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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 *The Gazette of India* 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, *India – Measures Concerning the Importation of Certain Agricultural Products*, 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 *The Gazette of India* 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, *Annual Report 2012-13*
IND-10	C. Tosh et al., "Emergence of amantadine-resistant avian influenza H5N1 virus in India" (2011) 42 *Virus Genes*, 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 *Veterinary Microbiology*, 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 *PLoS ONE* (www.plosone.org)
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, *Annual Report for 2011-12*
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) *Virology Journal*
IND-108	Biosecurity Australia, *Generic Import Risk Analysis Report for Chicken Meat*, 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) *Scientific and Technical Review of the Office International des Epizooties*, 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) *Avian Diseases*, pp. 142-149
IND-111	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
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, *Terrestrial Animal Health Code*, 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.), *Avian Influenza* (Blackwell Publishing, 2008)
S-19	D.E. Swayne and D.L. Suarez, "Highly pathogenic avian influenza" (2000) 19(2) *Scientific and Technical Review of the Office International des Epizooties*, pp. 463-482
US-20	Canada Food Inspection Agency, "Fact Sheet – Avian Influenza" (modified 22 December 2012), available at: <www.inspection.gc.ca/animals/terrestrial-animals/diseases/reportable/ai/fact-sheet/eng/1356193731667 /1356193918453>
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.), *Avian Influenza* (Blackwell Publishing, 2008), chapter 12
US-31	D.E. Swayne and C. Thomas, "Trade and Food Safety Aspects for Avian

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 *Avian Diseases*, 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 *Veterinary Pathology*, 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 *Virology Journal*, 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) *Avian Pathology*, 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 *Avian Diseases*, 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 *Vaccine*, 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 *The Gazette of India* 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

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation

Short Title	Full Case Title and Citation
EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 943
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, p. 1851
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
India – Quantitative Restrictions	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, p. 1763
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
Japan – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
Japan – Apples	Panel Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/R, adopted 10 December 2003, upheld by Appellate Body Report WT/DS245/AB/R, DSR 2003:IX, p. 4481

Short Title	Full Case Title and Citation
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Clove Cigarettes	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
US – Continued Suspension	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257

1.4. All AI subtypes are classified into one of two groups according to their ability to cause

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.[25]

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).[38]

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.[45] 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.[46] 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.[47] 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.[48]

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.[49] The DSB adopted this decision following a joint request by India and the United States, which was filed in view of the

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.[58]

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.[59] 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.[60]

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

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.[62] 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."[63] 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.[64] 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".[65] 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.[66] 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

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SPS Agreement with respect to [AI]".[82] 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 ar

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

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.[92] 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.[93]

2.37. India disagrees with the Panel's statement that the United States expressly clarified the scope of its claim under Article 5.6.[94] 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.[95] 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.[96] 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.

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

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

[94] India's appellant's submission, para. 261 (referring to Panel Report, para. 7.516).

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

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

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.[99]

2.45. Second, India asserts that the Panel's questions to the experts erroneously shifted to India the burden of proving that LPAI is exotic to India, rather than properly requiring the United States to bear the burden of proving that LPAI 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,

to ensure that the measure is rationally related to the scientific evidence underlying the assessment of risks".[103]

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.[104] 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.[105]

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.[106] 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."[107]

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

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

2.59. The United States points out that the Appellate Body has found that determining the

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.[119]

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

India argues that a letter from a US official requesting India to reconsider its measures establishes

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.[132] 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.[133]

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

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 f18a2(l'ei)-6.6(z)8u0mg fhete Inl'ei-.8(t)5.4(t)6.7(s)5.8(fAImea7.2(la5
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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 Stat

trade, inconsistent with the second sentence of Article 2.3.[144] 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 OI

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

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".[162] 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,

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.[167] 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

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".[169] 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

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.

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

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

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."[184]

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).[185]

4.2 Avian influenza (AI)

been a close association with infected birds or infective carcasses.[197] Generally, serious

status of the exporting country.[211] 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.[212] 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.[213]

4.16. The OIE Code contains numerous substantive provisions and recommendations grouped into two volumes.[214] Volume I is comprised of general provisions that concern horizontal standards applicable to a wide range of species, production sectors, and diseases.[215] 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".[216]

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.[217] 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.[218] 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.[219]

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.[220] The disease status is determined on the basis of

[211] Panel Report, paras. 2.54 and 2.59.
[212] Panel Report, paras. 2.53 and 7.250.
[213] 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

NAI, which is defined as an infection of poultry that can be classified as either highly pathogenic notifiable avian influenza (HPNAI)[221] or low pathogenicity notifiable avian influenza (LPNAI).[222] 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.[223] 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.[224] 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.[225]

4.19. Chapter 10.4 of the OIE Code provides that disease status can be determined with respect to a country, zone[226], or compartment[227] based on certain criteria.[228] 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".[229] 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.[230] 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.[231]

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.[232]

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.[233] 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.[234] 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.[235]

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.[236]

maintained without sufficient scientific evidence.[239] 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.[240] 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.[241]

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.[242]

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.[243] 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.[244] 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.[245] 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".[246] 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."[247] 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

[239] India's appellant's submission, para. 26 (referring to Panel Report, para. 7.332) and para. 58.
[240] India's appellant's submission, para. 63 (referring to Panel Report, paras. 7.318-7.319).
[241] India's appellant's submission, paras. 64-85.
[242] India's appellant's submission, para. 14 (referring to Panel Report, paras. 7.309-7.319 and 7.331-7.332).
[243] United States' appellee's submission, para. 44.
[244] United States' appellee's submission, para. 37.
[245] United States' appellee's submission, paras. 42 and 59.
[246] United States' appellee's submission, paras. 48-50.
[247] United States' appellee's submission, para. 35.

consequence"[258] because it was "not required to conduct a risk assessment for measures which conform to the international standards".[259] 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[260] (Summarw3-"

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basic obligations under Article 2 is through the "particular routes" or "specific obligations" set out in Article 5.[270]

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".[271] 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".[272] 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.[273] 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."[274] 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".[275]

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

[270] Appellate Body Reports, *Australia – Apples*, para. 339; *EC – Hormones*, para. 212. See also Panel Report,

obligation set out in Article 2.2 impart meaning to Article 5.1".[285] 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'".[286]

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.[287] Significantly, Article 2.2 itself contains express language limiting its scope of application to circumstances in which Article 5.7 does not apply.[288] 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

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.[305]

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

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.[316] 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".[317] 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".[318]

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
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Article 2.2".[321] Immediately following this statement, the Panel stated its "[c]onclusion on the United States' claim" pursuant to Article 2.2.[322] 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."[323]

5.36. Thus, in its brief analysis under Article 2.2, the Panel made no mention of the evidence and

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

erred in claiming a breach of Article 11.[336] 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.[337] 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.[338] 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.[339] 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.[340]

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.[341] 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.[342] 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.[343] 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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[336] United States' appellee's submission, para. 34 (referring to Appellate Body Reports, *China – Rare Earths*, para. 5.173).
[337] United States' appellee's submission, para. 51.
[338] United States' appellee's submission, para. 59.
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scientifically more robust than the evidence relied upon by the United States.[353] By contrast,

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.[359] 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.[360]

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 scd2.2(pai201 Tc.2s6 0 0 6 325.94-2.84 5994
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respect to AI. The Panel, therefore, found that the relevant international standard for purposes of

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.[379] 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.[380]

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.[381]

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.[382] 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.[383] 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".[384]

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.[385]

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

[379] Panel Report, para. 7.238.
[380] Panel Report, para. 7.239.
[381] Panel Report, para. 7.249.
[382] Panel Report, para. 7.251.
[383] 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.
[384] Panel Report, para. 7.253.
[385] 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

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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 .0027ei the OI o5(r)4. v(n)6.5(i)-1eft,hedn.2(e)6.9'd

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.[405] With respect to AI, the relevant international standards are those set out in the OIE Code, in particular, Chapter 10.4.[406] 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

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.[413]

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".[414] 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.[415]

5.87. In the SPS context, there are special or additional rules set forth in Article 11.2 of the SPS Agreement.[416] 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 seput2dlb.1(r)4v A2 indicarsputes implb.1(r)4vating claims under the SPS Agreement would normally involve "scientifb.1(r)4v or technical issues", the use of the term "should" in Article 11.2 suggests that a pane

of the SPS Agreement "explicitly *instructs* panels in disputes under this Agreement involving scientific and technical issues to 'seek advice from experts'".[417] 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

demonstrated that the Panel acted inconsistently with Article 3.2 of the DSU.[425] 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.[426] 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.[427]

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".[428] 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.[429] 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

the views of such experts in connection with its own assessment of the matter before it.[435] 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".[436] 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.[437]

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.[438] 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.[439]

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.[440] 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.

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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.[443] 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.[444]

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.[445] 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 interpy's .5(7(s)-.6(i)-6..E)-2.4(g thPanel) TDthPaeap(ie)jnhdchdy g thPanelyidg thPllow4(g thP in)2.ws ydutye-3-7.

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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

concerning Article 3 of the SPS Agreement.[453] 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

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

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."[460] 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".[461]

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.[462] 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".[463] 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."[464] 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".[465]

whether it should be done in writing through a legislative or administrative act."[486] 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."[487] 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."[488]

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.[489] 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"[490], and that it does so in "clear and unequivocal language".[491] 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".[492]

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.[493] 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.[494]

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.[495]

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

[486] Panel Report, para. 7.698. The Panel adopted the4812T88g of "recognize" identified by the ew.2()3.7(eye)4.ogni.1(s1.5

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

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

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[501], 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 wh

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.[505] We note

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

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.[517] 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."[518]

5.151. Having said that, we now turn to examine whether the Panel's findings are c6(r30/A)-17amien.e831.4(whe

5.152. As foreshadowed in the preceding section of this Rep
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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*

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

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

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

unbiased and even-handed treatment of the evidence.[565] 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

imposition of the import prohibitions on a country-wide basis.[575] Even if the statement in that letter could be understood as "recognition" of the concepts listed in Article 6.2 of the

modest with respect to HPNAI and negligible with respect to LPNAI since surveillance is unlikely to detect it".[578] 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

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

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.[601]

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.

objective.[608] 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.[609]

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".[610] 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.[611] 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."[612] 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."[613]

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."[614] 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."[615]

5.207. Article 2.2 of the SPS Agreement reads, in relevant part:

5.4.3 Whether the Panel erred under Article 5.6

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.[621]

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)).[622] 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.[623]

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.[624]

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.[625] 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.[626] 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.[627]

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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[621] India's appellant's submission, paras. 263-265.

[622] India's appellant's submission, para. 266 (referring to Appellate Body Report, *Australia – Salmon*, paras. 190-191, 197, and 207).

[623] India's appellant's submission, paras. 266 and 268.

[624] United States' appellee's submission, para. 199.

[625] Appellate Body Report, *Australia – Salmon*, para. 194. See also Appellate Body Report, *Australia – Apples*, para. 337.

[626] Appellate Body Report, *Australia – Apples*, para. 344.

[627] Appellate Body Report, *Australia – Salmon*, paras. 199 and 205-207. See also Appellate Body Report, *Australia – Apples*, para. 343.

high as India's 'very high' or 'very conservative' level of protection."[645] 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".

5.232. In addition, we note that India's claim appears premised on its contention that the OIE

5.238. In its second allegation, India argues that the Panel acted inconsistently with Article 11 of

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.[667] 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.[668]

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".[669]

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

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.[684] 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.[685]

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.[695]

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).[696] 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 bu

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

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.[710] 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".[711] 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.[712] 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".[713] 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.[714] 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.[715]

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.[716] 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.2(e)l75r8(c)6.5(l)-6.4(

record.[720] 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".[721] 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

by the United States, in which H5 and H7 antibodies were found in ducks in India (the Pawar et al. study).[740]

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[741]; question No. 2 sought to get the experts' views on evidence submitted by both India and the United States[742]; and question No. 3 sought the experts' opinion on a study submitted by the United States.[743] 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".[744]

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".[745] 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.[746] Once a *prima facie* case has been made, the defending party bears the burden of rebutting it.[747] 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."[748] As the Panel rightly recognized, this burden also requires that a responding party asserting a fact is responsible for providing proof thereof.[749]

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 LPAI 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".[750] 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.[751] According to the United States, the effect of this is

[740] Panel Report, para. 7.443.
[741] Question No. 1 "relates to India's assertion that LPNAI 'is exotic to poultry in India'", and reads, in

ii. finds that the Panel did not err in its application of Article 6.2 by not relying solely on

a. It made an incorrect interpretation and application of Article 2.2 of the SPS Agreement[2] 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.[3]

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.[4]

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[5] 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.[6]

6. For these reasons, India requests the Appellate Body to reverse the Panel's finding that

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.[8]

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.[9] It also failed to make an objective assessment of the matter by disregarding India's arguments and evidence.[10] 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.[11]

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.[12]

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.[13]

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.

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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 Indi

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.[23] 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.[24]

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.[25]

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

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c. the Panel did not identify the proposed alternative measure with precision[29] and therefore committed a legal error by concluding that the alternate measure would fulfill India's ALOP.[30] Further, the United States presented a *prima facie*