which are endemic to some parts of Australia but exotic to others." (emphasis added))) See also, in the context of the analysis under the chapeau of Article XX of the GATT 1994, Appellate Body Reports, *EC – Seal Products*, paras. 5.299 and 5.317.

<sup>704</sup> India's appellant's submission, heading E(b).

<sup>705</sup> India's appellant's submission, para. 291 (referring to OIE's response to Panel question No. 9, pp. 19-21).

<sup>706</sup> India's appellant's submission, para. 292.

<sup>707</sup> India's appellant's submission, para. 293.

<sup>708</sup> India's appellant's submission, paras. 292-294.

<sup>709</sup> India's appellant's submission, para. 297.



OIE Code had provided that an OIE member should defer to another OIE member's self-assessment that it has no AI, this could not have absolved the Panel of its responsibility to assess the evidence on the record and determine whether such evidence supported India's assertion of being LPNAI free.<sup>710</sup> The United States highlights that India fails to identify anything in the OIE Code that prescribes the weight that a WTO panel, as opposed to OIE members, must give to the self-assessment by an OIE member of its disease situation with respect to a listed disease for which the OIE does not grant official recognition, such as AI. The part of the OIE Code relied on by India (Article 1.6.1) addresses what an OIE member making a claim of its disease status with respect to a disease can or should do, and what the OIE may or will not do in response; however, it "does not speak to any other entity".<sup>711</sup> Further, the United States asserts that there is nothing in the OIE Code to support India's position that a country's self-declaration of its AI situation must be accepted as "unassailably correct", including by the Panel in this dispute.<sup>712</sup> Article 1.6.1 of the OIE Code states that members "may" inform the OIE of their claimed disease status, and that the OIE may "publish" such claims, but that "[p]ublication does not imply endorsement of the claim".<sup>713</sup> Given that self-declarations of disease status are merely claims, and not official disease statuses, the United States submits that the Panel could not have failed to make an objective assessment by considering whether the evidence supports India's self-assertion of LPNAI freedom, and by posing questions to the experts relating to this issue.<sup>714</sup> The United States also stresses that Chapter 10.4 of the OIE Code, which specifically concerns AI, is consistent with the Panel's approach, as it makes clear that self-declarations of freedom from AI must be supported by evidence of surveillance capable of justifying the self-categorization.<sup>715</sup>

5.264. The United States submits that the adequacy of India's LPNAI surveillance to detect reliably LPNAI and to support India's claim of LPNAI freedom are "technical questions" on which the Panel could have reasonably sought expert assistance in interpreting the evidence put forth by the parties, consistently with Article 11.2 of the SPS Agreement and Article 11 of the DSU.<sup>716</sup> Given these facts, as well as the importance of the issue of the adequacy of India's surveillance regime for LPNAI in this dispute, the United States contends that it was fully consistent with Article 11 of the DSU for the Panel to have asked the experts what the evidence showed about India's AI surveillance and about India's assertion that LPNAI is not present within its territory.

5.265. We begin by recalling that a panel's duties are set out in Article 11 of the DSU, which requires a panel to make "an objective assessment of the facts of the case", including an assessment of whether the evidence on the record supports a party's assertion. In this case, we note that India is not claiming that the Panel's use of, or reliance upon, the responses provided by the individual experts as part of its assessment of the United States' claims violated Article 11. Instead, India's challenge goes to the scope of the Panel's consultations with the individual experts, as set out in the "terms of reference" for the individual experts, and the questions posed to the experts by the Panel. The "terms of reference" that India appears to be taking issue with<sup>717</sup> state that "the Panel will conduct: ... a written and oral consultation with two experts on the AI surveillance regime with particular reference to India's domestic measures and its disease situation".<sup>718</sup> We also note that, in the context of these dispute settlement proceedings, it was India that made the assertion that it was LPNAI free.<sup>719</sup> The Panel was thus required, by the terms of Article 11 of the DSU, to assess whether India's assertion was supported by the evidence on the

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<sup>710</sup> United States' appellee's submission, para. 128.

<sup>711</sup> United States' appellee's submission, para. 129 (referring to India's appellant's submission, para. 290).

<sup>712</sup> United States' appellee's submission, para. 130 (referring to India's appellant's submission, paras. 291-294).

<sup>713</sup> United States' appellee's submission, para. 132 (quoting OIE Code, Article 1.6.1, and referring to OIE's response to Panel question No. 9, pp. 19-21).

<sup>714</sup> United States' appellee's submission, para. 132.

<sup>715</sup> United States' appellee's submission, para. 133 (referring to OIE Code, Chapters 10.4.27-10.4.32 (Panel Exhibit US-1); Article 10.4.29, para. 1; and Article 10.4.30, para. 1).

<sup>716</sup> United States' appellee's submission, para. 135.

<sup>717</sup> India's appellant's submission, para. 293 (referring to letter dated 10 September 2013 from the Panel to the parties).

<sup>718</sup> Letter dated 10 September 2013 from the Panel to the parties. Notwithstanding the reference to "two experts" in the initial "terms of reference" framed by it, following receipt of the curricula vitae, lists of publications, and other relevant documentation pertaining to potential experts, the Panel subsequently decided to select three, rather than two, individual experts. (Panel Report, para. 1.23 and fn 15 thereto)

<sup>719</sup> Panel Report, paras. 7.413 and 7.439.

record.<sup>720</sup> India appears to suggest that Chapter 1.6 of the OIE Code precludes such an assessment, and required the Panel simply to accept India's self-assessment. India submits that "the Panel's terms of reference to the individual experts [are] *inconsistent with the obligations* provided under Chapter 1.6 of the OIE Code".<sup>721</sup> Chapter 1.6 of the OIE Code, however, does not prescribe duties and obligations for WTO panels, and it cannot override the text of Article 11 of the DSU, which sets out the function of WTO panels and requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts of the case. Nothing in the text of Article 11 of the DSU prevented the Panel from setting "terms of reference" for the individual experts and posing questions concerning an issue which, given the manner in which India sought to defend itself against the claim raised by the United States under Article 2.3, first sentence, was clearly relevant to the matter before it, namely, India's disease status as regards LPNAI.

5.266. For these reasons, we do not accept that India's argument that, by virtue of the OIE Code, the Panel was required to accept as definitive India's self-assessment of being LPNAI free. Thus, we reject India's claim, under Article 11 of the DSU, that the Panel failed to make an objective assessment of the matter before it by setting "terms of reference" for individual experts, and posing questions to them, that went beyond the scope of the OIE Code.

### **5.5.2.2 Whether the Panel failed to make an objective assessment by requiring India to prove that LPNAI is exotic to India, instead of requiring the United States, as the complainant, to establish *prima facie* its allegation that LPNAI should be present in India**

5.267. India's second claim of error under Article 11 of the DSU relates to the allocation of the burden of proof by the Panel. Recalling that the initial burden of proof to establish a *prima facie* case in an SPS dispute lies on the complainant, India asserts that the burden of proof was on the United States to establish its allegation that LPNAI is present in India.<sup>722</sup> According to India, however, the Panel's questions to the experts erroneously shifted the burden of proving the opposite onto India. In India's view, the Panel should have asked the experts to opine first on whether the evidence submitted by the United States supported its allegations, and only then could it have asked the experts to assess India's evidence.<sup>723</sup> The Panel, however, expressly stated that the burden to establish that LPNAI is exotic to India was on India.<sup>724</sup> India submits that, as a result of the Panel's approach, the United States' arguments and evidence on this issue were not "evaluated at all", even though it was clear that the United States had failed to present a *prima facie* case.<sup>725</sup> Moreover, India argues that, because the OIE Code requires countries to report any occurrence of LPNAI, the fact that India had never reported an occurrence of LPNAI to the OIE should have been sufficient for the Panel to conclude that LPNAI is exotic to India.<sup>726</sup> India claims that, by wrongly allocating the burden of proof to India in this manner, the Panel acted inconsistently with Article 11 of the DSU.<sup>727</sup>

5.268. Referring to WTO jurisprudence, the United States responds that the Panel rightly explained that, while the United States had the burden of establishing a *prima facie* case, India had the burden of proving those facts it asserted in attempting to rebut that case.<sup>728</sup> In the present case, the United States asserts that it had established that India treats domestic and imported products differently with respect to the risk of LPNAI, depending on whether the risk originates in India or in another Member. The United States had therefore made a *prima facie* case that India's AI measures discriminate against imported products in an apparently arbitrary manner and without apparent justification. In order to rebut this *prima facie* case, India had the burden of

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<sup>720</sup> At the oral hearing, India clarified that the "self-declaration" allegedly made by it to the OIE, within the meaning of Article 1.6.1 of the OIE Code, was not a part of the Panel record. Thus, by referring to its "self-declaration", India appears to be referring simply to its factual assertion that it is LPNAI free. This assertion was not made to the OIE, but rather to the Panel in this dispute.

<sup>721</sup> India's appellant's submission, para. 293 (referring to letter dated 10 September 2013 from the Panel to the parties). (emphasis added; fn omitted)

<sup>722</sup> India's appellant's submission, paras. 298-299 (referring to Panel Report, para. 7.442).

<sup>723</sup> India's appellant's submission, para. 300.

<sup>724</sup> India's appellant's submission, para. 301 (referring to Panel Report, para. 7.442).

<sup>725</sup> India's appellant's submission, para. 302.

<sup>726</sup> India's appellant's submission, para. 303.

<sup>727</sup> India's appellant's submission, para. 304.

<sup>728</sup> United States' appellee's submission, para. 138 (referring to Appellate Body Report, *Japan – Apples*, paras. 152 and 154; and Panel Report, para. 7.442).

establishing the facts supporting any justification for the discriminatory treatment.<sup>729</sup> The Panel correctly explained that India's justification for the differential treatment is that LPNAI is exotic to India, and the Panel therefore correctly proceeded to assess whether the factual premise of India's justification, i.e. that LPNAI is exotic to India, was supported by the evidence adduced by India.<sup>730</sup> Contrary to India's assertion, the United States submits that it did not have to establish that LPNAI is present in India in order to establish its *prima facie* case. Instead, with respect to the second form of alleged discrimination, the United States' case focused on the fact that India imposed LPNAI-based import bans, but failed to undertake surveillance capable of reliably detecting LPNAI domestically.<sup>731</sup> The United States points out that the Panel found that the United States had established this point, and that India does not contest the Panel's findings in this regard.<sup>732</sup> By contrast, it was India's assertion before the Panel that LPNAI was absent from India and this, therefore, was a fact that India needed to establish.<sup>733</sup>

5.269. The United States also takes issue with India's argument that, since India never reported an occurrence of LPNAI to the OIE, the Panel should have accepted that India had established that LPNAI is absent from India.<sup>734</sup> The United States views this as a "repackaging" of India's argument that India's self-assessment of LPNAI freedom should have been accepted by the Panel as a fact, even in the absence of scientific evidence supporting it – an argument which is contrary to both logic and the requirements of the OIE Code.<sup>735</sup> Moreover, the United States submits that the Panel's questions to the experts on whether India is LPNAI free did not reflect an allocation by the Panel of the burden of proof, but, instead, only sought expert comments on what the evidence on the record showed regarding different points made by the parties on the issue.<sup>736</sup>

5.270. We consider that India's second claim of error under Article 11 of the DSU raises three issues: (i) whether the Panel's questions to the individual experts erroneously shifted the burden of proof onto India; (ii) whether the Panel erred in concluding that India had the burden of proving that LPNAI is exotic to India; and (iii) whether the Panel erred in failing to find that India had discharged any burden of proof that it bore by establishing that it has never reported to the OIE an occurrence of LPNAI within its territory.

5.271. As to the first issue, we have difficulty accepting India's assertion that the "Panel's questions to individual experts erroneously shifted the burden of proof onto India".<sup>737</sup> India explains that, "[s]ince it was the United States that had presented the hypothesis that LPNAI must be present in India as it is ubiquitous in wild birds, the Panel should have asked the experts to opine first and foremost whether this assumption was borne out by the evidence advanced by the United States and then could have asked the individual experts to assess India's arguments and evidence."<sup>738</sup> Instead, India alleges that the Panel's approach "resulted in the United States' arguments and evidence with respect to this issue not being evaluated at all".<sup>739</sup>

5.272. We recall that, in order to "help it evaluate the parties' arguments and the evidence supporting the presence, or lack thereof, of LPNAI in India", the Panel sought the advice of experts and asked them the following three questions: (i) whether the evidence provided by India supports India's statement that LPNAI is exotic to poultry in India; (ii) whether it is plausible that a country such as India that has experienced multiple H5N1 HPNAI outbreaks is free from LPNAI; and (iii) whether anything can be inferred about the LPNAI situation in India from a study, submitted

<sup>729</sup> United States' appellee's submission, para. 139 (referring to Panel Report, paras. 7.425 and 7.438).

<sup>730</sup> United States' appellee's submission, para. 140 (referring to Panel Report, para. 7.441).

<sup>731</sup> United States' appellee's submission, para. 141 (referring to India's appellant's submission, para. 299).

<sup>732</sup> United States' appellee's submission, para. 141 (referring to Panel Report, paras. 7.412 and 7.423-7.424; and United States' first written submission to the Panel, para. 174).

<sup>733</sup> United States' appellee's submission, para. 142.

<sup>734</sup> United States' appellee's submission, para. 143 (referring to India's appellant's submission, para. 303).

<sup>735</sup> United States' appellee's submission, paras. 143-144.

<sup>736</sup> United States' appellee's submission, para. 145.

<sup>737</sup> India's appellant's submission, para. 300.

<sup>738</sup> India's appellant's submission, para. 300. (fn omitted)

<sup>739</sup> India's appellant's submission, para. 302.

by the United States, in which H5 and H7 antibodies were found in ducks in India (the Pawar et al. study).<sup>740</sup>

5.273. As an initial matter, we consider that, given the broad discretion that panels enjoy in consulting with experts, the mere posing of questions to individual experts does not, in and of itself, constitute a panel's allocation of the burden of proof as between the parties to a dispute. Moreover, we note that, of the three questions posed by the Panel to the experts on the status of LPNAI in India, question No. 1 sought the experts' views on evidence submitted by India<sup>741</sup>; question No. 2 sought to get the experts' views on evidence submitted by both India and the United States<sup>742</sup>; and question No. 3 sought the experts' opinion on a study submitted by the United States.<sup>743</sup> Thus, the questions posed by the Panel to the individual experts concerned the arguments and evidence submitted by both India and the United States, and do not, in the context and circumstances of this dispute, equate to somehow shifting the burden of proof onto India, or result in "the United States' arguments and evidence with respect to this issue not being evaluated at all".<sup>744</sup>

5.274. The second issue raised by India is whether the Panel acted inconsistently with Article 11 of the DSU in concluding that "it is India which had the burden of proof to establish that LPNAI is exotic to India".<sup>745</sup> As to the allocation of the burden of proof with respect to claims under the SPS Agreement, we recall that the initial burden lies on the complaining party, which must establish a *prima facie* case that the respondent's SPS measure is inconsistent with a particular provision of the SPS Agreement.<sup>746</sup> Once a *prima facie* case has been made, the defending party bears the burden of rebutting it.<sup>747</sup> Yet, this "does not imply that the complaining party is responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent with a given provision of a covered agreement. In other words, although the complaining party bears the burden of proving its case, the responding party must prove the case it seeks to make in response."<sup>748</sup> As the Panel rightly recognized, this burden also requires that a responding party asserting a fact is responsible for providing proof thereof.<sup>749</sup>

5.275. Keeping in mind these general observations, we recall that the United States claimed before the Panel that "India's measures unjustifiably discriminate against imported products by banning them from India following detections of LPNAI in the exporting country, while India does not even maintain surveillance requirements that would result in detection of LPNAI cases occurring in India's domestic poultry flocks".<sup>750</sup> In support of its claim of discrimination, the United States submitted that India's surveillance regime is not mandatory, and that the principal means of detection of LPNAI is visual observation.<sup>751</sup> According to the United States, the effect of this is

<sup>740</sup> Panel Report, para. 7.443.

<sup>741</sup> Question No. 1 "relates to India's assertion that LPNAI 'is exotic to poultry in India'", and reads, in part, as follows: "[D]oes the evidence provided by India, including Exhibits IND-7 to IND-15, support India's statement that LPNAI is exotic to poultry in India?" (Panel questions to individual experts of 24 October 2013, paras. 2.1 and 2.4)

<sup>742</sup> Question No. 2 "relates to the United States' allegation that ... it is simply not plausible that, during a period when India had over ninety HPNAI outbreaks, there were no cases of LPNAI in India". It reads, in part, as follows: "In light of the above [parties'] statements as well as evidence submitted by the parties about India's LPNAI situation, including Exhibits US-89, US-90, US-92, US-106, US-122, US-143, US-144, US-145, IND-47, IND-115 and IND-117, is it plausible that a country that has experienced multiple H5N1 HPNAI outbreaks is free of LPNAI? Please cite to the scientific evidence or information in the record that supports your conclusions." (Panel questions to individual experts of 24 October 2013, para. 2.7)

<sup>743</sup> Question No. 3 "relates to a study by Dr Pawar *et al.* ... submitted by the United States as Exhibit US-122". Referring to the study, the Panel asked the experts to "provide [their] professional opinion on what can be inferred from the finding of H5 and H7 antibodies in ducks in India about the LPNAI situation in India". (Panel questions to individual experts of 24 October 2013, para. 2.12)

<sup>744</sup> India's appellant's submission, para. 302.

<sup>745</sup> India's appellant's submission, para. 301 (referring to Panel Report, para. 7.442).

<sup>746</sup> As discussed *supra*, in para. 5.260, a complainant bears the overall burden of establishing *prima facie* the inconsistency of the SPS measure(s) at issue with Article 2.3, first sentence.

<sup>747</sup> Appellate Body Report, *EC – Hormones*, para. 98 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997: I, p. 335).

<sup>748</sup> Appellate Body Report, *Japan – Apples*, para. 154.

<sup>749</sup> Panel Report, para. 7.442 (referring to Appellate Body Report, *Japan – Apples*, para. 157).

<sup>750</sup> Panel Report, para. 7.358 (referring to United States' first written submission to the Panel, para. 174).

<sup>751</sup> Panel Report, para. 7.412 (referring to United States' first written submission to the Panel, paras. 176-178).

that "in practice ... while India relies on the detection of LPNAI to ban the sale of products, India in fact applies LPNAI-based bans only to imported products because India has failed to put in place measures that would effectively detect LPNAI, so India is not taking steps necessary to restrict domestic products on account of LPNAI".<sup>752</sup> Although the United States did put forth arguments and evidence to establish that LPNAI is present in India<sup>753</sup>, it explained that this was not the most "crucial point" for the purpose of its claim with respect to the second form of discrimination.<sup>754</sup> For example, the United States stated that India's response that LPNAI is exotic to India "miss[es] the point" because "India's imposition of import bans based on LPNAI detections in exporting Members discriminates against imports *not because LPNAI incidents have occurred in India, but because India's surveillance for LPNAI is inadequate, resulting in a situation where controls on trade in domestic products due to domestic LPNAI will not be imposed.*"<sup>755</sup>

5.276. India, on the other hand, "d[id] not make arguments in relation to whether or not its AI measures are discriminatory *per se*; however, India *stresse[d] that LPNAI is exotic to India*".<sup>756</sup> India argued that, because LPNAI is not present within India, "the risk associated with the introduction of LPNAI means that 'India is fully justified in prohibiting imports of poultry and poultry products from countries upon a declaration of LPNAI'."<sup>757</sup> More specifically, India relied on its assertion that LPNAI is exotic to India in contending that the conditions in India are not similar or identical to those in the United States<sup>758</sup>; that its AI measures do not discriminate against imported products from other WTO Members<sup>759</sup>; and that any discriminatory treatment is not arbitrary or unjustifiable because there is a legitimate rationale for such treatment.<sup>760</sup>

5.277. Thus, from the parties' positions before the Panel it appears that the factual assertion that LPNAI is exotic to India was the crux of India's rebuttal with respect to all three elements under the first sentence of Article 2.3, and not an element of the United States' *prima facie* case with respect to the second form of discrimination. We recall that the United States sought to establish its *prima facie* case by demonstrating, *inter alia*, that India's AI measures arbitrarily and unjustifiably discriminate against imported products because they prohibit imports upon occurrence of LPNAI, when India does not have in place a surveillance system capable of reliably detecting LPNAI, and, therefore, has not taken a critical step that would be necessary to make it possible to restrict domestic products on account of LPNAI.

5.278. Our review of the Panel's analysis confirms that this is indeed how the Panel understood the content of the United States' *prima facie* case and the nature of India's factual assertion that LPNAI is exotic to India. We note, in this regard, that the Panel made several findings in the course of its overall analysis of the different aspects of the United States' claim that are not the subject of India's appeal. The Panel found, for example, that the risks against which India is protecting (i.e. LPNAI) constitute conditions that are similar in India and other Members (including the United States).<sup>761</sup> The Panel also found that India treats domestic and imported products differently with respect to the risk of LPNAI, depending on whether that risk originates within India or in another Member.<sup>762</sup> The Panel reached the latter finding after having compared the import prohibition that India maintains against countries that have notified LPNAI with the surveillance regime that India maintains for LPNAI in India, and found that the evidence before it did not suffice to establish that India's domestic surveillance regime is adequate to detect reliably LPNAI.

<sup>752</sup> Panel Report, para. 7.412 (quoting United States' first written submission to the Panel, para. 180).

<sup>753</sup> Panel Report, para. 7.360 (referring to United States' second written submission to the Panel, para. 91).

<sup>754</sup> Panel Report, para. 7.360.

<sup>755</sup> Panel Report, para. 7.361. (emphasis added)

<sup>756</sup> Panel Report, para. 7.395 (referring to India's first written submission to the Panel, paras. 201-207). (emphasis added)

<sup>757</sup> Panel Report, para. 7.439 (quoting India's first written submission to the Panel, para. 214).

<sup>758</sup> Panel Report, paras. 7.395 and 7.466.

<sup>759</sup> Panel Report, paras. 7.395 and 7.413.

<sup>760</sup> Panel Report, para. 7.439.

<sup>761</sup> Panel Report, para. 7.470. In reaching this finding under the third element of its analysis under Article 2.3, first sentence, the Panel stated that there was no evidence before it "to suggest that the risks associated with LPNAI are in any way different on the basis of the origin of the relevant product" and, thus, "India is protecting against an identical or similar risk when it takes measures to protect against LPNAI, regardless of whether the relevant product originates in India or the United States or somewhere else." (Ibid., para. 7.469)

<sup>762</sup> Panel Report, para. 7.424.

None of these findings has been appealed by India.<sup>763</sup> India also does not take issue with the Panel's statement that, without a suitable surveillance system capable of reliably detecting LPNAI, it is difficult to establish conclusively the absence of LPNAI within the territory of India.<sup>764</sup>

5.279. India's appeal under Article 11 of the DSU focuses on the Panel's assessment of whether LPNAI is exotic to India. The Panel made this factual assessment in analysing the second element under the first sentence of Article 2.3, namely, "whether the discriminatory treatment maintained by India through the application of different standards to foreign and Indian products, respectively, is arbitrary or unjustifiable".<sup>765</sup> The Panel explained, that, in this part of its analysis, it would "focus on the cause of the discrimination ... and the rationale put forward by India to explain its existence"<sup>766</sup>, namely, that LPNAI is exotic to India.<sup>767</sup> The Panel proceeded to consider whether India's assertion that LPNAI is exotic to India was supported by the facts and evidence before it. In doing so, the Panel observed that, having made this factual assertion, India bore the burden of proving it. The Panel then undertook a review of the relevant evidence. The Panel took particular account of the views of the independent experts, who "unanimously affirmed that there is no basis on the record of this dispute to support" the assertion that LPNAI is exotic to India.<sup>768</sup> On this basis, the Panel found that India had not proven its factual assertion regarding the alleged absence of LPNAI in India. For this reason, the Panel also found that India had not demonstrated that there is a rationale for the discriminatory application of its AI measures to foreign products, as opposed to Indian products, that is rationally connected to the objective of those measures.<sup>769</sup>

5.280. Given these observations and findings by the Panel, together with the Panel's finding that similar or identical conditions prevail in the United States and India, and that India treats domestic and imported products differently with respect to the risk of LPNAI, depending on whether that risk originates in India or another Member, we do not consider that the Panel acted inconsistently with Article 11 in concluding that the United States had discharged its burden of establishing its *prima facie* case with respect to the second "form" of discrimination.<sup>770</sup> The central factual pillar of India's efforts to rebut this case was its assertion that LPNAI was exotic to its territory. In these circumstances, insofar as the Panel's overall allocation of the burden of proof under Article 2.3, first sentence, is concerned, we do not consider that the Panel erred in observing that "India has the burden of proving that LPNAI is exotic to India".<sup>771</sup> We therefore reject India's argument that the Panel acted inconsistently with Article 11 of the DSU in finding that "India has the burden of proving that LPNAI is exotic to India".<sup>772</sup>

5.281. Finally, with respect to the third question raised by India's claim – i.e. whether the fact that India had never reported to the OIE an occurrence of LPNAI within its territory was sufficient for the Panel to conclude that LPNAI is exotic to India – we agree with the United States that this "amounts to a repackaging of [India's] argument that its own assertion of LPNAI freedom should have been accepted as a fact even in the absence of scientific evidence in the record to support it".<sup>773</sup> Having found above that the Panel was not obligated by Article 1.6.1 of the OIE Code to accept as conclusive India's alleged "self-declaration" of LPNAI freedom, we also reject India's

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<sup>763</sup> Panel Report, para. 7.423.

<sup>764</sup> Panel Report, para. 7.454 and fn 871 thereto (quoting Dr Honhold's statement that, without such a surveillance system, "absence of evidence is not evidence of absence").

<sup>765</sup> Panel Report, para. 7.440.

<sup>766</sup> Panel Report, para. 7.440 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226).

<sup>767</sup> Panel Report, para. 7.441.

<sup>768</sup> Panel Report, para. 7.457.

<sup>769</sup> Panel Report, para. 7.457.

<sup>770</sup> Although the Panel, in proceeding through the different steps of its analysis, separately assessed whether India's AI measures discriminate between imported and domestic products, and whether such discrimination is arbitrary or unjustifiable, the United States did not present its claim in the same segmented fashion. Rather, the United States contended that, "while India relies on the detection of LPAI to ban the sale of products, India in fact applies LPAI-based bans only to imported products" because "India has failed to put in place measures that would effectively detect LPAI, and so India is not taking steps necessary to restrict domestic products on account of LPAI. India's imposition of a ban on specified imports following LPAI detections in the exporting country therefore constitutes arbitrary or unjustifiable discrimination in breach of the first sentence of Article 2.3." (United States' first written submission to the Panel, para. 180. See also Panel Report, para. 7.363)

<sup>771</sup> Panel Report, para. 7.442. In reaching this conclusion, the Panel expressly, and rightly, relied on the Appellate Body reports in *EC – Hormones* and *Japan – Apples*. (Ibid.)

<sup>772</sup> Panel Report, para. 7.442.

<sup>773</sup> United States' appellee's submission, para. 143.

argument that the fact that India had never reported an occurrence of LPNAI within its territory to the OIE required the Panel to conclude that LPNAI is exotic to India.

5.282. In the light of the foregoing, we reject India's claim that the Panel acted inconsistently with Article 11 of the DSU by requiring India to prove that LPNAI is exotic to India.

### 5.5.2.3 Whether the Panel acted inconsistently with Article 11 of the DSU by delegating to the experts the factual determination of whether LPNAI is exotic to India

5.283. In its third claim of error under Article 11 of the DSU, India submits that the questions posed by the Panel to the individual experts amounted to an improper delegation of the factual determination of whether LPNAI is exotic to India to the experts. India maintains that Article 11 of the DSU requires that the objective assessment of the facts be made by a panel, and argues that this task cannot be delegated.<sup>774</sup> India thus seeks reversal of those Panel findings that were based on the testimony provided by the individual experts.<sup>775</sup>

5.284. In response, the United States asserts that India's claim of error under Article 11 fails for two reasons: first, because the Panel conducted its own objective assessment as to whether LPNAI is exotic to India; and, second, because the Panel's questions to the experts did not delegate its decision-making responsibility, but only sought scientific and technical assistance in evaluating scientific and technical evidence.<sup>776</sup> The United States notes that, to the extent that India takes issue with the Panel's use of, or reliance upon, the experts' views, and not just the questions posed by the Panel, this is an issue that falls beyond the scope of appellate review under Article 17.6 of the DSU.<sup>777</sup>

5.285. We note that India claims that the questions posed by the Panel concerning India's domestic LPNAI situation "resulted in delegating the factual determination of whether LPNAI is exotic to India to the individual experts".<sup>778</sup> As the United States rightly points out, India's appeal is therefore restricted to the scope of the Panel's consultations with the individual experts, i.e. the questions posed to the individual experts, and not the Panel's use of, or reliance upon, the responses provided by the experts. In its appeal, India does not explain, and we do not see, how the Panel's questions, in and of themselves, can be seen as a delegation by the Panel of its function as the assessor of facts under Article 11 of the DSU. Nor has India explained how the mere posing of questions amounted to a lack of objectivity on the part of the Panel. Finally, although India's claim is that the Panel improperly "delegated" the factual determination of whether LPNAI is exotic to India, we observe that, ultimately, the Panel did not make a determination on this factual issue.<sup>779</sup> Instead, the Panel simply ruled that India had not presented arguments and evidence to substantiate the factual assertion that it made.<sup>780</sup>

5.286. We therefore reject India's claim that the Panel acted inconsistently with Article 11 of the DSU because the questions posed by the Panel to the individual experts amounted to an improper delegation of its function to make the factual determination of whether LPNAI is exotic to India to the experts.

### 5.5.3 Conclusion

5.287. We have rejected each of the three claims of error raised by India in this part of its appeal. For the reasons set out above, we 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 and findings with respect to the United States' claim relating to the second "form" of discrimination under Article 2.3, first sentence, of the

<sup>774</sup> India's appellant's submission, para. 306 (referring to Appellate Body Reports, *India – Quantitative Restrictions*, para. 149; and *Australia – Apples*, para. 384).

<sup>775</sup> India's appellant's submission, para. 307.

<sup>776</sup> United States' appellee's submission, para. 148.

<sup>777</sup> United States' appellee's submission, para. 148 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 141).

<sup>778</sup> India's appellant's submission, para. 306.

<sup>779</sup> To the contrary, the Panel stressed that it could not make, and was not making, a finding on whether LPNAI is exotic to India. (Panel Report, paras. 7.455-7.456)

<sup>780</sup> Panel Report, para. 7.455.

SPS Agreement and, more specifically, in its consultations with the individual experts regarding the issue of whether LPNAI is exotic to India, or by requiring India to prove that LPNAI is exotic to India. Accordingly, we uphold the Panel's finding, in paragraphs 7.472 and 8.1.c.vi of the Panel Report, that India's AI measures are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily or unjustifiably discriminate between WTO Members where identical or similar conditions prevail.

## 6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body:

- a. with respect to Articles 2.2, 5.1, and 5.2 of the SPS Agreement:
  - i. finds that the Panel did not err in its interpretation of Articles 2.2, 5.1, and 5.2, and, in particular, in its understanding of the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand;
  - ii. finds that, by failing to consider whether the presumption of inconsistency with Article 2.2 that flowed from its finding that India's AI measures are inconsistent with Articles 5.1 and 5.2 was rebutted by the arguments and evidence presented by India, the Panel erred in its application of Article 2.2 to India's AI measures with respect to the import prohibition on fresh meat of poultry and eggs from countries reporting LPNAI; and, therefore
  - iii. reverses, in part, the Panel's findings, in paragraphs 7.332, 7.334, and 8.1.c.v of the Panel Report, that India's AI measures are inconsistent with Article 2.2 because they are not based on scientific principles and are maintained without sufficient scientific evidence, insofar as those findings concern India's import prohibition on fresh meat of poultry and eggs from countries reporting LPNAI;
  - iv. finds 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;
  - v. finds that it is unable to complete the legal analysis and assess the consistency of India's AI measures with Article 2.2 with respect to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI; and
  - vi. upholds the Panel's findings, in paragraphs 7.318, 7.319, 7.333, 8.1.c.iii, and 8.1.c.iv of the Panel Report, that India's AI measures are inconsistent with Articles 5.1 and 5.2;
- b. with respect to Articles 3.1 and 3.2 of the SPS Agreement:
  - i. finds that the Panel did not act inconsistently with Article 11.2 of the SPS Agreement or Article 13.2 of the DSU in consulting with the OIE regarding the meaning of the OIE Code;
  - ii. finds 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; and
  - iii. upholds the Panel's findings, in paragraphs 7.274, 7.275, and 8.1.c.ii of the Panel Report, that India's AI measures are inconsistent with Article 3.1, and that India is not entitled to benefit from the presumption of consistency of its AI measures with other relevant provisions of the SPS Agreement and the GATT 1994 as provided for under Article 3.2;
- c. with respect to Article 6 of the SPS Agreement:
  - i. finds that the Panel did not err in its interpretation of the relationship between Articles 6.1 and Article 6.3;



- ii. finds that the Panel did not err in its application of Article 6.2 by not relying solely on Sections 3 and 3A of the Livestock Act in assessing whether India recognizes the concepts of disease-free areas and areas of low disease prevalence in respect of AI;
  - iii. finds 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 analysis of the consistency of India's AI measures with Article 6.2; and
  - iv. upholds the Panel's findings, in paragraphs 7.707-7.709, 7.712-7.715, 8.1.c.ix, and 8.1.c.x of the Panel Report, that India's AI measures are inconsistent with Articles 6.1 and 6.2;
- d. with respect to Articles 5.6 and 2.2 of the SPS Agreement:
- i. finds that the Panel did not err in finding that the United States had identified alternative measures that would achieve India's appropriate level of protection;
  - ii. finds that the Panel did not fail to identify the alternative measures with precision;
  - iii. finds 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 analysis of the consistency of India's AI measures with Article 5.6; and
  - iv. upholds the Panel's finding, in paragraphs 7.616 and 8.1.c.vii of the Panel Report, that India's AI measures are inconsistent with Article 5.6 because they are significantly more trade restrictive than required to achieve India's appropriate level of protection, with respect to the products covered by Chapter 10.4 of the OIE Code; and finds it unnecessary to address India's request for reversal of the Panel's finding that India's AI measures are consequentially inconsistent with Article 2.2;
- e. with respect to Article 2.3 of the SPS Agreement:
- i. finds 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 consultation with the individual experts regarding the issue of whether LPNAI is exotic to India, and by requiring India to prove that LPNAI is exotic to India; and
  - ii. upholds the Panel's finding, in paragraphs 7.472 and 8.1.c.vi of the Panel Report, that India's AI measures are inconsistent with Article 2.3, first sentence.

6.2. The Appellate Body recommends that the DSB request India to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the SPS Agreement, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 13th day of May 2015 by:

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Yuejiao Zhang  
Presiding Member

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Seung Wha Chang  
Member

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Shree Baboo Chekitan Servansing  
Member

## ANNEX 1

WORLD TRADE  
ORGANIZATION

WT/DS430/8

2 February 2015

(15-0717)

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Original: English

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**INDIA – MEASURES CONCERNING THE IMPORTATION OF  
CERTAIN AGRICULTURAL PRODUCTS****NOTIFICATION OF AN APPEAL BY INDIA  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 26 January 2015, from the Delegation of India, is being circulated to Members.

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1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review (WT/AB/WP/6) ("Working Procedures") and in view of the decision taken by the Dispute Settlement Body in its meeting dated 18 November 2014, India hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretation in the Panel Report in *India – Measures Concerning the Importation of Certain Agricultural Products* (WT/DS430) ("Panel Report").<sup>1</sup>
  2. Pursuant to Rules 20(1) and 21(1) of the Working Procedures, India files this Notice of Appeal *together* with its Appellant's Submission with the Appellate Body Secretariat.
  3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an *indicative* list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel in its report, without prejudice to India's ability to rely on other paragraphs of the Panel Report in its appeal.
  4. India seeks review by the Appellate Body of the errors of law and legal interpretation by the Panel in its Report and requests findings by the Appellate Body as noted below.
    - A. The Panel has committed legal errors in Sections 7.5.2 - 7.5.4 of its Report and in connected findings in Section 7.5.5 of its Report**
  5. The Panel erred in its interpretation and application of Article 2.2 of the SPS Agreement and/or failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, in so far as the Panel found that India's Avian Influenza ('AI') measures are inconsistent with Article 2.2 of the SPS Agreement. In particular, the Panel erred because:

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<sup>1</sup> WT/DS430/R and WT/DS430/R/Add.1.

- a. It made an incorrect interpretation and application of Article 2.2 of the SPS Agreement<sup>2</sup> and therefore committed a legal error. The Panel consequently did not analyze the independent claim under Article 2.2 of the SPS Agreement on the ground that India had acted inconsistently with Article 5.1 and 5.2 of the SPS Agreement.<sup>3</sup>
  - b. the Panel failed to make an objective assessment of the matter by disregarding arguments and evidence presented by India to establish that its AI measures are based on scientific principles and sufficient scientific evidence pursuant to Article 2.2 of the SPS Agreement.<sup>4</sup>
  - c. it failed to take into account that the United States arguments under Article 2.2 of the SPS Agreement were limited to the ban upon occurrence of LPNAI in fresh meat of poultry and eggs and did not include the ban upon occurrence of HPNAI. In spite of the limited nature of the claim, the Panel ruled that India's AI measures which provide for import prohibition upon occurrence of HPNAI and LPNAI are inconsistent with Article 2.2 of the SPS Agreement<sup>5</sup> and therefore acted inconsistently with Article 11 of the DSU.
  - d. the Panel disregarded India's arguments under Article 5.1 of the SPS Agreement and therefore acted inconsistently with Article 11 of the DSU.<sup>6</sup>
6. For these reasons, India requests the Appellate Body to reverse the Panel's finding that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement.<sup>7</sup>
7. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:
- a. The Panel incorrectly interpreted and applied Article 2.2 of the SPS Agreement.
  - b. A SPS measure can comply with Article 2.2 of the SPS Agreement by being based upon scientific principles and sufficient scientific evidence and which would also fulfill the requirement of Article 5.1 and Article 5.2 of the SPS Agreement.
  - c. The Panel has failed to make an objective assessment of the matter pursuant to Article 11 of the DSU by completely disregarding the evidence and the arguments submitted by India with respect to Article 2.2 of the SPS Agreement.
  - d. The arguments of the United States with respect to its claim under Article 2.2 of the SPS Agreement are limited to eggs and fresh meat of poultry upon occurrence of LPNAI.
  - e. In light of the scientific evidence submitted by India, its AI measures are based on scientific principles and sufficient scientific evidence and are consistent with Article 2.2 of the SPS Agreement.

**B. The Panel has committed legal errors in Sections 7.4.2.2 - 7.4.2.3 of its Report and in connected findings in Sections 7.4.2.2.4; 7.4.2.2.6 and 7.4.2.3 of its Report**

8. The Panel erred in its interpretation and application of Article 3.1 and Article 3.2 of the SPS Agreement and/or failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, in so far as the Panel found that India's AI measures do not conform with the international standard and therefore are inconsistent with Article 3.2 of the SPS Agreement and/or are not based on international standard and are therefore inconsistent with Article 3.1 of the SPS Agreement. In particular, the Panel erred because:

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<sup>2</sup> Panel report, *India – Agricultural Products*, paragraphs 7.282 and 7.331.

<sup>3</sup> *Ibid*, paragraph 7.332.

<sup>4</sup> *Ibid*, paragraphs 7.331-7.332.

<sup>5</sup> *Ibid*, paragraph 7.332.

<sup>6</sup> *Ibid*, paragraphs 7.309-7.319.

<sup>7</sup> *Ibid*, paragraphs 7.332 and 7.334.

- a. First, the terms of reference of the Panel to the OIE were inconsistent with Article 11(2) of the SPS Agreement and Article 13 of the DSU.<sup>8</sup>
- b. Second, the Panel delegated the judicial function of making an objective assessment of the matter to the OIE and therefore acted inconsistently with Article 11 of the DSU.<sup>9</sup> It also failed to make an objective assessment of the matter by disregarding India's arguments and evidence.<sup>10</sup> Further, it also acted inconsistently with Article 3.2 of the DSU by not interpreting the OIE Code in accordance with the customary principles of international law as codified in Article 31 and Article 32 of the VCLT.<sup>11</sup>
- c. Third, the Panel has arrived at a conclusion which is not supported by the evidence available and thus is not an objective assessment of matter.<sup>12</sup>

9. For these reasons, India requests the Appellate Body to reverse the Panel's finding that India's AI measures do not conform to and/or are not based upon the international standard and therefore are inconsistent with Article 3.1 and Article 3.2 of the SPS Agreement.<sup>13</sup>

10. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- a. The Panel's terms of reference to the OIE were inconsistent with Article 13(2) of the DSU and Article 11(2) of the SPS Agreement.
- b. The Panel delegated the judicial function of making an objective assessment of the matter to the OIE and therefore acted inconsistently with Article 11 of the DSU.
- c. The Panel has failed to make an objective assessment of the matter pursuant to Article 11 of the DSU by completely disregarding the evidence and the arguments submitted by India with respect to Article 3.2 and Article 3.1 of the SPS Agreement.
- d. The conclusion of the Panel with respect to Article 3.1 and Article 3.2 of the SPS Agreement is not based upon the factual evidence and thus, the Panel failed to make an objective assessment of the matter.
- e. Interpret Article 10.4.1.10 of the OIE Code in accordance with the customary principles of international law as codified in Article 31 and Article 32 of the VCLT and to conclude that a country can impose a trade ban upon occurrence of HPAI/LPNAI in poultry.
- f. Interpret the product specific recommendations in chapter 10.4 of the OIE Code in accordance with the customary principles of international law as codified in Article 31 and Article 32 of the VCLT and to conclude that an importing country based upon its ALOP can import from a NAI free country/zone/compartiment or HPNAI free country/zone/ compartment and in the event this condition of entry is not fulfilled, products of concern may not be imported.
- g. Clause 1(ii)(a) of S.O. 1663(E) (live poultry) conforms to Article 10.4.1.10 and Article 10.4.5 of the OIE Code; Clause 1(ii)(b) of S.O. 1663(E) conforms to Article 10.4.1.10 and Article 10.4.7 of the OIE Code; Clause 1(ii)(c) of S.O. 1663(E) conforms to Article 10.4.1.10 and Article 10.4.19 of the OIE Code; Clause 1(ii)(d) of S.O. 1663(E) conforms to Article 10.4.1.10 and Article 10.4.10 of the OIE Code; Clause 1(ii)(e) of S.O. 1663(E) conforms to Article 10.4.1.10; Article 10.4.13 and Article 10.4.15 of the OIE Code; Clause 1(ii)(j) of S.O. 1663(E) (poultry semen) conforms to Article 10.4.1.10 and Article 10.4.16 of the OIE Code. These clauses of

<sup>8</sup> Panel Report, *India – Agricultural Products*, paragraph 1.23. Also see Panel's letter to the parties dated 10 September 2013 and Panel's letter to the OIE dated 11 September 2013.

<sup>9</sup> Panel Report, *India – Agricultural Products*, paragraphs 7.231-7.273.

<sup>10</sup> *Ibid*, paragraphs 7.231-7.273.

<sup>11</sup> *Ibid*, paragraphs 7.231-7.273.

<sup>12</sup> *Ibid*, paragraphs 7.231-7.273.

<sup>13</sup> *Ibid*, paragraphs 7.272-7.275.

S.O. 1663(E) conform to the international standard and are therefore consistent with Article 3.2 of the SPS Agreement.

- h. Alternatively, Clause 1(ii)(a) of S.O. 1663(E) (live poultry) is based upon Article 10.4.1.10 and Article 10.4.5 of the OIE Code; Clause 1(ii)(b) of S.O. 1663(E) is based upon Article 10.4.1.10 and Article 10.4.7 of the OIE Code; Clause 1(ii)(c) of S.O. 1663(E) is based upon Article 10.4.1.10 and Article 10.4.19 of the OIE Code; Clause 1(ii)(d) of S.O. 1663(E) is based upon Article 10.4.1.10 and Article 10.4.10 of the OIE Code; Clause 1(ii)(e) of S.O. 1663(E) is based upon Article 10.4.1.10; Article 10.4.13 and Article 10.4.15 of the OIE Code; Clause 1(ii)(j) of S.O. 1663(E) (poultry semen) is based upon Article 10.4.1.10 and Article 10.4.16 of the OIE Code. These clauses of S.O. 1663(E) are based upon the international standard and therefore are consistent with Article 3.1 of the SPS Agreement.

**C. The Panel has committed legal errors in Sections 7.9.2.3 - 7.9.2.4 of its Report and in connected findings in Section 7.9.2.6 of its Report**

11. The Panel erred in its interpretation and application of Article 6.1 and 6.2 of the SPS Agreement and/or failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, in so far as the Panel found that India's AI measures fail to recognize the concept of disease free areas and areas of low disease prevalence and therefore are inconsistent with Article 6.2 of the SPS Agreement and are also inconsistent with Article 6.1 of the SPS Agreement as India's AI measures fail to adapt to the SPS characteristics of the areas from where the products originate. In particular, the Panel erred because:

- a. The Panel observed that India pursuant to Livestock Act may be able to recognize the concepts of disease-free areas and areas of low disease prevalence<sup>14</sup>, though there is no evidence of this being ever recognized and in addition, S.O. 1663(E) provides for a country wide prohibition.<sup>15</sup> On this basis, the Panel concluded that India's AI measures do not recognize the concept of disease-free areas and areas of low disease prevalence with respect to AI and therefore are inconsistent with Article 6.2, first sentence.<sup>16</sup> Consequently, the Panel ruled that India's AI measures are also inconsistent with Article 6.2, second sentence.<sup>17</sup>
- b. The Panel while coming to this conclusion has committed legal errors. The first is a legal error as the requirement under Article 6.2, first sentence of the SPS Agreement is of recognizing the concept of disease free areas in a domestic measure and not of implementing a domestic measure which recognizes the concept of disease free areas.<sup>18</sup> The Panel's conclusion was therefore not consistent with the obligation as provided in Article 6.2, first sentence of the SPS Agreement. Further, this analysis and conclusion by the Panel, was not based on and is contrary to the United States' argument under Article 6 of the SPS Agreement which is limited to the argument that India as a policy does not recognize the concept of disease-free areas and areas of low disease prevalence<sup>19</sup>. Thus, the Panel also failed to make an objective analysis of the matter under Article 11 of the DSU as its conclusion is based on an argument not advanced by the United States.
- c. Second, the Panel erred in disregarding arguments and evidence submitted by India<sup>20</sup> as the same do not find any mention in the Panel's analysis<sup>21</sup> and therefore the Panel acted inconsistently with Article 11 of the DSU. As a result, the Panel incorrectly concluded that India's AI measures are inconsistent with Article 6.2.<sup>22</sup>

<sup>14</sup> Panel Report, *India – Agricultural Products*, paragraphs 7.701 and 7.706.

<sup>15</sup> *Ibid*, paragraphs 7.701; 7.702 and 7.706.

<sup>16</sup> *Ibid*, paragraphs 7.706-7.707.

<sup>17</sup> *Ibid*, paragraph 7.708.

<sup>18</sup> *Ibid*, paragraph 7.698.

<sup>19</sup> *Ibid*, paragraph 7.618.

<sup>20</sup> *Ibid*, paragraph 7.632 and footnote 1155.

<sup>21</sup> *Ibid*, paragraphs 7.693-7.706.

<sup>22</sup> *Ibid*, paragraphs 7.707 and 7.708.

- d. Third, the Panel made a legal error by incorrectly interpreting the relationship between Article 6.1, first sentence and Article 6.3, first sentence.<sup>23</sup> As a result, the Panel incorrectly concluded that India's AI measures are inconsistent with Article 6.1, first sentence and consequently with Article 6.1, second sentence.<sup>24</sup>

12. For these reasons, India requests the Appellate Body to reverse the Panel's finding that India's AI measures are inconsistent with Article 6.1 and Article 6.2 of the SPS Agreement.<sup>25</sup>

13. Further, the Appellate Body must, where necessary, complete the legal analysis and find that:

- a. Article 6.2, first sentence of the SPS Agreement only requires recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence and not of implementation of these concepts. The Panel therefore committed a legal error in coming to its conclusion in Article 6.2, first sentence. Further, the Panel's conclusion was also not based upon an objective assessment of the matter as the Panel ruled on a claim not argued by the United States.
- b. The Panel also acted inconsistently with Article 11 of the DSU by disregarding evidence under Article 6.2, first sentence of the SPS Agreement which was of critical importance to India and therefore failed to make an objective assessment of the matter.
- c. Pursuant to Article 6.1, first sentence of the SPS Agreement an importing country is required to adapt its sanitary measures to the sanitary or phytosanitary characteristics of the area of the exporting country only upon receiving a formal proposal pursuant to Article 6.3 of the SPS Agreement.
- d. Since the United States has not made any formal proposal pursuant to Article 6.3 of the SPS Agreement, India has not acted inconsistently with Article 6.1, first sentence and Article 6.1, second sentence of the SPS Agreement.

**D. The Panel has committed legal errors in Sections 7.8.2.1 - 7.8.2.3 of its Report and in connected findings in Sections 7.8.2.1 - 7.8.3 of its Report**

14. The Panel erred in its interpretation and application of Article 5.6 and 2.2 of the SPS Agreement and/or failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, in so far as the Panel found that India's AI measures are more trade restrictive than required to achieve India's ALOP and therefore are inconsistent with Article 5.6 of the SPS Agreement and as a consequence are also inconsistent with Article 2.2 of the SPS Agreement. In particular, the Panel erred because:

- a. the Panel concluded that the United States' claim under Article 5.6 of the SPS Agreement is not restricted to LPNAI<sup>26</sup> and the alternate measure is Chapter 10.4 of the Terrestrial Code which would fulfill India's ALOP.<sup>27</sup> However, the United States had only presented arguments and evidence for LPNAI whereas the OIE Code includes recommendations for both HPNAI and LPNAI. The Panel therefore ruled on a claim not argued by the United States and therefore failed to make an objective analysis of the matter.
- b. the United States failed to make a *prima facie* case as the alternate measure identified by the United States to fulfill India's ALOP was not based upon the measure at issue but was instead based upon its domestic control measure<sup>28</sup>. Further, the Panel disregarded India's arguments and therefore failed to make an objective assessment of the matter.

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<sup>23</sup> *Ibid*, paragraph 7.711.

<sup>24</sup> *Ibid*, paragraphs 7.711-7.712.

<sup>25</sup> *Ibid*, paragraphs 7.707-7.708 and paragraphs 7.709-7.712.

<sup>26</sup> Panel Report, *India – Agricultural Products*, paragraph 7.516.

<sup>27</sup> *Ibid*, paragraph 7.586.

<sup>28</sup> *Ibid*, paragraph 7.487.

- c. the Panel did not identify the proposed alternative measure with precision<sup>29</sup> and therefore committed a legal error by concluding that the alternate measure would fulfill India's ALOP.<sup>30</sup> Further, the United States presented a *prima facie* case with respect to only two products and upon occurrence of HPNAI.<sup>31</sup>

15. For these reasons, India requests the Appellate Body to reverse the Panel's finding that India's AI measures are more trade restrictive than required to achieve India's ALOP and therefore are inconsistent with Article 5.6 of the SPS Agreement and as a consequence are also inconsistent with Article 2.2 of the SPS Agreement.<sup>32</sup>

16. Further, the Appellate Body must, where necessary, complete the legal analysis and find that India's AI measures are consistent with Article 5.6 of the SPS Agreement and consequently with Article 2.2 of the SPS Agreement.

**E. The Panel has committed legal errors in Sections 7.6.4.2.1 - 7.6.4.2.2 of its Report and in connected findings in Sections 7.6.5 - 7.7. of its Report**

17. The Panel erred in its interpretation and application of Article 2.3 of the SPS Agreement and/or failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, in so far as the Panel found that India's AI measures arbitrarily and unjustifiably discriminate between members where identical or similar conditions prevail and therefore are inconsistent with first sentence of Article 2.3 of the SPS Agreement. In particular, the Panel erred because:

- a. the terms of reference of the Panel's consultation with the individual experts<sup>33</sup> were beyond the scope of the OIE Code which with respect to avian influenza does not provide for review of member countries' domestic surveillance regime and allows self certification of freedom from avian influenza by member countries. The Panel therefore acted inconsistently with Article 11 of the DSU.
- b. the Panel's questions to the experts on this issue erroneously shifted the burden of proof onto India even though it was the United States which had presented the hypothesis that LPNAI must be present in India as it is ubiquitous in wild birds. The Panel therefore acted inconsistently with Article 11 of the DSU.<sup>34</sup>
- c. the Panel questions to the individual experts delegated the determination of India's LPNAI status to the individual experts and which is inconsistent with Article 11 of the DSU.<sup>35</sup>

18. For these reasons, India requests the Appellate Body to reverse the Panel's finding which is based upon the testimony provided by the individual experts.<sup>36</sup>

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<sup>29</sup> *Ibid*, paragraphs 7.529-7.534.

<sup>30</sup> *Ibid*, paragraphs 7.582-7.586.

<sup>31</sup> *Ibid*, paragraphs 7.529-7.534.

<sup>32</sup> *Ibid*, paragraph 7.597 and paragraphs 7.616-7.617.

<sup>33</sup> Panel Report, *India – Agricultural Products*, paragraph 1.23.

<sup>34</sup> *Ibid*, paragraphs 1.31-1.34 and 7.443.

<sup>35</sup> *Ibid*, paragraphs 7.437-7.457 and 7.418-7.425.

<sup>36</sup> *Ibid*, paragraphs 7.454 and 7.457.