

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL**

***UNITED STATES - CERTAIN MEASURES AFFECTING
IMPORTS OF POULTRY FROM CHINA
(WT/DS392)***

March 9, 2010

I. Introduction

1. Mr. Chairman, members of the Panel, and the Secretariat: on behalf of the United States, we would like to thank you for your ongoing work in this panel proceeding.
2. In the course of this dispute, the United States has explained in detail why Section 727 was necessary to protect human and animal life and health against the risks posed by Chinese poultry. We will not repeat all of these arguments today. Instead, the U.S. statement will focus on responding to the issues raised by China in its second written submission.
3. China's second submission mainly addresses the applicability of GATT Article XX(b) to the U.S. measure. Accordingly, most of our statement will be addressed to the issues under Article XX(b). China's second submission also contains some additional comments on other matters, including its GATT Article I claim and the U.S. preliminary ruling request. We will turn to those issues at the end of this statement.

II. Section 727 Is Justified Under GATT Article XX(b)

4. In its second submission, China makes six primary arguments in an effort to undermine Section 727's necessity and in an attempt to demonstrate that the measure is applied in a manner that would constitute arbitrary or unjustifiable discrimination against China. China's arguments suffer from numerous flaws. They often miss the point and frequently mis-characterize the U.S. position. Additionally, China completely overlooks the fact that Section 727 was an act of congressional oversight taken in the context of an ongoing equivalence proceeding. Today's statement by the United States will expose these flaws in China's arguments and will again demonstrate why Section 727 was necessary to protect life and health in accordance with GATT Article XX(b).

A. Section 727 Was Part of an Ongoing Equivalence Proceeding

5. The first substantive Article XX(b) argument that China puts forth in its second submission is a reiteration of its position that Section 727 denied China access to the PPIA.¹ Indeed, China spends nearly ten pages on this argument.

¹ See China Second Written Submission, paras. 27-50.

6. However, this is simply not the question presented. There is nothing in the GATT 1994 provisions cited by China that requires a Member to utilize any particular set of procedures when evaluating whether another Member's system will ensure the safety of the food that it exports to a Member. In fact, there is nothing that speaks to providing an exporting Member with "access" to any procedures at all.

7. Rather, the question presented is whether food exported from a Member poses risks to life or health such that it is necessary for the importing Member to take steps to ensure that the exported food will be safe. And that is what the United States did here. The United States was faced with a situation where there were massive food safety concerns in China as well as the comprehensive overhaul of China's food safety system all while a process was underway to ascertain and ensure the safety of exports of Chinese poultry. And this very process depended on being able to be confident that China's own system would work to ensure the safety of poultry exports. At the time Section 727 was enacted, the U.S. Congress did not yet have the level of confidence it desired. It was in this context that the U.S. Congress took the steps it deemed necessary to ensure the safety of the U.S. food supply with respect to Chinese poultry exports.

8. There are many legitimate types of steps which a Member could take to ensure food safety, including within the context of an overall review of the equivalence of another Member's system. For example, an importing Member as part of its system could decide that it could not complete an equivalence process until after it sought additional information, a more complete application, additional audits, further explanation, or additional scientific studies. Section 727, which provided that the United States could not complete its equivalence process for a set period of time while additional work was underway, was one of these legitimate types of steps.

9. Thus, China's argument is simply incorrect because it overlooks an important factual matter, namely, that Section 727 was a normal act of congressional oversight taken in the context of an ongoing equivalence proceeding. As the United States has noted, congressional oversight of this nature is commonplace in the U.S. system of governance. Congress often places funding restrictions on executive branch agencies to ensure that their actions comply with their congressional mandate. In this instance, Congress enacted Section 727 to ensure that FSIS met its congressional mandate of protecting life and health by fully considering China's systemic food safety enforcement problems and new food safety laws before establishing or implementing equivalence rules for Chinese poultry. In other words, the action by Congress was not separate and apart from the system in the United States to ensure the safety of imported food, but rather is a part of that system. Had an executive branch official taken action to ensure that China's enforcement problems were fully considered, the United States doubts that we would even be before this Panel today.

10. Putting this aside, the United States agrees with China that Section 727 did not allow FSIS to undertake every possible aspect of the equivalence procedure. In particular, as a result of this measure, for a specified, temporary, period of time, FSIS could not complete two very specific tasks. First, FSIS could not use funding to "establish" a rule related to slaughtered

poultry from China. Second, FSIS could not use funding to “implement” a rule related to processed poultry from China. And of course, this was the whole point of Section 727.

11. However, contrary to China’s arguments, Section 727's impact went no further than this. The measure did not prevent FSIS from conducting activities *related* to China’s equivalence application, such as the document review step and other actions under the PPIA for which funding was not explicitly prohibited. Any assertion to the contrary flies in the face of clear U.S. domestic jurisprudence.² Indeed, even China appears to endorse this position in its second submission when it states that “the legal impact of a congressional funding restriction is limited to its express terms.”³

12. The United States is glad that the parties agree on this point. And based on this agreed point – that Section 727's legal effect is limited to its explicit terms – it is indisputable that China was not denied with access to the PPIA and could conduct activities under the PPIA while Section 727 was in effect.

13. Perhaps recognizing the weakness of its position, China subtly shifts its argument to suggest that whether FSIS could take related activities is “ultimately irrelevant.”⁴ However, FSIS’s ability to conduct this work during Section 727's period of applicability is far from meaningless.

14. In fact, FSIS’s ability to engage in related work underscores Section 727’s contribution to its objective. By allowing FSIS to conduct this work during 2009 and by including a Joint Explanatory Statement (JES) directing FSIS on the steps to take to ensure that life and health is protected, including evaluating China’s new food safety law to assess whether it improved China’s food safety outlook,⁵ Congress designed Section 727 such that it directly contributed to its objective. The JES also included further steps FSIS could have taken to advance this objective if China had responded to the U.S. request for information, such as conducting audits of China’s inspection systems, one of the specific steps listed in the PPIA.

15. FSIS’s ability to work on related issues also highlights Section 727’s temporary nature and limited restrictiveness. Section 727 would have been more restrictive if it operated as a permanent denial of equivalence for China, were a permanent import ban, or stopped all work related to China’s equivalence application during its period of applicability. Instead of enacting a measure of this nature, Congress enacted a temporary and limited measure. Further, Congress included a JES that provided clear instructions on a path forward to address its concerns. By designing the measure this way, Congress set the stage for FSIS to proceed to the implementation

² See, e.g., Exhibit US-5 and Exhibit US-6.

³ China Second Written Submission, para. 32.

⁴ China Second Written Submission, para. 50.

⁵ Exhibit CN-33.

or establishment of poultry equivalence rules in an expeditious fashion after the set period had expired.

16. Before moving to China's next argument, the United States would like to make one additional point related to China's arguments on Section 727's scope. China's submission incorrectly asserts that FSIS's equivalence-related actions during 2009 were "minimal."⁶ To the contrary, FSIS did considerable work related to China's equivalence application including the development of an action plan while Section 727 was in effect. FSIS completed the first three steps under the action plan, took steps to improve its equivalence process, and could have done more had China been responsive to its request for information about its food safety overhaul.⁷

17. We would note that China concedes it did not respond to the U.S. letter of May 12, 2009, requesting additional information about revisions to China's food safety system, but rather China relies on notifications over three months later, at the end of August 2009, made to the SPS Committee.⁸ We would also note that China itself acknowledges in its second submission that Members were notified of the implementing regulations for China's food safety overhaul only on August 27, 2009, towards the end of the period set by Section 727. The regulations were not effective until December 1, 2009, after the end of the period set by Section 727.⁹ It was reasonable for the United States to want to know what changes China was making to its system, how they would operate in the real world, and how they would affect China's poultry inspection system. Yet China did not find it important to respond to U.S. requests for that information.

18. As the country who enacted the law, China is in the best position to explain any implications that the new law may have for China's poultry inspection system. Therefore, it is not enough for China to simply state that FSIS should obtain a copy of the law elsewhere. FSIS could have done more work related to China's equivalence application in 2009 had China responded to the U.S. request, and FSIS maintains its interest in engaging in this work once it receives the additional information from China that it needs.

*B. China Misses the Point of U.S. Responses to the Panel's Questions Regarding
Section 727's Necessity*

19. China's second argument is that Section 727 was not necessary to protect life and health because imports of Chinese poultry were not imminent at the time Section 727 was enacted.¹⁰ In making this argument, China quotes the U.S. response to question 78 from the Panel noting that "China was not in a position to immediately export poultry products to the United States at the

⁶ China Second Written Submission, para. 27.

⁷ See U.S. Second Written Submission, paras. 18-21.

⁸ See China Second Written Submission, para. 40.

⁹ See China Second Written Submission, para. 40.

¹⁰ See China Second Written Submission, paras. 51-60.

time the funding restriction was enacted.”¹¹ According to China, the procedural steps that the United States would have been required to take before Chinese exports could enter the United States and the potential for these steps to take a significant amount of time undermine Section 727's necessity.

20. China misses the point of the U.S. response to question 78. By stating that China would not have been able immediately to export poultry to the United States even in Section 727's absence, the United States was illustrating the measure's limited trade restrictiveness by contrasting it with other measures that would have impeded a flow of products immediately upon enactment, such as an import ban. Accordingly, in weighing the “necessity” of Section 727, it may be useful to note where Section 727 falls in the range of its trade effects. This is the point that the United States was making in its response to the question, a point that China appears to have missed.

21. Further, the need for FSIS to conduct certain equivalence procedures before China could actually export poultry to the United States does not undermine Section 727's necessity. Implementing or establishing equivalence rules is one, significant step in the process by which China could ship poultry products to the United States. It was important that this step only be taken when there was reason to be confident that poultry products exported to the United States would be safe. It is not enough to show that Section 727 was not necessary by simply stating that further steps would be needed before product would actually arrive in the United States – those further steps would proceed from, not replace, the steps governed by Section 727.

22. Additionally, the equivalence review process that China refers to could have been completed within the period set by the measure, and even if it could not, this is irrelevant. After all, the need for protection begins with the first shipment of Chinese poultry and continued into the future beyond 2009 to protect against every shipment of Chinese poultry that could enter the United States and harm consumers if FSIS were to “establish” or “implement” equivalence rules without fully considering China's systemic food safety problems.

23. Later in its argument, China attempts to use the U.S. response to question 77 from the Panel as evidence against Section 727's necessity.¹² The U.S. response acknowledged that FSIS theoretically could have considered China's systemic food safety problems in Section 727's absence.¹³ However, it is typical for a Member to have different options for ensuring food safety. The mere existence of these options does not mean that any given option is not “necessary.” Exports of poultry products from China posed a risk, and it was necessary to be sure that these exports were safe in order to protect life or health. The fact that there could have been another way to ensure safety does not take away from the fact that it was necessary to ensure food safety.

¹¹ See China Section Written Submission, para. 52, quoting Responses by the United States to the First Set of Questions from the Panel, para. 113.

¹² See China Second Written Submission, paras. 56-59.

¹³ See Responses by the United States to the First Set of Questions from the Panel, para. 110.

24. China's argument also overlooks the fact that FSIS had never before made an equivalence determination for a Member with such widespread food safety crises and systemic problems as China. As a result, there were strong concerns that FSIS did not and would not fully account for these novel risks. Accordingly, Section 727 was necessary to focus FSIS's attention on these problems to ensure they were fully considered before equivalence rules were established or implemented, and therefore, to ensure that life and health was protected. By ignoring the fact that its application posed a unique set of challenges that FSIS was not familiar with, China again misses the point of the U.S. response to the Panel's question.

C. China Overlooks the Importance of Differences Between the Food Safety Procedures Used by FSIS and FDA

25. China's third argument relates to the differences between FSIS and FDA procedures for ensuring the safety of imported food under each agency's jurisdiction. China argues that "the United States cannot justify having blocked application of only FSIS procedures by suggesting that equivalency systems involve greater risk than other types of food import procedures."¹⁴ Again, China mis-characterizes the U.S. position and misses the point of the facts presented by the United States.

26. In pointing out the differences between FSIS and FDA procedures, the United States is not suggesting that one agency's method for protecting against risk is preferable to the other. Rather, the United States is pointing out the absurdity of China's assertion that the United States should not be able to protect against the risk posed by Chinese poultry by enacting Section 727 simply because it has not enacted the same measure in a different context against different products regulated by a different regime. These regimes should be viewed independently.

27. Further, China ignores the fact that significant measures have been taken to protect life and health from the risk posed by the Chinese products that are regulated by FDA. FDA has issued numerous import alerts against contaminated Chinese products¹⁵ and FDA negotiated a Memorandum of Understanding¹⁶ with Chinese officials to attempt to deal with China's serious, and unfortunately, still ongoing, melamine crisis.¹⁷ As a result of this crisis, FDA also stationed officials in China to work with Chinese officials on ensuring the safety of Chinese food and other exports to the United States.¹⁸ This represented the first time FDA ever stationed permanent

¹⁴ See China Second Written Submission, paras. 61-73.

¹⁵ See Exhibit US-24, pp.2, 15.

¹⁶ Exhibit US-69.

¹⁷ See, e.g., *Tainted Milk shows China's food safety challenges: Despite stricter regulations enforcement is weakened by local governments*, The Associated Press (Feb. 4, 2010) (Exhibit US-71); *China Uncovers More Tainted Milk, Melamine Found in Infant Formula*, BNA (Feb. 11, 2010) (Exhibit US-72).

¹⁸ *HHS Opens Offices of the Food and Drug Administration (FDA) in China*, U.S. Department of Health and Human Services Press Release (Nov. 18, 2008) (Exhibit US-73).

officers overseas. The fact that these measures were necessary to protect life and health for FDA-regulated products does not undermine the fact that Section 727 was necessary to protect life and health from the risk posed by Chinese poultry in the FSIS context.

28. For, as the United States has pointed out, Section 727's necessity was in large part due to concerns about China's food safety enforcement track record. China's food safety enforcement problems raise particularly serious concerns under an equivalence regime because FSIS heavily relies on the exporting country to enforce its laws to ensure that the U.S. level of sanitary protection is being met.

29. While it is true, as China points out, that FSIS does conduct annual audits and re-inspections, these measures are not alone sufficient to protect life and health. In fact, FSIS's re-inspections simply monitor compliance with certification and labeling requirements. Indeed, it is the equivalence determination itself that is FSIS's primary tool to protect life and health. And in this case, given the many problems China has had with food safety enforcement and food safety crises related to enforcement, Section 727 gave FSIS additional time to fully consider these issues before establishing or implementing equivalence rules for Chinese poultry and therefore helped ensure that Chinese exports would only be permitted if they were safe.

D. China's Avian Influenza Problems Support Section 727's Necessity

30. China's fourth substantive argument involves its widespread problems with highly pathogenic avian influenza (AI). China's argument appears to be that since it is not the only country that has suffered from the highly pathogenic strain of the virus, its AI problems do not support Section 727's necessity.¹⁹

31. China's argument is misleading because it overlooks key facts related to AI. First, China points out that "more than 80 countries have been or are currently affected by the highly pathogenic avian influenza virus, based on information from the World Organization for Animal Health ("OIE")."²⁰ However, China fails to mention that China is one of only 15 of these countries that the OIE has classified as having current unresolved disease events, infection present, or demonstrated clinical disease.²¹ For China, the OIE notes that a reoccurrence of AI took place on August 5, 2009.

32. While it is true that the United States has not imposed a funding restriction with respect to the equivalence process for any of these other 14 countries and territories, it is not accurate to compare China with them in the context of China's efforts to demonstrate poultry equivalence. Hong Kong is the only other WTO Member in this group with a poultry inspection system that FSIS had found equivalent with the United States, but the United States is not aware of broad

¹⁹ See China Second Written Submission, paras. 74-83.

²⁰ China Second Written Submission, para. 75.

²¹ See Exhibit CN-65.

systemic problems or widespread crises affecting Hong Kong's food safety system like those that have plagued China.²²

33. Finally, China argues that Section 727 was not justified by AI concerns because cooked poultry cannot transmit the disease. This argument is flawed because it overlooks U.S. concerns about China's lack of enforcement. As the United States has pointed out in past submissions,²³ under APHIS's requirements to protect against AI, Chinese authorities would have to certify that any poultry exported to the United States is fully cooked or otherwise processed sufficiently. 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 AI into the United States.

E. China's Poultry-Related Crises Support Section 727's Necessity

34. China's fifth argument involves the various poultry-related crises that have been cited by the United States in this dispute. According to China, these crises are not relevant to the risk posed by Chinese poultry.²⁴ In support of its position, China points out that other countries, such as the EU member States, have accepted poultry imports from China in recent years.²⁵

35. Again, China's arguments avoid or overlook key facts. China argues that its chicken feed crises are not relevant to the safety of Chinese poultry because contaminated chicken feed does not increase the risk of consuming the related poultry meat. However, China fails to mention that China's Health Secretary responded to the chicken feed crisis by announcing that all Chinese chicken meat would be tested for melamine to ensure that it was safe to eat.²⁶

36. Similarly, China notes that the EU accepts limited quantities of Chinese poultry, but avoids the fact that the EU banned Chinese poultry for six years from 2002 to 2008. Perhaps the reason that China does not raise this issue is because the EU's ban on Chinese poultry was based in large part on concerns about AI in China,²⁷ an issue that China argues is not relevant to the safety of Chinese poultry.

F. Section 727 Does Not Discriminate Against China in an Arbitrary or Unjustifiable Manner

²² See United States Second Written Submission, paras. 69-72.

²³ See Responses by the United States to the First Set of Questions from the Panel, para. 25; United States Second Written Submission, para. 48.

²⁴ See China Second Written Submission, paras. 84-87.

²⁵ See China Second Written Submission, para. 87.

²⁶ See Exhibit US-62.

²⁷ Exhibit US-70.

37. China's sixth argument is an attempt to demonstrate that Section 727 is applied such that it discriminates against China in an arbitrary or unjustifiable manner. In short, China argues that the same conditions prevail in China and in other countries not within Section 727's scope.²⁸ Therefore, China argues that it was arbitrarily or unjustifiably discriminatory to enact Section 727 without taking similar measures against other WTO Members.

38. China's discrimination arguments are not persuasive. By its very nature, any action taken in the context of an equivalence review of a particular country's food inspection system may make explicit reference to that country alone. This country-specific nature of an equivalence review does not automatically raise questions of arbitrary or unjustifiable discrimination. China was the only country whose poultry product exports raised such a high level of concern for food safety and that was subject to an imminent equivalence determination at the time Section 727 was enacted. Therefore, it simply would not have made sense to apply this measure to other countries.

39. Further, Section 727's treatment of China certainly was not arbitrary or unjustifiable. As the United States has pointed out, concerns about China's food safety enforcement problems and food safety crises have been the subject of reports and articles by numerous well-regarded international organizations and academics.²⁹ In addition, even China's government has conceded the massive problems it has had with food safety.³⁰ Therefore, the treatment that China received pursuant to Section 727 was necessary to protect against the risk posed by Chinese poultry.

40. In making a comparison between China and other WTO Members to determine whether Section 727 was applied so as to discriminate against China in an arbitrary or unjustifiable manner, China argues that it should be compared with all other WTO Members. However, a comparison of this nature does not make sense. After all, most Members have never attempted to export poultry products to the United States, and therefore, there would never be a reason to enact a measure like Section 727 with regard to their products. Accordingly, the Panel should not compare China with all other 152 Members to determine whether Section 727 was applied in a manner that led to arbitrary or unjustifiable discrimination.

41. Instead, the proper comparison for Article XX purposes is between China and those Members whose poultry inspection systems had already been found equivalent or those Members who had progressed far enough along in the equivalence process such that a determination on their application could be characterized as imminent. It is these Members who were similarly situated as China in that they had an expressed desire to export poultry to the United States, acted on that desire, and were in a position to be able to export in the near future.

²⁸ See China Second Written Submission, paras. 88-111.

²⁹ See, e.g., Exhibit US-21; Exhibit US-22; Exhibit US-23; Exhibit US-24.

³⁰ See Exhibit US-38.

42. Among these Members, China’s application stands out for the unique concerns that it presents. None of the other Members who have been found equivalent or who are nearing an equivalence determination have suffered from a massive food safety crisis that the head of the WHO has dubbed “one of the largest food safety events the agency has had to deal with in recent years.”³¹ The United States is also not aware of food safety enforcement problems of the severity that exist in China in any of these countries, problems that would raise particular concerns in the context of FSIS’s equivalence regime.

43. Another distinction between China and these equivalent Members is that many of them had been exporting poultry to the United States for many years without significant incident before they were found equivalent under FSIS’s current equivalence regime.³² For example, at the time that FSIS began using the equivalence process that it uses today, Canada, France, Great Britain, Israel, and Hong Kong had already been exporting poultry products to the United States under a previous regime. Thus, at the time these WTO Members were subject to FSIS’s equivalence process for poultry, FSIS already had a familiarity with them and confidence in their inspection systems for ensuring the safety of the poultry products that they exported to the United States.

44. Similarly, some equivalent Members were already equivalent for meat at the time FSIS considered their poultry equivalence applications.³³ This group includes Australia, Chile, Mexico, and New Zealand. The situations of these Members were also different from China because FSIS was familiar with their inspection systems in general, and thus had a heightened level of confidence in their ability to meet the U.S. level of sanitary protection in the poultry context. By contrast to these two groups of Members, China had never before exported poultry or meat to the United States when it applied for equivalence in 2004.

45. Among these equivalent Members, China spends the most time in its submission comparing itself with Mexico. In essence, China appears to argue that the same conditions prevailed in Mexico as China at the time Section 727 was enacted because Mexico also had serious food safety enforcement problems.³⁴ To support its position, China points to certain findings in FSIS’s audit reports of Mexico’s meat and processed poultry inspection systems.³⁵

46. The United States agrees with China that FSIS’s audit reports on Mexico’s meat and processed poultry inspection systems are troubling. In fact, the 2008 audit that China cites led FSIS to suspend Mexico from being able to export poultry products to the United States.³⁶

³¹ Exhibit US-35.

³² See United States Second Written Submission, para. 72.

³³ See United States Second Written Submission, para. 73.

³⁴ See China Second Written Submission, paras. 102-110.

³⁵ See China Second Written Submission, paras. 103-105.

³⁶ FSIS Letter to Mexico (Sep. 5, 2008) (Exhibit US-74).

47. Like its audit reports on Mexico's meat and processed poultry inspection systems, FSIS's reports on China's poultry inspection systems are also troubling. For example, for every single Chinese slaughtering facility that FSIS audited in 2005, it concluded: "If this establishment were certified to export to the U.S., this establishment would be immediately delisted."³⁷

48. However, despite the fact that FSIS's audits of both China's and Mexico's inspection systems raised concerns, China's comparison between itself and Mexico does little to prove discrimination. Unlike China, Mexico was not in the middle of an ongoing equivalence proceeding in which new rules had to be implemented and established to allow Mexico to export poultry to the United States at the time Section 727 was enacted. Thus, it would not have been possible to construct a measure like Section 727 to deal with Mexico's problems. Additionally, Mexico had a long history of exporting meat and poultry products to the United States at the time of the audit, which gave FSIS confidence that Mexico would work to resolve the problems it identified during the audit as it had done in the past.

49. More fundamentally, China's discrimination argument appears to rest on a faulty premise. China asserts that it was discriminated against because FSIS continued to work with Mexican officials to resolve its issues while by enacting Section 727, FSIS was refusing to work with China. However, to the contrary, FSIS did engage in work related to China's equivalence application during 2009 and did reach out to China in May 2009, as well as afterward, to try to obtain information on China's food safety law so it could do even more work on this matter.

50. Thus, while China and Mexico may share minor similarities, their situations are actually quite different. And if the problems with Mexico that China cites demonstrate anything, it is the importance of fully considering a country's challenges with food safety enforcement via the equivalence process prior to the initiation of trade.

51. The last issue related to discrimination that the United States would like to address is China's overly simplistic analysis of the Appellate Body's report in *US – Shrimp*.³⁸ The report's conclusion regarding discrimination is simply not analogous to the instant dispute. While it is true that the Appellate Body in *US – Shrimp* compared the treatment between countries desiring to export to the United States when determining whether the U.S. action was discriminatory, the Appellate Body never directly stated that the same conditions prevailed within these countries within the meaning of the chapeau simply because of a shared interest in exporting.

52. Rather, the Appellate Body found that the U.S. policy being examined in *US – Shrimp* ran afoul of the Article XX chapeau because it employed a one-size-fits-all approach to protect sea turtles without accounting for any differences in the conditions prevailing in the different exporting countries. For example, the Appellate Body noted "it is not acceptable ... for one WTO Member to use an economic embargo without taking into consideration different conditions

³⁷ See Exhibit CN-16.

³⁸ See China Second Written Submission, paras. 93-97.

which may occur in the territories of those other Members.”³⁹ Later, the Appellate Body stated “We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.”⁴⁰

53. Enactment of a one-size-fits all policy is not the case with Section 727. In fact, as the United States has explained, Section 727 was narrowly tailored to the unique concerns presented by China’s equivalence application and its problems with food safety enforcement. Accordingly, Section 727 was not applied in a manner that resulted in arbitrary or unjustifiable discrimination against China.

III. China Has No Basis for an Article I Claim

54. As the United States has explained, China has no basis for an Article I claim. First, China’s argument misses the point of an equivalency-based regime. Many of a Member’s actions taken in implementation of an equivalency-based food-safety regime will differ for different Members, depending on the specific facts and circumstances of that Member’s status in the process of applying for a determination of equivalency. China tries to get around this fundamental point by claiming that the U.S. measure is somehow different than a regulatory action, because it was adopted by the U.S. Congress as opposed to FSIS, the U.S. regulator.

55. China’s argument, however, relies on an artificial distinction between procedures administered only by FSIS, and the broader U.S. system of ensuring food safety, which includes congressional oversight. This distinction has no basis in the WTO Agreement. All actions taken by U.S. regulators, including food safety equivalency determinations for China and other WTO Member, are subject to oversight. The fact that the particular exercise of oversight involved in this dispute applied to one Member does not establish an Article I violation, just as the fact that a specific FSIS regulatory action applied to only one Member would not establish an Article I violation. Rather, as the United States has explained, in the context of addressing the criteria under the Article XX(b) chapeau, Section 727 applied specifically to China because there was no other similarly situated WTO Member.

56. In addition, China has provided 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. China’s second submission continues to rely on a “hypothetical like product” approach for measures based on a product’s country of origin. But China’s argument is circular. China is assuming the answer to the very question at issue. China is assuming that its exports of poultry products would be as safe as exports from

³⁹ *US – Shrimp* (AB), para. 162.

⁴⁰ *US – Shrimp* (AB), para. 164.

other Members, yet that is the point of an equivalency process. As the United States explained, China's approach has no validity in the context of evaluating the operation of an equivalency based food-safety regime. China has not, and cannot, explain why there is any basis for assuming that all WTO Members have equivalent safety regimes, and therefore, that all poultry products from all WTO Members have the same level of safety.

IV The Panel Should Find that Claims Under the SPS Agreement are Not Within the Terms of Reference in this Dispute

57. As the United States has explained, China's claims under the SPS Agreement are not within the terms of reference of this dispute because China failed to request consultations under the SPS Agreement. In its second submission, China characterizes this issue as one of an "initial" failure by the United States to understand China's consultations request, and that the matter was subsequently clarified in further communications from China. China's characterization is incorrect.

58. The issue here is not a matter of misunderstanding – in fact, China's request was more than clear that it was not requesting consultations under the SPS Agreement. Instead, China stated that it considered that the SPS Agreement did not apply, and China would only request consultations under the SPS Agreement in the future if there were a subsequent demonstration that any U.S. measure was subject to the SPS Agreement. To the extent any further developments in this dispute are relevant, they serve to confirm the plain meaning of China's request for consultations. In particular, in China's opening statement at the first substantive meeting, China stated that it had determined the U.S. measures were SPS measures after reviewing the first U.S. written submission. Thus, under the plain meaning of China's consultations request, and as China has confirmed, China would only have requested consultations under the SPS Agreement well after this panel process began. Accordingly, China had not invoked the SPS Agreement, nor consulted under it, such that the SPS Agreement could be within the terms of reference of the Panel.

59. Thus, the question here is not one of "understanding" or "misunderstanding." Instead, it is a question of whether the DSU allows a Member to include claims under a covered agreement without seeking consultations under that agreement. This is not, as China asserts, a question of "form over substance." Members agreed in the DSU to the rules that would apply in invoking the DSU. China has not followed those rules, but nonetheless asserts that it is entitled to the mechanisms under the DSU. China seeks to have it both ways – it can assert that an agreement does not apply, while claiming that it has requested consultations under that (non-applicable) agreement. If China's approach here were to be accepted, it would be in derogation of the agreed rules, would undermine the usefulness of the consultation process, and lead to uncertainty and confusion in all future disputes.

60. Nor is this a situation in which China's request was made in the alternative. Many other consultation requests have been made in the alternative and China had access to these. However,

China flatly stated that the U.S. measures at issue were not SPS measures, and that China would only bring claims against those measures under the SPS Agreement were there to be a subsequent demonstration disproving China's position.

61. China's second submission also argues that the United States has not "advanced a claim that the consultations request affected the United States' due process rights." Although the United States has not used that phrase, this simply reflects that "due process" is a term nowhere used in the Dispute Settlement Understanding. Certainly, "due process" must include the right to have disputes conducted in accordance with the rules set out in the DSU, and those rules also serve to protect the rights of other Members. A Member reading China's consultations request would have been justified to conclude that it was not a request under the SPS Agreement and hence may have chosen not to request to join the consultations. Here, China asks the Panel to adopt a fundamental departure from those rules by allowing China to bring claims under a covered agreement without requesting that consultations be held under that agreement.

IV. Conclusion

62. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.