

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

(WT/DS392)

**EXECUTIVE SUMMARY OF THE
ORAL STATEMENT OF THE
UNITED STATES OF AMERICA
AT THE FIRST SUBSTANTIVE
MEETING OF THE PANEL**

December 22, 2009

1. China's submission and oral statement overlook two important facts: first that Section 727 was adopted in the context of an ongoing food safety equivalency procedure, and second that Section 727 was of only limited duration and effect. A proper examination of Section 727 under relevant WTO rules requires both of these facts to be fully taken into account.

2. First, under the U.S. system for ensuring the safety of imported poultry products, FSIS must determine that the exporting country has a poultry inspection system that achieves the same level of sanitary protection as the U.S. system. The equivalency determination is not addressed to the food safety of particular products, but to the equivalency of the inspection system of the exporting country. China does not contest the right of a WTO Member to adopt an equivalency-based food safety system. However, China argues that Section 727 was "discriminatory" simply because it mentions China. This argument ignores the fundamental point that Section 727 was addressed to China because the measure was an exercise of Congressional oversight over the ongoing equivalency procedure involving China's poultry inspection system. An action taken in the context of an equivalency review of a particular country's food safety inspection system will, by its very nature, make explicit reference to that country. The country-specific nature inherent in an equivalency review does not automatically raise questions of "discrimination."

3. Second, Section 727, on its face, was of only limited duration and effect. Neither Section 727, nor any other U.S. measure, imposed an indefinite restriction on the completion of the equivalency procedures applicable to China's poultry inspection system. Rather, Section 727 applied for a period of less than seven months, and was intended to ensure that China's lax food safety enforcement was properly considered. The measure has expired, and under a separate measure – Section 743 – the funding restriction has been removed. Section 727 also applied only to the establishment or implementation of equivalency rules for Chinese poultry; it did not prohibit – and indeed contemplated – the consideration of issues related to China's food safety enforcement system during the period subject to the measure.

4. Thus, to the extent that China establishes that the measure is inconsistent with any discipline of the GATT 1994, the question is not – as China seems to frame it – whether a Member may impose an indefinite import ban. Rather, the question is whether the measure actually at issue, which was limited in both time and substantive effect and which was adopted for the purpose of ensuring the consideration of a legitimate food safety issue, may be justified under GATT Article XX.

5. Finally, the mere fact that a measure implicates food safety does not dictate whether or how such a measure is covered by the SPS Agreement. To the contrary, the SPS Agreement – in its Annex A – contains a specific and detailed definition of covered measures. And as illustrated in the *EC – Biotech* dispute, even if a measure is covered by Annex A, it is far from trivial to determine how each of the differing SPS obligations apply to any particular measure.

6. Along these lines, it is up to China, as the complaining party, to allege how and why a measure is covered by the SPS Agreement if it wishes to receive DSB findings under that agreement. In this dispute, China has not chosen to make the case that Section 727 is covered by the SPS Agreement. In fact, China's request for consultations plainly states that "China does not believe that the US measures at issue restricting poultry products from China constitute SPS measures within the meaning of the SPS Agreement."

7. China, however, has alleged that the U.S. measure is subject to, and is inconsistent with, disciplines under the GATT 1994. As a result, the United States has presented its defense of the measure under the relevant provisions of the GATT 1994. Had China requested consultations under the SPS Agreement, and had China made a *prima facie* case of how and why the U.S. measure fell under the SPS Agreement, the United States would have presented its defense under

that framework. But the United States, as responding party, cannot be expected to present a defense based on claims never consulted upon and with respect to which China has failed to make even a *prima facie* case.

8. China asserts that two other measures – an “indefinite moratorium” and the subsequently enacted Section 743 – also are inconsistent with the WTO Agreement. Section 727, however, is the only measure within the terms of reference of the Panel. China has no basis for the allegation of the separate, distinct measure that it calls “the Moratorium.” In particular, China’s citation to a provision in the 2008 appropriations bill does not establish an indefinite moratorium. The fact that Congress enacted a time-limited funding restriction twice does not show the existence of an “*indefinite*” suspension of approvals. Moreover, Section 743 disproves China’s claim as it has resulted in a lifting of the funding restriction.

9. In addition, contrary to China’s assertions, Section 743 is not a measure that the Panel may examine for conformity with the covered agreements because it is not within the Panel’s terms of reference as part of the “matter” referred to the Panel by the DSB. First, the parties did not consult on its provisions. Second, Section 743 plainly changes the “essence” of Section 727.

10. China also mischaracterizes the effect of Section 727 by failing to take account of the “scope and meaning” of provisions contained in U.S. appropriations legislation generally, and of the particular conditions contained in Section 727 specifically. U.S. domestic law dictates that a congressional funding restriction is limited to its explicit terms. Funding restrictions do not amend or modify the underlying law administered by an executive agency. Accordingly, these restrictions do not prevent the agency from taking actions *related* to the prohibited act as long as the agency does not take the prohibited act itself. Further, unless the funding restriction states otherwise, it only applies to the fiscal year covered by the appropriations bill in which it is contained.

11. Thus, Section 727’s legal meaning was limited to preventing USDA from “establishing” or “implementing” a rule allowing poultry products from China to be imported into the United States for a temporary six and a half month period during the 2009 fiscal year. Section 727 did not create a permanent funding restriction that would impact FSIS’s ability to establish and implement rules related to equivalency after its expiration. And indeed, as a consequence of Section 743, the funding restriction on FSIS has been lifted.

12. Further, Section 727 did not prohibit FSIS from using funds to engage in activities under the PPIA *related* to an equivalency rulemaking for China. To the contrary, Section 727 directed FSIS to engage in this work, and it did so during 2009. FSIS reviewed its documentation with regard to China’s equivalency application, it sent a letter to China requesting additional information on its new food safety law, and it provided an equivalency action plan to Congress. FSIS could have done even more work, including the PPIA’s document analysis step, but its work was thwarted by China’s failure to respond to its letter requesting additional information.

13. Finally, Section 727 did not ban imports of poultry from China. Rather, the import prohibition was imposed by the PPIA, a measure not at issue in this dispute. And even in the absence of Section 727, FSIS procedures would not have necessarily allowed China to export poultry to the United States. For neither processed or slaughtered poultry was it a foregone conclusion that FSIS would find China’s inspection system to be equivalent.

14. Thus, the most China can allege is that Section 727 prevented FSIS from taking final actions to specifically establish or implement equivalency rules during fiscal year 2009 that *might* have otherwise occurred. China has no basis for alleging how, if at all, any final actions would have differed during the period covered by Section 727 had this measure not been enacted.

15. In any event, Section 727 is justified pursuant to GATT Article XX(b).

16. Section 727's policy objective falls within Article XX(b)'s range of policies. First, it is well known that poultry can contain bacteria, contaminants, and other additives and substances that pose a risk to human life and health. Thus, if China's authorities fail to enforce its laws to ensure that its poultry is produced under equivalent conditions, then the life or health of U.S. consumers would potentially be at risk. Similarly, avian influenza-infected poultry can pose a risk to animal and human life and health. And entry of infected poultry from China could occur if Chinese authorities did not adequately enforce the law to ensure that poultry had been cooked or otherwise processed sufficiently to kill the disease.

17. The risk posed by China's lax enforcement of its food safety laws is further highlighted by critical reports on China's systemic problems and the series of food safety crises that have plagued China in recent years. For example, the Asian Development Bank noted that "unsafe food in the PRC remains a serious threat to public health," and indicated that "there is a pressing need for further reform." Similarly, the World Health Organization's food safety chief characterized China's food safety system as "disjointed," noting that this feature of the system helped prolong the melamine crisis. Finally, a study by *Global Health Governance* pointed out that the reluctance of local officials in China "to enforce standards or regulations set at the provincial or national level makes it unlikely that food safety can be ensured consistently across the country." The report also stated: "corruption within the Chinese government poses a further challenge" to food safety as this problem "extends from grass-roots cadres to the highest levels."

18. In addition, numerous high-profile crises have occurred, threatening the life and health of consumers and leading to frequent bans on Chinese products. Most notably, in 2007, the use of melamine in China to adulterate feed and gain bigger profits led to the deaths of numerous U.S. household pets, with unofficial figures indicating the practice responsible for the death of up to 4,000 cats and dogs. In 2008, it was discovered that Chinese producers were using melamine in products intended for human consumption, such as baby formula, milk, and eggs. Consumption of melamine-tainted products led to over 300,000 illnesses and the deaths of at least 14 infants. The World Health Organization dubbed China's melamine crisis "one of the largest food safety events the agency has had to deal with in recent years."

19. China's central government even recently acknowledged the extent of its problems with food safety. For example, China's Ministry of Health stated that "China's food security situation remains grim, with high risks and contradictions." And as a result of these problems, China was forced to enact a new food safety law earlier this year.

20. These many broad-ranging food safety crises raise serious questions about China's ability to enforce its laws. And the question of enforcement is of particular importance in the context of an equivalency regime where the United States must rely on China to enforce its laws to ensure that the poultry it is exporting to the United States is safe.

21. With these risks in mind, the U.S. Congress enacted Section 727. The measure and its Joint Explanatory Statement ("JES") make clear that its policy objective was to protect against

the risk posed to human and animal life and health from potentially unsafe poultry from China. In fact, the JES accompanying Section 727 states: “There remain very serious concerns about contaminated foods from China and therefore the bill retains language prohibiting FSIS from using funds to move forward with rules that would allow for the importation of poultry products from China into the U.S.” Similar language was also included in the Committee Report accompanying Section 733.

22. Section 727 was necessary to achieve this important policy objective in light of the severe risks posed by the importation of potentially unsafe poultry from China. China’s food safety system suffers from broad systemic problems, problems that FSIS is not typically faced with when making an equivalency determination. These include widespread smuggling, corruption, and the lax enforcement of China’s food safety laws. Furthermore, China has experienced numerous food safety crises in recent years, such as the devastating melamine crisis that occurred shortly after FSIS had made a final determination about China’s poultry processing system.

23. The conclusion that Section 727 was necessary is bolstered by the analysis that past panels have used when addressing whether a measure was “necessary” in the context of Article XX(b). Other panels have often found it helpful to weigh and balance the importance of the interests or values at stake, the contribution made by the measure to its policy objective, and the trade restrictiveness of the measure. In the instant dispute, these factors all support the conclusion that Section 727 was necessary.

24. First, the need to protect human life and health from the risk posed by consuming potentially unsafe poultry is of the utmost importance, as is the need to protect animal life and health from the threat of avian influenza. Second, there is a direct relationship between Section 727’s policy objective and its contribution to food safety. Section 727 directly contributed to the protection of human and animal life and health by ensuring that FSIS did not establish or implement equivalency rules that would allow for potentially unsafe poultry to be imported into the United States. In addition, Section 727 set up a process by which FSIS could further evaluate the rules in light of China’s systemic problems and recent food safety crises. Finally, Section 727 was temporary and did not stop work related to China’s equivalency application, and it was explicitly designed to allow FSIS to move forward with the implementation and establishment of equivalency rules when the funding restriction was lifted.

25. Section 727 also meets the conditions of the Article XX chapeau. Section 727 was not discriminatory because there is no other country where the same conditions prevail as they did for China at the time the measure was enacted. No other country as far along in the equivalency process had experienced food safety crises of such a serious magnitude. Neither had any country in that situation suffered from the systemic problems that plagued China’s food safety system.

26. Even if the Panel considers Section 727 discriminatory, it was not applied in an arbitrary or unjustifiable manner. The *Brazil – Tyres* Appellate Body Report noted that whether a measure is applied in a way that is “arbitrary or unjustifiable” should focus “on the cause of the discrimination, or the rationale put forward to explain its existence.” Section 727’s application was not arbitrary or unjustifiable because there was a strong rationale for the measure’s treatment of China that directly relates to the measure’s policy objective – namely the many legitimate concerns about China’s food safety system.

27. Section 727 is also not a disguised restriction on trade. First, the text of the explanatory statement accompanying the measure explicitly indicates that the measure’s policy objective was

to protect human and animal life and health, not to protect a domestic industry. Further, if Section 727's objective were to restrict trade, it would not have included language instructing FSIS to set the stage for expeditious action on the implementation and establishment of the equivalency rules as soon as the funding restriction was lifted. Statements by members of Congress directly involved with Section 727's enactment also support this view, as does the U.S. poultry industry's widespread opposition to the measure.

28. The United States believes that any SPS claims by China are not within the Panel's terms of reference. DSU Article 1.1 states that consultations must be requested pursuant to the consultation and dispute settlement provisions of each covered agreement for which dispute settlement under the DSU is sought. But here, China's request for consultations plainly states that "China does not believe that the US measures at issue restricting poultry products from China constitute SPS measures within the meaning of the SPS Agreement."

29. China's *ex post facto* explanation that it wanted to invoke claims under the SPS Agreement as "alternative claims" is unavailing. First, regardless of what China subjectively intended, the governing document is the request for consultations itself, which does not request consultations in order to pursue alternative claims, but asserts that the U.S. measures at issue are not SPS measures. Second, Members routinely invoke alternative claims by stating just that: that particular claims are presented "in the alternative." China in its request for consultations could have, but did not, present SPS claims in the alternative.

30. The issue presented by China's consultations request is not a mere technicality. In raising the deficiency of China's consultations request, the United States is pursuing an important systemic concern. A complaining party should not be free to claim that it is not invoking the dispute settlement provisions of a covered agreement and then later claim that it did. China's approach could lead to greater confusion in future disputes. The DSU provisions are clear and were agreed upon – a complaining party's consultations request "shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint." As stated in the U.S. preliminary ruling request, clarity in the request for consultations is important for the overall operation of the dispute settlement system.

31. Finally, the United States agrees with China that the Panel should not accept the EU's request that the Panel alter its working procedures in order to provide enhanced third party rights. 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 measure at issue in the dispute. And in *EC – Hormones*, the panel granted enhanced rights to what were essentially co-complainants in parallel proceedings. 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. 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 continue to develop after the first substantive meeting. Indeed, if this were not the case, the DSU's requirement for a second substantive meeting would be pointless.