

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

(AB-2015-2 / DS430)

**CLOSING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE ORAL HEARING**

March 20, 2015

1. In this closing statement, the United States would like to take a few moments to comment on this appeal in the context of the larger issue of workload in the WTO dispute settlement system.
2. As the Division is aware, in this Organization, WTO Members are at the beginning of a conversation relating to the workload of the dispute settlement system. Serious concerns have been raised about that workload and its impact on WTO resources and delays in the resolution of disputes.
3. To find the right solution to those concerns will require more information to ensure that Members are addressing the right problems. The United States looks forward to further communication with other Members, the Appellate Body, and the WTO Secretariat to identify the necessary information and possible solutions.
4. Already, however, we can identify some remedies. WTO Members would need to consider greater focus to the disputes and appeals they bring. For example, the United States would note that it has not appealed any issues in this dispute. While the United States prevailed on most of the issues before the panel, nonetheless, a party may always identify certain issues on which it would have preferred a different approach by the panel.
5. Similarly, on the part of WTO adjudicators, an increased focus could be part of the solution. The Appellate Body has in past reports developed an approach of applying judicial economy – that is, resolving only those issues that are necessary to secure a positive solution to the dispute.
6. The United States would note that we consider this approach fully consistent with DSU Article 17.12. Under this provision, the Appellate Body “shall address” each of the issues raised

in the appeal. It does not state the Appellate Body shall make findings on each of those issues, and indeed in determining to apply judicial economy to an issue because it is not necessary to resolve the dispute, the Appellate Body has “addressed” that issue.

7. In this hearing, we have had a very interesting discussion of whether international standards, guidelines, and recommendations of the OIE are SPS Agreement text under Article 3, and therefore should be considered an issue of law for purposes of a WTO dispute and appeal.

8. The Division is aware of the U.S. view that the answer to that question is no, and we will not repeat the substance of those views now. However, on further consideration, we would like to emphasize that we would not view it as necessary to resolve that issue for purposes of this appeal. We don’t consider it necessary for three reasons.

9. First, the issue has not been raised directly by India as part of its appeal.

10. Second, we do not see that any different meaning would be given to the relevant OIE standard, guideline, or recommendation even if customary rules of interpretation of public international law were applied to interpret that OIE text. No participant in this appeal suggested otherwise. And as discussed, the approach of the Panel was very similar to the commonsense approach of the Vienna Convention.

11. And, third, we do not see that any difference in meaning would result if the Appellate Body approach to discerning the meaning of municipal law were applied. Again, no participant disagreed. Further, the Panel’s interpretation again was similar to that approach. For example, the Panel looked at the plain text of the instrument and expert views – in this case, those of the OIE.

12. On the other hand, the United States does consider that there would be risks from deciding this issue in the context of this appeal. If the meaning of the OIE Code is a matter of law, then the Appellate Body would undertake review of the Code, perhaps with no Panel findings on a particular provision, and even if those provisions had not been put forward by either party, without any relevant argument by either party, without the Panel having asked the OIE regarding that provision, and without any questions to scientific experts. Indeed, the relevance of a particular provision could be asserted for the first time on appeal, and as an issue of law, its meaning and relevance to the OIE standards, guidelines, or recommendations would be determined *de novo* by the Appellate Body.

13. This is not a mere hypothetical concern. In this very hearing, the Appellate Body projected Chapter 1.6 of the OIE Code on the screen and asked the parties about its meaning and relevance. But neither party had introduced that chapter as part of the record before the Panel; neither party made any arguments to the Panel about its meaning; the Panel put no questions to the OIE concerning that chapter; the Panel put no questions to the scientific experts concerning it; and the Panel made no findings on the meaning of that chapter.

14. This approach could have serious consequences. It could have consequences for the way parties choose to litigate SPS disputes in the WTO, not presenting certain evidence or arguments to a panel. It could have consequences for the standards, guidelines, or recommendations developed under the auspices of international organizations, if it's understood that those texts are subsequently to be interpreted as treaty text in WTO dispute settlement. And it could have consequences for the nature of appeals, and ultimately for the Appellate Body's workload.

15. Therefore, on the one hand, the United States would not view this issue as one that is necessary to be resolved in this appeal. And on the other hand, we see serious risks and negative consequences that could arise from reaching it. Perhaps the better approach would then be to avoid resolving the issue in this appeal and instead to permit more time for reflection, by Members and the Appellate Body.

16. And if the Appellate Body were to find value in this suggestion, it could consider whether it applies with respect to other issues discussed in this hearing that are not directly implicated by India's appeal and arguments.

17. The United States looks forward to engaging in a dialogue with the Appellate Body and other WTO Members on the general issue of dispute settlement workload in this Organization and to finding appropriate solutions.

18. In closing, we would thank the Division for its thought-provoking questions, for its hard work preparing for this hearing and in this appeal, and for its service on the Appellate Body helping the parties, India and the United States, resolve their dispute.