

**UNITED STATES – CERTAIN MEASURES AFFECTING  
IMPORTS OF POULTRY FROM CHINA**

**(WT/DS392)**

**Answers of the United States of America  
to the First Set of Questions from the Panel to the Parties**

**January 11, 2010**

### Table of Reports

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<i>Brazil – Tyres (Panel)</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by the Appellate Body Report, WT/DS332/AB/R
<i>Brazil – Tyres (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>China – Publications and Audiovisual Products (Panel)</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R, circulated 12 August 2009
<i>China – Publications and Audiovisual Products (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R, circulated 21 December 2009
<i>EC – Asbestos (Panel)</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R
<i>EC – Bananas III (Panel)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/R, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R
<i>EC – GSP (Panel)</i>	Panel Report, <i>European Communities – Conditions for Granting Tariff Preferences to Developing Countries</i> , WT/DS246/R, adopted 20 April 2004, as modified by the Appellate Body Report, WT/DS246/AB/R
<i>EC – Hormones (Panel)</i>	Panel Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/R, WT/DS48/R, adopted 13 February 1998, as modified by the Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R
<i>EC – Hormones (AB)</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998

<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000
<i>Mexico – Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002
<i>US – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, and Corr.1
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Shrimp (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998
<i>US – Upland Cotton (AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005

I. EUROPEAN UNION'S REQUEST FOR ENHANCED THIRD-PARTY RIGHTS

**Q1. China/United States: In Section V of its third party submission, the European Union requests the Panel to amend its Working Procedures and provide enhanced third party rights to all third parties to these proceedings. Do the parties agree to this request?**

1. The United States does not agree with the EU's request that the Panel alter its working procedures in order to provide enhanced third party rights.
2. The present dispute is not comparable to past cases where panels have granted enhanced third party rights. For example, in *EC – Bananas* and *EC – GSP*, the panel granted enhanced rights because third parties had substantial trade interests in the specific measures at issue in the dispute.<sup>1</sup> And in *EC – Hormones*, the panel granted enhanced rights to what were essentially co-complainants in parallel proceedings.<sup>2</sup>
3. But here, the basis for the EU's request is that issues under the SPS Agreement may be further developed after the first substantive meeting, and that the EU has systemic interests in the SPS Agreement. The United States submits that this rationale cannot suffice as the basis for granting enhanced third party rights. It is a common element of nearly every dispute that the legal and factual issues – including systemic issues – continue to develop after the first substantive meeting. Indeed, if this were not the case, the DSU's provisions for a second substantive meeting would be pointless. However, notwithstanding that Appendix 3 contemplates a second substantive meeting, Article 10.3 of the DSU provides that third parties receive only the parties' submissions to the first meeting of the panel.
4. In short, if the EU's rationale for its request were accepted, it would mean that third parties should be granted enhanced rights in most if not all disputes. Such a result would be contrary to the balance between third party and party rights that was agreed, as reflected in the text of the DSU. Accordingly, the Panel should not grant the EU's request. The United States notes that proposals are currently under consideration in the DSU Review for altering the opportunities available to third parties rights in the course of a dispute. Such a change is appropriately the topic for negotiations where all Members may consider the proposal; such an expansive change in the opportunities afforded to third parties should not be done in the context of an individual dispute.

II. PANEL'S TERMS OF REFERENCE

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<sup>1</sup> *EC – Bananas III (Panel)*, paras. 7.4 - 7.9; *EC – GSP (Panel)*, para. 7.1 & Annex A.

<sup>2</sup> *EC – Hormones (Panel)*, para. 8.15.

**Q2. United States: Please provide the Panel with your views on China's request, in paragraph 122 of its oral statement, for a preliminary ruling from the Panel on whether Section 743 of AAA 2010 is part of its terms of reference.**

5. As the United States explained at the first substantive meeting, the United States opposes the modification of the Panel's working procedures in order to adopt a procedure for making a preliminary ruling with respect to whether Section 743 is within the terms of reference of this dispute.

6. However, the United States understands that this issue is now moot. Given China's letter of January 7, 2010 stating that it will not pursue any claims regarding Section 743, there is no need to examine whether Section 743 is within the scope of the proceeding and therefore also no need for a special procedure to do so.

**Q4. China/United States: In paragraph 132 of its oral statement, China argues that there is a clear and close relationship between Section 727 and Section 743. China goes on to conclude that the two measures have the same "essence". Can both parties please elaborate on their understanding of what the "essence" of a measure is? How would the findings of the Appellate Body in *Mexico - Anti Dumping Measures on Rice and Chile - Price Band System* apply to our case?**

7. As noted in response to Question 2 above, the United States understands that this issue is now moot because China in its January 7 letter has notified the Panel that it will not be pursuing any claims under Section 743.

**Q5. United States: At the first substantive meeting, the United States indicated that if China would need substantial additional briefing on Section 743 this would be evidence that Section 743 did not have the same essence as Section 727. Is the United States arguing that the "essence" should be determined based on the quantity of work required to present arguments related to the consistency of the measure with the WTO Agreements?**

8. As noted in response to Question 2 above, the United States understands that this issue is now moot because China in its January 7 letter has notified the Panel that it will not be pursuing any claims under Section 743.

**Q6. China/United States: Can the parties please comment on the relevance of the difference in the requirement in Article 4.4 of the DSU to "indicate" the legal basis for the complaint versus the requirement to provide a "brief summary of the legal basis of the complaint" in Article 6.2 of the DSU?**

9. As the Panel's question notes, Article 4.4 of the DSU requires that consultations requests include only "an indication" of the legal basis for the complaint, whereas Article 6.2 requires a panel request to provide a "brief summary of the legal basis of the complaint sufficient to present the problem clearly." "An indication" of the legal basis does not require that all the claims be spelled out in the consultations request. Accordingly, a consultations request need not provide as full a description of the claims as a panel request.

10. This difference, however, is not pertinent to the issue of whether claims under the SPS Agreement are properly within the terms of reference of this dispute. As the United States has explained, China's consultation request plainly states China's view that the U.S. measures are not subject to the SPS Agreement.<sup>3</sup>

**Q7. China/United States: Are the terms of reference based on the panel request or the consultations request? Can the panel request be an evolution from the consultations request or must it be identical?**

11. Both of these documents must be considered in determining what measures and claims are within the terms of reference of a panel.

12. To begin with, Article 7.1 of the DSU provides that the terms of reference of a panel are:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

The words "document ..." in Article 7.1 refer to the complaining party's request for establishment of a panel. Accordingly, the request for panel establishment must be examined to determine the panel's terms of reference.

13. However, a panel's terms of reference are further bounded by the consultations request. Article 4.7 of the DSU provides that a panel may be requested if the consultations fail to settle a dispute within 60 days following the consultations request; this provision implies limits on what may be included in a panel request and thus what may permissibly fall within a panel's terms of reference. Thus, for example, if a measure is not identified in a request for consultations, that measure is not properly within a panel's terms of reference – even if it is identified in the panel request. Although these provisions do not "require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in

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<sup>3</sup> In addition, to the extent that this question is related to China's arguments regarding an unwritten "moratorium" or the subsequently-enacted Section 743, the United States understands from China's statements at the first substantive meeting that China has decided not to pursue these arguments.

the request for the establishment of a panel,” the Appellate Body has emphasized that measures covered in the panel request must not “change the essence of the [measures identified in the request for consultations].”<sup>4</sup>

14. In addition, as explained in the U.S. request for a preliminary ruling, Article 1.1 of the DSU provides that the DSU rules and procedures “shall apply to disputes brought pursuant to the consultation and dispute settlement provisions” of the covered agreements.<sup>5</sup> Accordingly, in order for a Member to bring a dispute under the DSU with respect any particular agreement, that Member must bring the dispute pursuant to the consultation and dispute settlement provisions of that specific agreement. The Member is not free to leave the Member to whom the request is addressed, nor other Members who may wish to request to join the consultations, guessing as to what agreements are being invoked in the dispute.

15. In response to the second part of Question 7, the consultations request and the panel request need not be identical. Furthermore, as indicated in the question, there may be an evolution of the legal basis of a claim between the consultations request and panel request.<sup>6</sup>

16. The United States would emphasize, however, that the failure of China’s consultations request to invoke consultation and dispute settlement provisions of the SPS Agreement cannot be “cured” by a subsequent identification of SPS claims in the panel request. Adding claims under a different covered agreement cannot be considered an “evolution” of the legal basis for claims, rather, the DSU is clear that in order to bring claims under a covered agreement, the dispute has to be brought under the consultation and dispute settlement provisions of that agreement.

**Q8. China/United States: Can both parties please comment on whether the jurisprudence from the Appellate Body that when examining a panel request for consistency with the obligations in Article 6.2 of the DSU, a panel must look at the request as a whole and in light of attendant circumstances (Appellate Body Report, *Korea - Dairy*, paragraphs 124-127; also Appellate Body Report, *US - Carbon Steel*, paragraph 127) is relevant to an examination of a consultations request under Article 4.4 of the DSU? What, in your view are "attendant circumstances"?**

17. The findings in *Korea – Dairy* and *US – Carbon Steel* are not relevant to the question of whether China’s consultations request invokes the consultation and dispute settlement provisions of the SPS Agreement. In particular, those reports involved the issue of whether the panel

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<sup>4</sup> *US – Upland Cotton (AB)*, n. 244.

<sup>5</sup> Request by the United States for a Preliminary Ruling, paras. 14-17 (Oct. 1, 2009).

<sup>6</sup> See, e.g., *Mexico – Rice (AB)*, paras. 135-145; *China – Publications and Audiovisual Products (Panel)*, paras. 7.114-7.133. Note that it is the legal basis of the claim that may evolve, not the identity of the measure at issue. As explained above, if the panel request identifies different measures than those identified in the consultations request, the measures in the panel request must have the same essence as the measures in the consultation request.

requests in those specific disputes met the DSU Article 6.2 requirement of providing “a brief summary of the legal basis for the complaint sufficient to present the problem clearly.” In other words, these disputes involved drawing a line between a panel request that was so vague as to fail to meet a minimum standard of presenting the problem “clearly,” and a panel request that was just sufficient to cross the threshold of clarity required under Article 6.2.

18. In evaluating whether a particular panel request falls on the “too vague” or “sufficiently clear” side of the Article 6.2 line, the Appellate Body indicated that panels may examine a number of factors. In *Korea – Dairy*, the Appellate Body noted, for example, that where a panel request only identifies an article number of a covered agreement, a relevant factor in drawing the line may be whether that article contains one or several obligations.<sup>7</sup> In *US – Carbon Steel*, the Appellate Body noted, for example, that an examination of the actual arguments presented in the first written submission could be instructive as to whether the language in the panel request was sufficiently clear as to foreshadow those arguments, or so vague as to make the arguments unanticipated, thus resulting in prejudice to the defending party.<sup>8</sup>

19. In contrast, the issue concerning China’s consultations request and any subsequent SPS claims does not involve drawing an Article 6.2 line between too vague and sufficiently clear. Indeed, China’s consultations request is abundantly clear in stating that “China does not believe that the US measures at issue . . . constitute [SPS measures] within the meaning of the [SPS Agreement].” Further, the request is clear that China was interested in requesting consultations under the SPS Agreement only upon a contingency to be resolved (if at all) in the indefinite future – namely, “if it were demonstrated that any such measure is an SPS measure.” Accordingly, the factors identified in *Korea – Dairy* and *US – Carbon Steel* are not relevant to the issue of whether SPS claims are within the terms of reference of this dispute

20. In summary, the United States submits that a consultations request denying the applicability of a covered agreement, combined with a contingent request based on future events occurring after the consultations are held, is illogical and impermissible, and thus that the terms of reference in this dispute cannot include claims under that agreement.

**Q9: China/United States: Will China please confirm its response to the oral questions at the first substantive meeting that if it were to present substantive arguments on Section 743 in its rebuttal submission, that the United States would be entitled to a surrebuttal?**

21. As noted in response to Question 2 above, the United States understands that this issue is now moot because China in its January 7 letter has notified the Panel that it will not be pursuing any claims under Section 743.

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<sup>7</sup> *Korea – Dairy (AB)*, para. 124.

<sup>8</sup> *US – Carbon Steel (AB)*, para. 127.

**Q10. China/United States: In paragraph 124 of its oral statement, China relies upon the Appellate Body Report in *US - Zeroing (EC)* (Article 21.5 - EC) to support its contention that Section 743 is within the Panel's terms of reference. Can the parties please comment on the relevance of the Appellate Body's interpretation of Article 6.2 of the DSU in the context of an Article 21.5 proceeding to proceedings before "original" panels?**

22. As noted in response to Question 2 above, the United States understands that this issue is now moot because China in its January 7 letter has notified the Panel that it will not be pursuing any claims under Section 743.

### III. PROCEDURES FOR THE IMPORTATION OF POULTRY PRODUCTS INTO THE UNITED STATES

**Q14. China/United States: In paragraph 31 of its first written submission, the United States argues that even if a country is listed in the FSIS regulations as equivalent and is eligible to export poultry or poultry products; those exports must also comply with and are subject to restrictions set forth by the APHIS. Please explain the role of the APHIS in the approval of imports of poultry products into the United States; including any procedures, requirements, restrictions, exceptions.**

23. The Animal and Plant Health Inspection Service (APHIS), part of the United States Department of Agriculture (USDA), has a broad mission that includes ensuring the health and care of U.S. animals. In accordance with this mission, APHIS issues regulations intended to prevent the introduction or spread of exotic agricultural pests and diseases from imported products. While these regulations may in some instances limit the importation of certain products, APHIS does not have primary responsibility for approving the import of poultry products into the United States or ensuring the safety of imported food for human consumption. Rather, the Food Safety Inspection Service (FSIS) is responsible for the approval of countries as eligible to export meat, poultry, and eggs to the United States, and the Food and Drug Administration (FDA) is responsible for ensuring the safety of other imported food products for human consumption.

24. With respect to poultry, APHIS restricts the importation of live poultry, commercial birds, pet birds, "hatching eggs," and unprocessed poultry products originating in countries and/or regions where animal diseases such as Exotic Newcastle Disease (END) and highly pathogenic avian influenza (HPAI) have been detected in commercially or traditionally raised poultry.<sup>9</sup> Because avian influenza (HPAI) has been detected and END is known to exist within China, this restriction applies to all poultry from China, regardless of whether the poultry

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<sup>9</sup> 9 C.F.R. § 94.6 (Exhibit US-56); 9 C.F.R. § 94.26 (Exhibit US-57).

processed in China was slaughtered in a country whose poultry inspection system has been found to be equivalent to the United States or processed and slaughtered in China.

25. Accordingly, Chinese authorities would have to certify that any poultry exported to the United States is fully cooked or otherwise processed sufficiently to kill the avian influenza (HPAI) and END viruses. APHIS would be relying on China to make this certification and enforce the related requirements. In this context, China's problems with the enforcement of its laws raise concerns about whether China's poultry inspection system could be relied upon to protect against the potential spread of avian influenza (HPAI) and END into the United States.

**Q15. China/United States: Has China complied with the APHIS regulations in relation to poultry products?**

26. This issue is not yet ripe because China has not yet exported any poultry products to the United States. Before China would be able to do so, FSIS must first issue a final rule indicating that China's poultry inspection system is equivalent, China must certify plants as eligible to export poultry to the United States, and China must actually export poultry to the United States. With regard to slaughtered poultry, FSIS never issued a final rule indicating that China's poultry slaughter inspection system was equivalent. Similarly, with regard to processed poultry, China did not certify any plants as eligible to export poultry to the United States until so much time had passed that FSIS needed to conduct an equivalence review determination before China could export poultry. Therefore, no situation has arisen to date in which China would have had to comply with APHIS regulations in relation to the export of poultry products to the United States.

27. However, as the United States noted in its First Written Submission, uncooked poultry that did not meet APHIS's requirements has previously been smuggled into the United States from China.<sup>10</sup>

IV. MEASURES AT ISSUE

**Q20. China/United States: What is the legal status of the JES and its role in interpreting Section 727 of the AAA 2009?**

28. As the United States discussed in its First Written Submission and Oral Statement, the legal impact of a congressional funding restriction is limited to the explicit terms of the statute.<sup>11</sup> Thus, Section 727's legal meaning is narrowly limited to preventing USDA from "establishing" or "implementing" a rule allowing poultry products from China to be imported into the United States for a short period during the 2009 fiscal year.

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<sup>10</sup> Exhibit US-30; Exhibit US-31; Exhibit US-32.

<sup>11</sup> See U.S. First Written Submission, paras. 85-92; U.S. Opening Statement at First Panel Meeting, paras. 17-25.

29. Although the legal meaning of an appropriations provision is limited to its terms, other forms of legislative history may be relevant when interpreting the statutory language or ascertaining a provision's policy objective. For example, the U.S. Congress often attaches conference reports to appropriations bills as a means of presenting the legislative text as it has been agreed upon by the conference between the House and the Senate.<sup>12</sup> Included within these conference reports are joint explanatory statements, which may further explain the bill's various legislative provisions and serve as a basis for ascertaining congressional intent. And in this instance, the JES accompanying Section 727 clearly indicates that the measure was enacted to protect against the risk posed by the importation of potentially dangerous poultry from China.

**Q22. United States: In paragraph 19 of its oral statement, the United States reiterates its argument that funding restrictions do not amend or modify the underlying law administered by an executive agency. In light of this argument, could the United States please respond to China's point in paragraph 7 of its oral statement that Section 727 contradicts the congressional intent of the PPIA?**

30. China's assertion that Section 727 contradicts the congressional intent of the PPIA is incorrect because it is based on a misunderstanding of Section 452 of the PPIA. Contrary to China's implications, that section has nothing to do with determinations of equivalence. In particular, the word "condemned" and the reference to "inspections standards" and "applications thereof" in this context does not refer to the process of determining whether a particular country's inspection system is equivalent to that of the United States. Rather, Section 452 refers to an action taken after a country's system has already been found to be equivalent and a specific product to be offered for import from that country is determined to be adulterated either at the border or by the exporting country's inspector. In fact, Section 455(c) of the PPIA, which is entitled "Condemnation; appeal; reprocessing," provides that "[a]ll poultry carcasses and parts thereof and other poultry products found to be adulterated shall be condemned and shall, if no appeal be taken from such determination of condemnation, be destroyed for human food purposes under the supervision of an inspector..."<sup>13</sup> As this Section demonstrates, the word "condemned" in the PPIA refers to the affirmative finding by an FSIS (or foreign) inspector that a specific poultry product is adulterated. It does not refer to a determination about equivalence. Imports from countries whose systems have not been found equivalent are not "condemned," but are considered ineligible and refused entry into the United States.

**Q23. United States: In reference to paragraph 91 of its first written submission and paragraph 22 of its oral statement, the United States lists several actions which it claims FSIS took during the period funding was restricted under Section 727. Can the United States please provide some evidence as to when**

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<sup>12</sup> Congressional Research Service, *Conference Reports and Joint Explanatory Statements* (Dec. 1, 2004) (Exhibit US-58).

<sup>13</sup> 21 U.S.C. § 455(c) (Exhibit US-60).

**and how the FSIS reviewed its documentation with regard to China's equivalency application? Can the United States also provide more detailed information with respect to the development of the Action Plan. Specifically, when it was developed by FSIS and when and how it was transmitted to Congress. Please provide documentary evidence to support your explanation. Has the United States implemented the Action Plan? If yes, what is the evidence of this?**

31. As the United States noted in its First Written Submission and Oral Statement, Section 727 did not prevent FSIS from taking actions *related* to the rulemaking for the import of poultry products from China while the measure was in effect. To the contrary, the JES accompanying Section 727 actually called on FSIS to take certain steps *related* to the rulemaking during 2009, including the submission of a report to Congress on China's new food safety law and the development of an action plan regarding China's equivalency application.

32. In light of the JES, FSIS developed an action plan in March 2009.<sup>14</sup> The action plan was designed to outline how to move forward with China's equivalence determinations. Several FSIS offices, including the Office of Policy and Program Development, Office of International Affairs, and Congressional and Public Affairs, worked together on the development of the plan, which was submitted to Congress later in the spring. The action plan included three initial steps to be taken with regard to China's equivalency application, including (1) reaching out to the Chinese government; (2) conducting an inventory of its documentation from previous equivalence proceedings; and (3) transmitting the documentation to the Chinese government to request updates on China's changes to its food safety laws. The action plan also listed other actions to follow these initial three steps, including an on-site audit of China's poultry inspection system, verification of inspection procedures in the slaughter and processing facilities identified for export to the United States, and an audit of laboratories and other control operations, among other steps.

33. While Section 727 was in effect, FSIS implemented the first three steps outlined in the action plan. FSIS staff reviewed and summarized all supporting documentation that was submitted by China as part of their application for initial equivalence. Subsequently, on May 12, 2009, FSIS transmitted a letter to China that included a summary of all of the documents that FSIS had uncovered during its inventory.<sup>15</sup> In addition, the letter requested information on China's changes to its food safety laws.

34. This updated documentation was required for FSIS to complete the document review step, a normal part of FSIS's equivalency process under the PPIA.<sup>16</sup> However, because China

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<sup>14</sup> Exhibit US-43.

<sup>15</sup> Exhibit US-44.

<sup>16</sup> See Exhibit CN-7, p.14.

did not respond to FSIS's letter requesting updated information, FSIS was not able to complete its document review or any of the action plan's subsequent steps. If China had provided this information to FSIS, FSIS could have taken the document review step, among other actions, directly contradicting China's assertion that Section 727's legal effect was to deny China with access to the PPIA.

35. During 2009, FSIS has taken other steps to improve the equivalency process. For initial equivalence determinations, FSIS has revised the Self-Assessment Tool it uses and has changed the risk areas it considers from five to six different areas.<sup>17</sup> These steps are intended to enhance the depth and scope of information required to make a determination of equivalence. Likewise, for ongoing equivalence determinations, FSIS has developed and provided a newly designed Self-Reporting Tool (SRT) to all exporting countries.<sup>18</sup> The SRT provides an organized framework to electronically transmit specific data to FSIS and is intended to increase FSIS's awareness of activities that occur within the country so that FSIS can ensure the ongoing adequacy of system controls. In subsequent evaluations, FSIS will devote more emphasis to the country's competent central authority's oversight when evaluating equivalence. In addition, FSIS is reconsidering the extent to which the agency communicates with U.S. trading partners and the extent to which it considers food safety issues that do not directly involve meat, poultry, or eggs.

36. At the same time, additional activity has been going on within the U.S. Government to evaluate and address the risk posed by potentially dangerous imports of poultry from China and potential risk posed by imported food in general. For example, the U.S. Congress has recently held several oversight hearings to address its concerns about the safety of products from China. Most notably, on June 28, 2009, the Agriculture Appropriations Subcommittee in the U.S. House of Representatives held a hearing to examine "the process the U.S. Department of Agriculture used to determine China's equivalency to export processed poultry to the United States."<sup>19</sup> In addition, USDA released a report thoroughly examining the safety of food imported from China in July 2009.<sup>20</sup> And from a broader standpoint, in March 2009, President Obama created a Food Safety Working Group within the executive branch. The Food Safety Working Group's mission focuses on enhancing U.S. food safety laws for the 21<sup>st</sup> century, including improving the United States' ability to ensure the safety of imported food from China and other countries.<sup>21</sup> All of these actions further demonstrate that work related to the concerns raised by Congress regarding

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<sup>17</sup> For example, in an initial equivalence determination, FSIS previously assessed a country's system with respect to five risk areas. These five areas have now been reclassified into six initial equivalence components: (1) government oversight, (2) statutory authority and food safety regulations, (3) sanitation, (4) hazard analysis and critical control point systems, (5) chemical residues, and (6) microbiological testing programs.

<sup>18</sup> USDA Letter on Self-Reporting Tool (May 27, 2009) (Exhibit US-61).

<sup>19</sup> Exhibit US-54.

<sup>20</sup> Exhibit US-24, p.1.

<sup>21</sup> Information about the Food Safety Working Group can be found at the following web site:  
<http://www.foodsafetyworkinggroup.gov/>.

the risk posed by potentially unsafe poultry and other imported food from China occurred while Section 727 was in effect.

**Q26. China/United States: Is there a JES for Section 743 of the AAA 2010?**

37. As noted in response to Question 2 above, the United States understands that this issue is now moot because China in its January 7 letter has notified the Panel that it will not be pursuing any claims under Section 743.

**Q28. United States: What is the legal value of the letter sent by the Secretary of Agriculture on 12 November 2009 to Congress concerning Section 743 of the AAA 2010? What was the practical implication of the letter on the status of China's eligibility to import poultry products into the United States?**

38. As noted in response to Question 2 above, the United States understands that this issue is now moot because China in its January 7 letter has notified the Panel that it will not be pursuing any claims under Section 743. Nonetheless, the United States believes an answer to the Panel's question will be helpful in allowing the Panel to better understand the temporary nature of the funding restriction on rules related to the importation of poultry from China. Therefore, the United States would like to make a few comments in response to the Panel's question.

39. The legal value of the letter sent by the Secretary of Agriculture to Congress on November 12, 2009 was to remove the temporary funding restriction on USDA's ability to promulgate or implement a rule regarding the importation of processed poultry from China. Section 743(a) states that "None of the funds made available by this Act may be used to promulgate or implement a poultry products inspection rule allowing processed poultry or processed poultry products from China to be imported into the United States from the People's Republic of China *unless* the Secretary of Agriculture formally notifies Congress" (emphasis added) that USDA acts in accordance with a series of elements outlined by the legislation. The only legal requirement contained in Section 743(a) is for the Secretary to notify Congress that USDA plans to follow Section 743's various elements. The Secretary made this notification to Congress on November 12, 2009; therefore, there is no funding restriction on the processed poultry rule for China as of that date.

40. From a practical standpoint, China is still not able to export processed poultry products to the United States. Before China can do so, FSIS must satisfactorily complete an equivalence review determination on China's processed poultry inspection system and China must certify plants as eligible to export to the United States. These steps would have had to be taken even in the absence of Section 727 or Section 743, because as the United States has previously noted, an equivalence review determination for China's processed poultry inspection system was necessary due to the amount of time that had passed since the last audit of the system in 2005.

41. With regard to slaughtered poultry, there has not been any funding restriction on USDA's ability to promulgate or implement a rule since the fiscal year 2010 appropriations legislation was signed into law on October 21, 2009.

**Q29. United States: Besides the letter, are there any other steps that the USDA must undertake in order to lift the alleged funding restriction?**

42. No. Besides the letter sent on November 12, 2009, there are no other steps that USDA must undertake.

V. CHINA'S CLAIMS

A. CLAIMS UNDER THE GATT 1994

**Q31. United States: In paragraph 99 of its first written submission, the United States argues that the core of this dispute involves whether Section 727 of the AAA 2009 is justified under Article XX(b) of the GATT 1994. Is the United States conceding a violation of Articles I:1 and XI:1 of the GATT 1994?**

43. Article I:1 and Article XI:1 set out different obligations, and accordingly the United States has different views on the role of Article I and Article XI in this dispute.

44. Article I: As noted in the U.S. First Written Submission, the United States submits that China has not even begun to make a prima facie case that Section 727 results in a breach of Article I obligations.<sup>22</sup> Most notably, China's First Written Submission provides no explanation for why poultry products from China are "like products" to poultry products from other WTO Members, including those already authorized to export poultry products to the United States. In effect, China's Article I argument improperly assumes the conclusion to be made at the end of the equivalency process, that is, whether poultry from China meets the same level of safety as poultry produced in other countries that have been found equivalent.

45. Article XI: As for any claim, China – as the complaining party – has the burden of establishing all of the elements of the alleged breach of Article XI:1 of the GATT 1994.<sup>23</sup> However, should the Panel find that China has made a prima facie case under Article XI, the United States submits that any import restriction imposed by Article XI is justified under Article XX(b) of the GATT 1994.

**Q32. United States: Are the requirements set out in Section 743 of the AAA 2010 relating to the importation of poultry products applied to countries other than China?**

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<sup>22</sup> U.S. First Written Submission, paras. 94-100.

<sup>23</sup> *Brazil – Tyres (Panel)*, para. 7.20.

46. As noted in response to Question 2 above, the United States understands that this issue is now moot because China in its January 7 letter has notified the Panel that it will not be pursuing any claims under Section 743.

**Q33. China/United States: What are the "like products" to be considered for the purposes of this dispute?**

47. As noted in response to Question 31 above, it is for China to frame and to prove any claim it may have under Article I. China has not specified how it intends to frame any argument regarding "like products."

**Q36. China/United States: Can products produced or processed under different food safety regimes/conditions be deemed unlike? If so, on what basis? Do equivalency procedures have a role to play in the determination of likeness?**

48. The United States respectfully refers the Panel to its response to Question 33 above. In addition, the United States would note its view that safe and unsafe poultry products are not "like products."

**Q38. China/United States: Can a measure that does not directly regulate importation, but rather achieves the effect of an import ban indirectly, constitute a "restriction on importation"?**

49. It is difficult to answer this question in the abstract. The United States notes that Article XI:1 of the GATT 1994 does not use the terms "directly" or "regulate." At the same time, however, it cannot be the case that measures that achieve the effect of an import ban indirectly are necessarily "restrictions on importation" within the meaning of Article XI:1. For example, the United States notes that in some cases internal measures can achieve the effect of an import ban; nevertheless, even if such measures are enforced at the border, they fall outside the scope of Article XI:1 pursuant to the Note *Ad Article III* (assuming the conditions of that Note are met). Individual measures would thus need to be examined in light of their characteristics and the circumstances of the particular dispute

50. The United States reiterates that it is China's burden to make a *prima facie* case that Section 727 results in an import prohibition or restriction that is inconsistent with Article XI:1.

**B. ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE**

**Q39. China/United States: The term "import restrictions on any agricultural ... products" under Article XI:2(c) of the GATT 1994, which provides for an exception to the general elimination of quantitative restrictions in Article XI:1, has been interpreted by GATT panels as not including "import prohibitions". What relevance does this have for the interpretation of the**

**term "quantitative import restrictions" in footnote 1, of Article 4.2 of the Agreement on Agriculture?**

51. At the first substantive meeting, China informed the Panel that it would not be pursuing its claim under Article 4.2 of the Agreement on Agriculture. Accordingly, the United States understands that further proceedings in this dispute should not address Article 4.2.

**Q40. China/United States: In paragraph 105 of its first written submission, the United States argues that Section 727 of the AAA 2009 is not inconsistent with Article 4.2 because it is a measure that the United States maintains consistently with Article XX(b) of the GATT 1994. Could the parties elaborate on the relationship between Article XX(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture?**

52. China has not responded to the United States views on Article 4.2, but rather has informed the Panel that it does not intend to pursue this claim under the Agreement on Agriculture. Accordingly, the United States has no further comments at this time on the relationship between Article 4.2 and Article XX(b) of the GATT 1994.

C. SPS CLAIMS

**Q42. China/United States: In paragraph 117 of its first written submission, China makes claims regarding the SPS Agreement "to the extent that Section 727 may be considered sanitary and phytosanitary measures within the meaning of the SPS Agreement ...". In paragraphs 37-43 of its oral statement, China indicates that the United States has, in its first written submission, demonstrated that Section 727 is a SPS measure.**

**(c) United States: Does the United States agree with China's assertion that the United States has demonstrated that the measures are SPS measures? If yes, what relevance does this have for China's claims under the SPS Agreement and for the United States' defence under Article XX(b) of the GATT 1994?**

53. The United States has difficulty understanding China's basic approach to raising any claims it might have had under the SPS Agreement. At the first substantive meeting, China acknowledged that at the time it drafted its request for consultations, China was aware of the Joint Explanatory Statement to Section 727, which clearly states that Section 727 was adopted for food safety reasons. Despite this, China's request for consultations explicitly states that Section 727 is not subject to the SPS Agreement. It is for this reason that the United States requested a preliminary ruling that no SPS claims are within the scope of the dispute.

54. China's First Written Submission refers to the Joint Explanatory Statement and includes it as an exhibit.<sup>24</sup> Yet, in the very paragraph in which China cites to the Joint Explanatory Statement, China's first written submission again argues that Section 727 is a "budgetary measure" instead of a food safety measure.<sup>25</sup> And China declines to make any prima facie case that Section 727 is covered by the SPS Agreement.

55. The U.S. First Written Submission, like China's First Written Submission, refers to the Joint Explanatory Statement.<sup>26</sup>

56. At the first substantive meeting, China claimed that the U.S. First Written Submission for the first time demonstrated that the U.S. measure was an SPS measure.<sup>27</sup> Yet China's argument refers to the part of the U.S. submission citing the Joint Explanatory Statement, which China admits to be aware of from the outset of this dispute.<sup>28</sup> In these circumstances, the United States finds it hard to understand China's representation that the U.S. first submission somehow changed China's understanding of the purpose of the U.S. measure.

57. That said, China's statement regarding what the United States has "demonstrated" has three specific types of relevance for this dispute.

58. First, China's statement supports the position of the United States that China's request for consultations did not cover any SPS claims. China's request for consultations is conditional on a "demonstration" that the U.S. measures are SPS measures. China has now informed the Panel that this "demonstration" only occurred at the time of the U.S. First Written Submission, which was not filed until seven months after the April 2009 request for consultations, and not until six months after the consultations were held. Thus, China is left with the fundamentally illogical position that any request for consultations on the SPS Agreement was only triggered six months after the parties had actually consulted. China's position, if accepted, would violate the fundamental proposition that a party must request consultations under a covered agreement in order for claims under that agreement to be included in the scope of dispute settlement.

59. Second, by acknowledging that the United States has demonstrated that Section 727 was adopted for the purpose of food safety, China has acknowledged that the U.S. measure has satisfied at least one prong of the analysis under Articles XX(b) of the GATT 1994 (namely, that the measure was adopted for the policy objective of protecting human or animal life or health).

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<sup>24</sup> See Exhibit CN-33.

<sup>25</sup> China First Written Submission, para. 116.

<sup>26</sup> U.S. First Written Submission, paras. 64, 119.

<sup>27</sup> China Opening Statement at First Panel Meeting, para. 34.

<sup>28</sup> China Opening Statement at First Panel Meeting, para. 34 (citing First Written Submission of the United States, paras. 119, 121, 122).

60. Third, by acknowledging that the United States has demonstrated that Section 727 was adopted for food safety purposes, China has to some extent moved closer to elaborating on why it believes it has a valid claim or claims under the SPS Agreement. However, as the United States noted at the first substantive meeting, the mere fact that a measure was adopted for food safety purposes does not determine whether, or how, a measure is subject to any particular provision of the SPS Agreement.

**Q43. China/United States: The panel in *EC - Approval and Marketing of Biotech Products* explained that in determining whether a measure is a SPS measure, regard must be had to such elements as the purpose of the measure, its legal form and its nature. This approach was followed by the panel in *US - Continued Suspension*. Should the Panel follow that same approach? Please elaborate.**

61. The United States agrees that it is essential for the Panel to review carefully all aspects of a measure, including its nature, purpose, and form, in order to determine how, if at all, a food safety measure fits under any particular provision of the SPS Agreement. China's written submission and oral statement do not undertake this analysis. Instead, China's submission takes the flawed approach of arguing that simply because the U.S. measure generally involves food safety, each SPS article cited by China automatically applies to the measure.

62. Given that China has made its first attempt at a *prima facie* SPS argument in its oral statement at the first substantive meeting, the United States will respond to China's arguments in full in its written rebuttal.

**Q46. United States: In paragraphs 150-151 of its first written submission, China argues that an alternative measure that is reasonably available, that would meet the United States' appropriate level of protection and is significantly less trade restrictive is the application to China of normal FSIS approval procedures for the importation of poultry products. Could the United States comment on this?**

63. The United States does not agree with China's assertion that simply applying FSIS's equivalency procedures represents a reasonably available alternative to Section 727. In fact, China's argument is circular. After all, asserting that FSIS's procedures are a reasonably available alternative to Section 727 is simply another way of asserting that Section 727 was not necessary to protect human and animal life and health against the risk posed by potentially dangerous poultry products from China in the first place. And as the United States has discussed at length in its First Written Submission and in its Oral Statement, Section 727 was indeed necessary to accomplish this objective. China's many food safety crises and its systemic problems raise serious concerns about whether China can be relied upon to enforce its laws, an issue that is of particular importance in the context of an equivalency regime where the United

States must rely on the exporting country's ability to enforce its laws to ensure that the food it exports to the United States is safe.

**Q49. United States: In paragraph 130 of the first written submission, China argues that, for the purpose of analysis of Article 5.5 of the SPS Agreement, importation of poultry products from China, on the one hand, and the importation of poultry products from all other WTO Members, on the other hand characterize "different" but comparable situations. Could the United States comment on this? Could the United State also comment on China's reference in paragraphs 47-56 of its oral statement, that importation of poultry from China on the one hand and importation of other food products from China on the other hand is a different but comparable situation?**

64. As noted in response to Question 43, the United States will respond in its written rebuttal to the SPS claims first advanced by China at the first substantive meeting. That said, and without prejudice to the question of whether China has established that the particular measure at issue is a sanitary or phytosanitary measure within the meaning of the SPS Agreement, the United States disagrees that there is any distinction in the level of protection established for risks arising from imported poultry from China than compared to the risk arising from poultry imported from any other Member. China's argument is all based on speculation and assumptions derived from the effect of the measure at issue, but in doing so, China confuses the concept of the appropriate level of protection and the measures applied to achieve the appropriate level of protection. Under China's approach, any difference in the measures applied by a Member to various products would by definition mean that there is a distinction in the appropriate level of protection sought to be achieved by that Member. China's approach is incorrect and without any basis under the SPS Agreement. Indeed, the SPS Agreement is clear that these two concepts are separate and distinct.

**Q50. United States: Does the access to the FSIS equivalency process provide the opportunity to scientifically demonstrate that a WTO Member achieves the United States' ALOP for the importation of poultry products?**

65. Yes. Indeed, the purpose of the equivalence process is to determine whether another country's measures achieve the U.S. appropriate level of protection, and a key aspect of that process is to afford the other country the opportunity to scientifically demonstrate that its measures achieve the U.S. ALOP.

66. In this context, the United States would reiterate that China is incorrect in asserting that Section 727 "denied access" to the U.S. equivalence process. To the contrary, it calls for further work on evaluating China's safety system, including China's new food safety law adopted in 2009. At the first substantive meeting, China confirmed that it had chosen not to respond to the U.S. requests for information on the new food safety law.

VI. UNITED STATES' ARTICLE XX(b) DEFENCE

**Q54. China/United States: In paragraph 38 of its third party submission, the European Union argues that the SPS Agreement provides immediate context for the interpretation of Article XX(b) of the GATT 1994. In paragraph 40 of its third party submission, the European Union further argues that an assessment of the compatibility of the measures at issue under Article XX(b) of the GATT 1994 has to take into consideration the relevant provisions of the SPS Agreement. Do the parties agree? In the parties' view, what is the relationship between Article XX(b) of the GATT 1994 and the SPS Agreement? What does it imply for the Panel's analysis of the United States' defence under Article XX(b) of the GATT 1994?**

67. The United States agrees that the SPS Agreement, as one of the covered agreements, is part of the context for Article XX(b) of the GATT 1994, just as other parts of the WTO Agreement are context. The United States cautions, however, that a consideration of “context” under the customary rules of interpretation reflected in the Vienna Convention occurs when there is a specific question of treaty interpretation. The fact that the SPS Agreement is context for Article XX(b) does not mean that any particular element of the SPS Agreement becomes a part of the legal test for the consideration of a justification under Article XX(b). Indeed, there is no question that the SPS Agreement is both narrower and goes beyond what is required under Article XX(b). The SPS Agreement is narrower because it only applies to a particular set of measures that meet the definition of a sanitary or phytosanitary measure, and Article XX(b) applies to a broader set of measures. The SPS Agreement goes beyond Article XX(b) by imposing numerous obligations on Members beyond those found in Article XX(b), for example the obligation to maintain an enquiry point. Therefore it would be incorrect to consider that Article XX(b) of the GATT 1994 is to be interpreted as somehow incorporating all the obligations of the SPS Agreement.

68. Nor is the EU clear in what it means by “immediate context.” If “immediate” means the most relevant, then the EU statement is not accurate. There is nothing that makes the SPS Agreement more relevant than, for example, Article XIV of the *General Agreement on Trade in Services*.

**Q55. China/United States: If the parties were to consider that the SPS Agreement provides immediate context for the interpretation of Article XX(b) of the GATT 1994, would the Panel have to establish first whether the measures at issue are SPS measures within the definition of Annex A:1 of the SPS Agreement? If so, who would have the burden to prove that the measures at issue are SPS measures?**

69. No, there is nothing in the concept of “context” that requires that another provision apply to the measure at issue in order for that provision to assist in treaty interpretation. The United

States notes, for example, that the Appellate Body has used provisions of the the GATT 1994 as context for interpreting the GATS, even though the measure at issue involved services and thus clearly was not subject to obligations under the GATT 1994.<sup>29</sup>

70. It is for this reason that the EU errs in paragraph 39 of its third party submission in arguing that: “Consequently, where a contested measure satisfies the definition of ‘sanitary measure’ included in the SPS Agreement, the Panel’s assessment of its compatibility with GATT Article XX(b) needs to take into consideration the relevant provisions of the SPS Agreement.” The EU’s error is in confusing “context” with obligation. “Context” assists in understanding the meaning of the language of a provision of an agreement, along with the ordinary meaning of its terms and the object and purpose of the agreement. “Context” does not, and cannot, add to or alter the scope of the provision or obligation being interpreted.

**Q56. China/United States: If the parties were to consider that the SPS Agreement provides immediate context for the interpretation of Article XX(b) of the GATT 1994 and that an assessment of the compatibility of the measures at issue under Article XX(b) of the GATT 1994 has to take into consideration the relevant provisions of the SPS Agreement, which specific provisions of the SPS Agreement should the Panel examine?**

71. As noted in response to Question 54, it would be incorrect to view the SPS Agreement as altering or adding to the scope of Article XX(b) or as necessarily being of more “immediate” context than other provisions of the covered agreements.

**Q57. China/United States: Korea in its third party submission argues that the precautionary principle in the SPS Agreement must be taken into account when interpreting Article XX(b) of the GATT 1994. What are the parties’ views in this respect?**

72. The United States does not agree. In particular, it is inaccurate to describe “the” precautionary principle as though there were a single, agreed formulation of a principle to be applied in all contexts. Rather, there is a precautionary approach used by nations to address regulatory issues, not a “relevant rules of international law applicable in the relations between the parties” within the meaning of Article 31 of the Vienna Convention. The United States also notes that the Appellate Body has considered and declined to accept the argument that the precautionary principle must be taken into account in interpreting the WTO Agreement.<sup>30</sup>

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<sup>29</sup> *US – Gambling (AB)*, paras. 291-292 (finding that the analysis used in prior disputes on the application of Article XX of the GATT 1994 was relevant to the analysis to be used under Article XIV of the GATS).

<sup>30</sup> *EC – Hormones (AB)*, para. 123 (“The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it has been widely accepted by Members as a principle of general or customary international law appears

**Q58. United States: In its first written submission, the United States argues that Section 727 is necessary to protect human and animal life and health from risks regarding the importation of poultry products from China. Does this make Section 727 an SPS measure in terms of Annex A of the SPS Agreement?**

73. As explained in response to Question 42, the fact that Section 727 was adopted for food safety purposes is certainly relevant to an analysis under the SPS Agreement. However, the mere fact that a measure was adopted for food safety purposes does not determine whether, or how, a measure is subject to any particular provision of the SPS Agreement. The burden is on China to establish that a particular measure meets the legal requirements to be an SPS measure.

**Q59. United States: The European Union and Korea argue in their third party submissions that the United States, because it has confirmed that Section 727 of the AAA 2009 was enacted to protect human and animal life and health from the risk posed by the importation of poultry products from China, seems to accept that the contested measure satisfies the definition of "sanitary measures" included in the SPS Agreement. Could the United States comment on this?**

74. The United States respectfully refers the Panel to its response to Question 58.

**Q60. China/United States: Is a food safety measure enacted for the purposes of protecting human and animal life and health necessarily a SPS measure?**

75. No. There are particular conditions specified in the SPS Agreement for a measure to meet the definition of an SPS measure. That definition does not provide that "food safety" is sufficient.

**Q61. United States: Has the United States conducted scientific studies relating to the safety of poultry products imported from China?**

76. The U.S. equivalence process, which China is not challenging in this dispute, is based on science. The audits and other documentation that the United States has produced in conjunction with the ongoing equivalence determination with regard to China's poultry processing and poultry slaughter inspections systems are scientific studies relating to the safety of poultry products imported from China.

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less than clear. We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note that the Panel itself did not make any definitive finding with regard to the status of the precautionary principle in international law and that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation." (Footnotes omitted)).

**Q62. United States: In the context of the chapeau of Article XX(b), are countries which have been found to have food safety levels for poultry products equivalent to those in the United States, such as China, Mexico and France, countries where the same conditions prevail regarding poultry products?**

77. In its First Written Submission and Oral Statement, China compares itself with numerous other countries, arguing that it is unfairly discriminated against because these countries all have access to the PPIA, while it does not.<sup>31</sup> As a preliminary matter, China's claim that it did not have access to the PPIA is inaccurate because, as the United States has explained, the legal effect of Section 727 was not to deny China access to the PPIA. Indeed, as the United States reiterated in its response to Question 23, the United States took steps related to China's equivalency application during 2009. The United States could have taken even more steps, including the document analysis step under the PPIA, had China responded to its request for more information about its new food safety laws. Thus, to say that China was denied access to the PPIA is simply inaccurate.

78. Further, China's comparisons between itself and various countries all fail to prove discrimination because the same conditions did not prevail in any of these countries as prevailed in China at the time that Section 727 was enacted.

79. One of the countries that China compares itself with is France, a country whose measures have been found equivalent to the U.S. measures for processed and slaughtered poultry.<sup>32</sup> With regard to France and other countries whose measures have been found equivalent for processed and slaughtered poultry, the United States is not aware of any crises that they have faced that have been so severe as China's melamine crisis, which the World Health Organization dubbed "one of the largest food safety events the agency has had to deal with in recent years."<sup>33</sup> Similarly, the United States is not aware of the same widespread problems of enforcement in these countries that plague China. Thus, it is not accurate to say that the same conditions prevail in these countries as prevailed in China at the time that China was going through the equivalence process.

80. China also compares itself with Mexico,<sup>34</sup> a country whose measures were found equivalent for processed poultry, but not slaughtered poultry. Like France, the United States is not aware of such widespread crises striking Mexico or of other issues that raise significant questions about Mexico's ability to enforce its own laws to the extent that they do with China. While it is true that deficiencies were found during FSIS's audits of Mexico's meat and processed

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<sup>31</sup> See China First Written Submission, paras. 63-71.

<sup>32</sup> See China First Written Submission, paras. 63-71.

<sup>33</sup> Exhibit US-35.

<sup>34</sup> See China Opening Statement at First Panel Meeting, para. 60.

poultry system in 2008, it is not unusual to find deficiencies during audits of food regulatory systems. In general, when deficiencies are found during audits, the country is advised of the deficiencies, and the country then initiates appropriate corrective actions. Proposed corrective actions to address the noted deficiencies are provided by the country to FSIS in writing. During the next audit, FSIS verifies the effectiveness of the corrective actions taken by the country. This is the process that was followed after the Mexico audits. Because Mexico took immediate and appropriate actions, FSIS continues to have confidence in the ability of Mexico's meat and poultry inspection system to produce products for export to the United States that are wholesome and not adulterated.

81. Putting this aside, the United States finds it unusual that China is comparing itself with Mexico in the first place. After all, Mexico is the only country other than China for which the United States has had to bifurcate its equivalence process due to issues with the country's slaughtered poultry system. And to date, Mexico's poultry slaughter inspection system still has not been found equivalent. Thus, it is unclear why China would want to compare itself with a country whose poultry slaughter inspection system has not been found equivalent in order to prove that its system should be.

82. Finally, China compares itself with all other WTO members. China alleges that some of these countries, such as Bangladesh, have a problem with the enforcement of their food safety laws.<sup>35</sup> However, this comparison is not apt either. Unlike China, Bangladesh and most of the 152 other members of the WTO have not made an equivalence application to the United States. Consequently, the approval of Bangladesh poultry products for import into the United States was not imminent at the time that Congress enacted Section 727. The similarity between China and Bangladesh is that neither country was completely denied access to the PPIA. The difference is that only China had an imminent equivalence determination together with a number of significant issues, which rendered Section 727 necessary to protect human and animal life and health.

**Q63. United States: Can the United States please tell the Panel if it views the proposal in paragraph 5 of China's oral statement is a "reasonably available alternative" within the understanding of the requirements of Article XX(b)? If not, why not? In your answer, please address China's argument that under its normal procedures FSIS could revoke the equivalency determination if it found that it was warranted.**

83. China's argument is based on the erroneous assumption that the FSIS procedures were not available to China. As the United States has explained, Section 727 was enacted in the context of those procedures in view of how those procedures needed to reflect particular conditions in China. Furthermore, China's argument is circular. After all, asserting that FSIS's procedures are a reasonable alternative is simply another way of asserting that Section 727 was not necessary in the first instance. And as the United States has discussed at length in its First

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<sup>35</sup> See China Opening Statement at First Panel Meeting, para. 60.

Written Submission and in its Oral Statement, Section 727 was indeed necessary to protect human and animal life and health against the risk posed by potentially dangerous poultry products from China. China's many food safety crises and its systemic problems raise serious concerns about whether China can be relied upon to enforce its laws, an issue that is of particular importance in the context of an equivalency regime where the United States must rely on the exporting country's ability to enforce its laws to ensure that the food it exports is safe.

84. Nor is it sufficient to suggest that FSIS simply revoke the equivalency determination if that were warranted. Such an approach would allow China to export potentially dangerous poultry to the United States when this product poses a potential risk to human and animal life and health. This risk of potentially dangerous product coming into the United States and causing harm to humans and animals applies to the very first shipment of poultry from China. Thus, allowing China to import until something "goes wrong" undermines Section 727's objective, which is to protect human and animal life and health in light of the food safety enforcement problems in China.

**Q65. United States: In paragraph 19 of its oral statement, China argues that the risks identified by the United States do not relate to poultry products, but to other food products from China. Please comment on the relevance of this for its justification that Section 727 is "necessary" to protect human and animal health from the risks arising out of the importation of poultry products from China.**

85. Section 727 was necessary to protect human and animal life and health against the risk posed by the importation of potentially dangerous poultry from China. The risk to human life and health was based on many concerns, including the potential spread of avian influenza (HPAI), smuggling, corruption, and China's history of lax enforcement of its food safety laws.

86. The numerous food safety crises that have plagued a whole range of Chinese products are directly relevant to Section 727's necessity because they illustrate China's broad systemic problems with the enforcement of its food safety laws. While these enforcement issues pose a concern with regard to the import of any type of food product, the risk that such enforcement issues pose for a product, such as poultry, which is subject to an equivalency regime, is particularly high. The reason for this is that by its very nature, the U.S. equivalency regime, to which poultry products are subject, requires the United States to rely on the exporting country's authorities to enforce its laws to achieve the requisite level of sanitary protection after the initial equivalence determination has been made. This differs from other regimes, which do not include such a strong reliance on the exporting country for enforcement. And outside of poultry, China has never even submitted an application to export products that are subject to the equivalence regime.

87. Furthermore, the risk posed by China's lax enforcement is also heightened in the context of the importation of poultry due to concerns about the presence of avian influenza (HPAI) in

China. As the United States discussed previously in response to Question 14, APHIS would be relying on Chinese authorities to certify that the poultry China exports to the United States was cooked or otherwise processed in accordance with APHIS's requirements to kill the virus. And China's problems with the enforcement of its laws raise concerns about whether it could be relied upon to protect against the potential spread of avian influenza (HPAI) into the United States.

88. In addition, a few crises that directly relate to poultry from China are also worth pointing out. For instance, in 2008, melamine was found in animal feed that was consumed by chickens in China and in eggs laid by Chinese chickens.<sup>36</sup> As a result of this, China's Health Secretary stated that China would begin testing chicken meat for melamine. Similarly, in 2006, ducks and hens in China's Hebei and Zhejiang Provinces were fed carcinogenic red dye so their red-yolk eggs would sell for a higher price.<sup>37</sup> Finally, poultry from China was smuggled into the United States in 2006.<sup>38</sup> Thus, although some of the most troubling food safety crises that have occurred in China in recent years affected non-poultry products, there have been multiple crises related to poultry products as well.

**Q67. China/United States: What sources should be the proper basis for the determination of the purpose and objectives of Section 727? Is it the JES? Are there any other valid sources?**

89. The purpose and objectives of Section 727 may be found primarily in the text of Section 727 itself. The JES, among other sources, may also be helpful. As the United States indicated in its First Written Submission, the text of the measure, the JES, the Committee Report accompanying the fiscal year 2008 measure, and statements by the author of the measure, Representative Rosa DeLauro, all provide evidence that Section 727 was enacted with the policy objective of protecting against the risk to human and animal life and health posed by the importation of potentially dangerous poultry products from China.<sup>39</sup> Concerns raised by members of Congress in response to FSIS's proposed rule for processed poultry may also be relevant to this question.<sup>40</sup>

**Q68. United States: China argues, in paragraph 91 of its oral statement, that if the United States' objective is to prevent risks from contaminated food generally, Section 727 would only address approximately 1 per cent of all United States' food imports from China and therefore the contribution towards the stated**

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<sup>36</sup> *China urged to halt melamine in eggs*, Reuters Online (Oct. 26, 2008) (Exhibit US-62).

<sup>37</sup> *'Food Safety' Tops the Menu*, China Daily (Nov. 28, 2006) (Exhibit US-63).

<sup>38</sup> Exhibit US-30.

<sup>39</sup> U.S. First Written Submission, paras. 119-122.

<sup>40</sup> *See, e.g.*, Exhibit US-9.

**objective of the measures would be insignificant. Can the United States please respond to this argument?**

90. In the first instance, the United States assumes that China is not arguing that other food exports from China are no more safe than poultry or that the United States should take additional measures with respect to other products in order to ensure food safety. Second, Section 727's objective is to protect human and animal life and health from the risk posed by the importation of potentially dangerous poultry products from China. The importance of this objective is not diminished by the amount of products that the measure addresses, whether it is only approximately one percent of total Chinese food imports or some other percent. Even if the amount of poultry that would enter the United States were small, it only takes one shipment of tainted poultry to cause serious health complications or even death to a U.S. consumer who consumes the contaminated product.

91. Further, it is worth noting that part of the reason Section 727 only applied to imports of poultry products from China is because at the time the measure was enacted only poultry products were the subject of an equivalence determination by FSIS. China had never before requested an equivalence determination for any product, and thus, there was no other instance where it would have even been hypothetically necessary for a measure similar to Section 727 to be enacted. And as the United States has pointed out in its answer to Question 65, China's systemic issues of enforcement raise concerns in the context of an equivalency regime that may not be raised in other contexts because the U.S. equivalency system is designed in such a way that it requires FSIS to rely on the other country to enforce its own laws to ensure that its exports to the United States meet the requisite level of sanitary protection.

92. Finally, poultry is not the only product from China with respect to which the United States has taken measures against when a potential risk to human and animal life and health was found to exist. In fact, in the context of FDA's regulatory process where import alerts are one of the typical means used to address problems with food safety, China has been the subject of numerous import alerts. A few examples of import alerts that FDA has imposed against Chinese products due to food safety concerns include import alerts against Chinese red melon seeds (illegal dyes), Chinese bean curd (insect filth), Chinese dried fungus and mushrooms (filth from animals and insects), Chinese garlic (mold, decomposition, insect filth/damage), Chinese honey (residues), Chinese farm-raised fish (drug residues), Chinese wheat gluten (intentional contamination), Chinese rice protein products (intentional contamination), Chinese shrimp (drug residues) and Chinese milk products (illegal contamination).<sup>41</sup>

**Q70. United States: In paragraph 80 of its oral statement, China argues that the United States' defence focuses on the FSIS procedures rather than on Section 727, which is completely outside the FSIS procedures. Could the United States please respond?**

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<sup>41</sup> See Exhibit US-24, p. 2.

93. China's argument is based on a flawed premise. In particular, China consistently fails to acknowledge that the U.S. process for determining equivalence includes Congressional oversight, as well as administrative procedures by FSIS. In contrast, the United States has explained at length why Section 727, considered in the context of ongoing FSIS administrative procedures, was necessary for ensuring food safety. Thus, China's assertion that the United States has "focused on FSIS procedures rather than Section 727" is a complete mischaracterization of the arguments actually presented by the United States.

**Q71. United States: The Panel notes that the evidence the United States is citing refers to a systemic problem that relates to all food imports from China and yet the measure at issue only deals with poultry. Can the United States please explain to the Panel the link between the systemic problem and the measure?**

94. China's food safety system suffers from numerous systemic problems, which include the inadequate enforcement of its food safety laws, smuggling, and corruption, among others. As the United States noted in its response to Question 65, China's systemic problem of lax food safety enforcement poses a particular problem with regard to food that is subject to an equivalency regime that it may not pose in other contexts. The reason for this is that under its equivalency system, once China's inspection systems have been found equivalent, the United States must rely on China to enforce its laws to achieve the requisite level of sanitary protection. This inherent feature of the U.S. equivalency regimes differs from other types of enforcement regimes that do not include such a strong reliance on the exporting country for enforcement and apply more in the nature of border measures. As a result, China's systemic problems are even more troubling in the equivalency context than they may be in others.

95. Furthermore, the risk posed by China's systemic problem of the lax enforcement of its food safety laws is further heightened in the context of the importation of poultry due to concerns about the presence of avian influenza (HPAI) in China. As the United States explained in its answer to Question 14, APHIS's regulations to protect against avian influenza (HPAI) would require China to certify that the products it is exporting have been cooked or otherwise processed in accordance with APHIS's requirements to kill the virus. Thus, the legitimate concerns about China's ability to enforce its laws raise questions about whether it would adequately enforce its laws in accordance with APHIS's requirements. Again, the risk of avian influenza (HPAI) is unique to poultry products, which is another reason why it is inappropriate to compare the treatment of Chinese poultry with the treatment of other Chinese food products.

**Q73. China/United States: Can both parties please explain their view on how the Panel should conduct the weighing and balancing of the contribution of the measure against its degree of trade restrictiveness given the relevant jurisprudence?**

96. In past disputes in which the responding party has invoked as a defense one of the GATT Article XX exceptions requiring a measure to be “necessary,” the Appellate Body, where relevant, has weighed and balanced a series of factors as part of a comprehensive analysis of the measure’s “necessity.”<sup>42</sup> Among the factors that these past reports have indicated can be taken into account include the importance of the stated policy objective, the contribution of the measure to this objective, and the measure’s trade restrictiveness. In addition, in conducting its analysis, the Appellate Body has also considered whether any WTO-consistent reasonable alternatives have been identified by the complaining party.<sup>43</sup>

97. The United States agrees that both a measure’s contribution to its stated policy objective and its degree of trade restrictiveness, among other relevant factors, can be taken into account by the Panel in conducting its comprehensive “necessity” analysis. And if in weighing these factors the Panel determines that a measure was particularly restrictive, such as an import ban, but made little contribution to its policy objective, this could weigh in favor of a determination that a measure was not necessary.

98. In the instant case, Section 727 was not an import ban and it only applied for a temporary short-term period. Further, the measure did not deny China access to the PPIA but instead, allowed work to continue related to China’s equivalency application. At the same time, Section 727 directly contributed to its policy objective of protecting human and animal life and health by ensuring that FSIS did not implement or establish rules relating to the importation of potentially dangerous poultry from China during the 2009 fiscal year before it could fully consider the risks posed. Therefore, both of these factors weigh in favor of a determination that Section 727 was necessary.

**Q74. United States: In paragraphs 53-55 of its oral statement, the United States argues that its measures are not a "disguised restriction on trade" because they are not to protect the domestic industry". Does the United States believe that a "protectionist" measure is the only type of measure that would qualify as a disguised restriction on trade.**

99. In *EC – Asbestos*, once the Panel concluded that the measure did not result in arbitrary or unjustifiable discrimination, it then looked at whether the measure was protectionist in nature.<sup>44</sup> And in that dispute, because the Panel did not find any evidence indicating that the measure was protectionist in nature, it concluded that it was not a disguised restriction on trade.

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<sup>42</sup> See *Brazil – Tyres (AB)*, para. 178; See also *China – Publications and Audiovisual Products (AB)*, para. 237, the most recent dispute in which the Appellate Body examined this issue, reaffirming the factors that were examined in *Brazil – Tyres (AB)* and in other disputes.

<sup>43</sup> See *Brazil – Tyres (AB)*, para. 178.

<sup>44</sup> See *EC – Asbestos (Panel)*, para. 8.238.

100. Thus, the reason that the United States emphasized that Section 727 was not protectionist in nature in demonstrating that the measure was not a disguised restriction on trade was because the United States had already demonstrated that the measure was not a form of either arbitrary or unjustifiable discrimination. Because Section 727 is none of these things, it meets the requirements of the Article XX chapeau.

**Q75. United States: In paragraph 110 of its oral statement, China argues that the United States has failed entirely to meet its burden to provide evidence about conditions in other WTO Members and to compare such conditions to those in China to justify its recourse to Article XX(b) of the GATT 1994. Does the United States agree that it should have provided this analysis? If not, why not?**

101. The United States does not have the burden of providing evidence about conditions in other WTO Members and comparing these conditions to those in China in order to justify its Article XX(b) defense. Rather, as the Appellate Body has affirmed on numerous occasions in the past, the United States, as the responding party invoking an Article XX(b) defense, must simply prove that Section 727 was necessary to protect human and animal life and health and that it also met the requirements of the Article XX chapeau.<sup>45</sup>

102. To prove that a measure is necessary to protect human and animal life and health, the responding party must demonstrate that a risk to human and animal life and health exists, that the measure was enacted with the policy objective of protecting against this risk, and that the measure was necessary to achieve this policy objective.<sup>46</sup> In the instant case, the United States has met its burden and has shown that Section 727 was necessary to protect human and animal life and health against the risk posed by the importation of potentially dangerous poultry from China.<sup>47</sup>

103. To meet the chapeau's requirements, past Appellate Body reports have explained that the responding party must demonstrate that its measure (1) was not a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or (2) a disguised restriction on international trade.<sup>48</sup> In the instant case, the United States has also met this burden. It has shown that Section 727 was not a form of unjustifiable or arbitrary discrimination because the same conditions did not prevail in China as prevailed in other countries who were at the same point as China in the equivalency process when Section 727 was enacted. Further, the United States has also shown that there was a strong rationale for enacting Section 727 because of the strong concerns about China's ability to enforce its laws to ensure

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<sup>45</sup> See, e.g., *US – Gasoline (AB)*, p. 22.

<sup>46</sup> See, e.g., *Brazil – Tyres (Panel)*, para. 7.40, *EC – Asbestos (Panel)*, para. 8.169.

<sup>47</sup> See U.S. First Written Submission, paras. 27-48.

<sup>48</sup> See, e.g., *US – Gasoline (AB)*, p.22; *US – Shrimp (AB)*, para. 118-120.

that the poultry it might export to the United States would be safe. Finally, the United States has also demonstrated that the measure was not a disguised restriction on trade because, among other reasons, it was not protectionist in nature and was based on health-related objectives, not trade-related ones.

104. While in some instances it may be helpful for a Member asserting an Article XX(b) defense to provide specific evidence with respect to the conditions prevailing in other countries, this is by no means required. Past Appellate Body and panel reports simply indicate that it is the responsibility of the responding party to demonstrate that its measure did not discriminate in an arbitrary or unjustifiable manner, and they have not narrowly circumscribed the manner in which this demonstration should take place. The United States has made this demonstration, and thus, it has met its burden.

**Q76. United States: Please address the Appellate Body's reasoning in *US - Shrimp* that the exporters were in "similar" positions in light of the simple facts that they all exported shrimp and that they all had a common interest in accessing the US shrimp market. Does the fact that this case dealt with Article XX(g) of the GATT 1994 have any relevance?**

105. In *US – Shrimp*, the Appellate Body concluded that the United States' policy of requiring all other WTO Members to adopt the same comprehensive regulatory program to achieve its goal of protecting sea turtles from being ensnared in shrimp trawlers resulted in both unjustifiable and arbitrary discrimination against these countries. The Appellate Body noted that it was simply not acceptable "to require Members to adopt the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within the Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members."<sup>49</sup> Further, the Appellate Body found fault with the fact that the United States did not engage in serious negotiations on a solution with all of the Members that sought to export shrimp to the United States. In other words, the flaw in the U.S. approach in *US – Shrimp* can be characterized as a failure to take into consideration different conditions in the territories of different Members and instead to simply apply the same approach to all countries regardless of the differences among them.

106. Section 727 does not suffer from this same flaw. To the contrary, Section 727 was based on a careful consideration of the troubling conditions that occurred in the territory of China that differentiated China from other countries. Namely, Section 727 was enacted in response to China's recent food safety crises, such as the melamine crisis, and China's severe systemic problems, such as its difficulty in reliably and consistently enforcing its food safety laws. Thus, unlike the measure examined by the Appellate Body in *US – Shrimp*, Section 727 explicitly took into consideration the conditions that occurred within China, and the measure was tailored to address these conditions.

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<sup>49</sup> *US – Shrimp (AB)*, para. 164.

107. While it may be true that China is similarly situated in some ways as the limited group of Members who have actually submitted an equivalency application to FSIS, it cannot be said that China was discriminated against vis a vis these other Members in an arbitrary or unjustifiable manner. After all, no other country who was in a position of imminently being able to export poultry product to the United States had just recently experienced food safety crises of the magnitude of the melamine crisis nor had any of these countries experienced broad systemic problems that raised as serious concerns as China's application. Therefore, even conceding that there may be some similarities between these countries and China, it cannot be said that the same conditions prevailed in them or that China was discriminated against in an arbitrary or unjustifiable manner.

108. In this context, it is important once again to stress that Section 727 did not deny China access to the PPIA. China was given access to the PPIA as were other Members who desired to export poultry products to the United States. Rather, Section 727 simply reflected the determination by the United States that it was necessary for FSIS to further consider and seek to address the troubling concerns raised by China's lax food safety enforcement for a short period of time during the 2009 fiscal year before allowing China to export poultry products to the United States.

109. Finally, because, as explained above, the situation examined in *US – Shrimp* is not analogous to the situation facing the Panel in the instant dispute, the United States believes that the Panel need not confront the question of whether its logic would also apply in a XX(b) context.

**Q77. United States: In paragraph 47 of its oral statement, the United States references the process set up by Section 727 by which the FSIS could further evaluate the rules in light of China's systemic problems and recent food safety crises. Could the United States please explain how this process is different from the regular re-evaluation provided for in FSIS's normal procedures?**

110. Under its applicable statute and regulations, FSIS is permitted to consider any issue relevant to the equivalency of another country's poultry inspection system when it is making an equivalency determination. In principle, FSIS could have considered the problems that were posed by China, such as its issues with corruption, smuggling, avian influenza (HPAI), and the lax enforcement of its food safety laws before Section 727 was enacted. However, because FSIS in practice had never before been asked to make an equivalency determination for a country with such severe problems, Section 727 was necessary to ensure FSIS would more fully consider these serious issues before moving forward with the promulgation or implementation of rules that would allow China to export poultry products to the United States.

111. During the time that Section 727 was in effect, FSIS and other parts of the U.S. government did take several steps to more fully consider the problems posed by China that would not have otherwise occurred. Some of these steps were specifically outlined in the JES accompanying Section 727, such as the action plan that Congress directed FSIS to develop and was thoroughly discussed in Question 23. The JES accompanying Section 727 also required USDA to submit a report to Congress on its findings on China's new food safety laws so that Congress could be certain that FSIS was fully considering all of the problems that it believed were relevant.

112. At the same time, FSIS also worked to improve the tools that it uses to make equivalence determinations, enhancing the depth and scope of information required to make a determination of equivalence, as was also discussed in Question 23. Thus, any subsequent proceedings related to China's equivalency application will take place under this new and modified framework.

**Q78. United States: In paragraph 48 of the oral statement, the United States states that even in the absence of Section 727 China would not have exported significant amounts of poultry to the United States. How does the United States reconcile this statement with the "necessity" of Section 727?**

113. The test is not whether a measure is necessary to restrict significant amounts of trade, but rather whether a measure is necessary to protect life and health. The U.S. comment in paragraph 48 of its Oral Statement was intended to illustrate Section 727's limited impact on trade by pointing out that even in Section 727's absence, China would not have exported significant amounts of poultry to the United States. The reason that China would not have exported significant amounts of poultry was that China was not in a position to immediately export poultry product to the United States at the time the funding restriction was enacted because FSIS would still have had to conduct an equivalence review determination for processed poultry and would still have had to finalize a rule for slaughtered poultry. Thus, even in Section 727's absence, it is unlikely that China would have been able to export significant quantities during the 2009 fiscal year.

114. However, this does not undermine Section 727's necessity. After all, Section 727's enactment was not intended to block these potential shipments of poultry from entering the United States, but to ensure that any shipments were safe. To achieve this, Section 727 was designed to make sure that FSIS took all of China's systemic concerns into account before actually implementing or promulgating an equivalency rule. Thus, even if no poultry were to enter the United States in fiscal year 2009 in Section 727's absence, Section 727 was still necessary to ensure that all of these concerns had been accounted for before shipments would begin at some later date.

115. Finally, Section 727's objective was to protect against the risk posed by the importation of potentially dangerous poultry products from China. This risk attaches to the consumption of even one shipment of contaminated poultry that could have serious health consequences for

someone who consumes it. Thus, regardless of the amount of poultry that China may have shipped, Section 727 was necessary to protect human and animal life and health.

**Q79. United States: In paragraphs 30, 34 and 35 of its oral statement, the United States references instances of smuggling of poultry products. Can the United States please explain how the potential for smuggling relates to the protection of human, animal and plant life or health rather than to the enforcement of the US customs laws?**

116. The potential that Chinese poultry will be smuggled into the United States threatens human and animal life and health in a variety of ways. First, China's history of smuggling and corruption underscore the problems with China's food safety enforcement system. Vulnerabilities, such as lax enforcement, have caused concern that the United States could not rely upon China's certifications that the poultry it was shipping to the United States under the processed poultry rule was slaughtered in an approved country or that the poultry it was shipping to the United States had been processed sufficient to kill the avian influenza (HPAI) virus. If poultry that was infected with avian influenza (HPAI) were exported to the United States, human and animal life and health would be endangered. Similarly, if poultry that was slaughtered in Chinese plants or in another ineligible country was exported to the United States under the processed poultry rule, there is a risk that the poultry would be unsafe to eat, given that the Chinese or other country's slaughter inspection system had not been found to be equivalent.

**Q80. United States: In paragraph 38 of its oral statement, the United States says "with this risk in mind, the US Congress enacted Section 727". Could the United States please specify exactly which risk it is referring to?**

117. Congress enacted Section 727 based on concerns about the risk posed to human and animal life and health from the importation of potentially dangerous poultry from China. The language of the measure, the JES accompanying the measure, statements from the author of the measure as well as from other members of Congress all illustrate that this was in fact the measure's policy objective.<sup>50</sup>

118. Congress began to grow concerned about the risk posed by potentially dangerous Chinese poultry for numerous reasons. Among the reasons that were cited in various pieces of legislative history, including the letters that members wrote in response to the proposed rule for processed poultry, were concerns about the potential spread of avian influenza (HPAI), concerns about smuggling, corruption, and China's lax enforcement of its food safety laws, and concerns about China's ongoing food safety crises, including the melamine scandal. These are the risks that were identified by members of Congress and that the United States was referring to when it stated "With this risk in mind, the U.S. Congress enacted Section 727."

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<sup>50</sup> See U.S. First Written Submission, paras. 119-122.

**Q81. United States: In paragraph 39 of its oral statement, the United States cites the Committee Report accompanying the Fiscal Year 2008 funding restriction to support its contention that the objective of Section 727 is to protect human, animal and plant life or health. Please explain to the Panel why the Report accompanying the 2008 measure is relevant for determining the purpose and objective of the 2009 measure.**

119. As the United States has noted, the fiscal year 2008 and fiscal year 2009 funding restrictions were both addressed to the same matter, in that they both prohibited FSIS from promulgating or implementing rules related to the importation of poultry products from China while they were in effect. Accordingly, the rationale behind the enactment of the fiscal year 2008 measure is relevant to the rationale behind the enactment of the fiscal year 2009 measure. It is for this reason that the United States cites the Report accompanying the 2008 measure, which explains that measure's policy objective.

**Q82. United States: In paragraphs 32-33 of its oral statement, the United States references several studies relating to China's food safety system. Additionally, in paragraph 34 of its oral statement, the United States provides a list of examples of high-profile crises threatening the life and health of consumers and leading to frequent bans on Chinese products. Can the United States please answer:**

**(a) What is the relevance of the fact that none of these "crises" cited specifically relate to poultry products?**

120. As the United States noted in its response to Question 65, the numerous food safety crises that have plagued a whole range of Chinese products help illustrate the necessity of Section 727 because they raise serious questions about China's ability to enforce its food safety laws in all contexts, including with regard to poultry. While lax enforcement poses a problem for the import of any type of food product, the risk that it poses for a product subject to an equivalency regime is particularly high. The reason for this is that by its very nature, the U.S. equivalency regime requires the United States to rely on the exporting country's authorities to enforce its laws to achieve the requisite level of sanitary protection. Furthermore, the risk posed by lax enforcement is heightened in the context of poultry due to concerns about the presence of avian influenza (HPAI) in China and the fact that APHIS would also be relying on Chinese authorities to certify that the poultry it export to the United States was cooked or otherwise processed in accordance with APHIS's requirements to kill the virus.

121. In addition, it is also worth repeating that some of the crises China has faced, such as those mentioned in response to Question 65, have directly related to poultry. These include melamine-tainted animal feed that was consumed by chickens in China, eggs laid by Chinese chickens that were also found to contain melamine, and the smuggling of Chinese poultry into the United States. Thus, although some of the most troubling food safety crises that have

occurred in China in recent years affected non-poultry products, there have been at least three crises related to poultry products as well.

- (b) What is the relevance of the fact that five of the examples cited pre-date the FSIS determination that the Chinese food safety system was "equivalent" to that of the United States?**

122. The fact that several of the examples pre-date FSIS's determination on the equivalency of China's processed poultry inspection system illustrate that China's problems with smuggling, corruption, and lax food safety enforcement are not new problems facing the country, but long-term problems that China has had trouble resolving. These examples illustrate that there were concerns about China's system even before the melamine crisis and the other crises that occurred around the time that Section 727 was enacted. In fact, the existence of these problems at the time FSIS made its determination on processed poultry helped cause concern among members of Congress that FSIS had not adequately considered these issues during its rulemaking and therefore Section 727 was necessary to ensure that issues of this nature could be more fully addressed.

- (c) What is the link between these studies and Section 727? Is the United States arguing that the measures are "based" on these studies?**

123. Section 727 was enacted due to concerns about China's many food safety crises and concerns about its lax food safety enforcement, concerns that pose a particular problem in the context of an equivalency regime. While it is not accurate to say that Section 727 was "based" on the numerous studies that discuss these broad, systemic problems, they do illustrate many of the reasons why Section 727 was necessary.

**Q83. United States: In paragraph 30 of its oral statement, the United States refers to China as being classified as a country where highly pathogenic avian influenza exists. Could the United States please answer the following:**

- (a) Who designated China as a country where highly pathogenic avian influenza exists?**

124. Countries that are members of the World Organization for Animal Health (OIE) are required to report positive tests for certain diseases to the OIE as soon as they are confirmed. Both avian influenza (HPAI) and END are on the list of diseases that are required to be reported, and China itself has reported outbreaks of avian influenza (HPAI) to OIE.

- (b) Is there an international standard, guideline or recommendation with respect to how to treat Chinese poultry?**

125. There is no specific standard on how to treat Chinese poultry. However, the OIE does

have a recommendation for the thermal mitigation of avian influenza (HPAI) in poultry meat,<sup>51</sup> with which APHIS agrees.

**(c) Were these risks considered by the FSIS in its equivalency evaluation?**

126. APHIS issues on animal health risks have not played a part in FSIS determinations about the equivalence of a foreign inspection system. However, as expressed in the comments submitted regarding the rule, many members of Congress and other individuals had significant concerns about China's ability to enforce its laws to ensure that the poultry it exported to the United States was properly treated to kill the avian influenza (HPAI) virus.

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<sup>51</sup> *Avian Influenza*, Chapter 10.4, Terrestrial Animal Health Code, World Organization for Animal Health (OIE) (Exhibit US-64).

### **List of U.S. Exhibits**

<u>U.S. Exhibit</u>	<u>Description</u>
US-56	9 C.F.R. § 94.6
US-57	9 C.F.R. § 94.26
US-58	Congressional Research Service, <i>Conference Reports and Joint Explanatory Statements</i> (Dec. 1, 2004)
US-59	[Intentionally Omitted]
US-60	21 U.S.C. § 455(c)
US-61	USDA Letter on Self-Reporting Tool (May 27, 2009)
US-62	<i>China urged to halt melamine in eggs</i> , Reuters Online (Oct. 26, 2008)
US-63	<i>'Food Safety' Tops the Menu</i> , China Daily (Nov. 28, 2006)
US-64	<i>Avian Influenza</i> , Chapter 10.4, Terrestrial Animal Health Code, World Organization for Animal Health (OIE)