

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

(WT/DS392)

**EXECUTIVE SUMMARY OF THE
FIRST WRITTEN SUBMISSION OF THE
UNITED STATES OF AMERICA**

November 23, 2009

I. INTRODUCTION

1. In 2007, adulterants added to pet food ingredients by Chinese producers led to the deaths of thousands of U.S. domestic animals. In 2008, adulterants added to milk by Chinese processors sickened hundreds of thousands of persons, and led to the deaths of over a dozen children. The contamination of these products was not allowed under China's food safety laws. Rather, these food safety crises arose from massive failures in China's system of food safety enforcement. Earlier this year China attempted to address these and other enforcement failures by adopting a comprehensive overhaul of its food safety regime.

2. In response to failures of food safety enforcement in China, and in the context of pending administrative proceedings concerning the authorization of the import of poultry products from China, the U.S. Congress enacted Section 727. Section 727 imposed a six and a half month funding restriction that prevented the establishment or implementation of rules approving the importation of poultry products from China, thereby ensuring an additional time period for review of food safety issues relating to China. Section 727 expired on September 30, 2009, and the funding restriction has been lifted as of November 12, 2009. Accordingly, U.S. food safety regulators no longer face any restriction on the establishment or implementation of such rules.

3. The temporary, now-expired, funding restriction was a measured reaction to China's major problems of food safety enforcement. Section 727 falls squarely within the GATT Article XX(b) exception for measures necessary to protect human or animal life or health and meets the elements of the Article XX chapeau. It imposes no arbitrary or unjustifiable discrimination between countries where the same conditions prevail; indeed, no other country subject to a U.S. poultry-product safety assessment had major crises of food safety enforcement. And Section 727 was not an instance of a disguised restriction on trade. In fact, the U.S. poultry industry opposed it. Thus, Section 727 is not inconsistent with any U.S. obligations under the GATT 1994.

4. The United States disagrees with most of the factual and legal assertions in China's First Written Submission and has two over-arching comments. First, China's submission repeatedly asserts that "This is a case about arbitrary discrimination." China, however, is well aware of its own problems of food safety enforcement, and of the food safety rationale for the temporary restriction imposed by Section 727. Yet, China's submission addresses none of these issues – indeed, it misleadingly implies that Section 727 was adopted only for "budgetary" reasons. Thus, despite its repeated assertions of "arbitrary discrimination," China's submission fails to explain why any alleged discrimination resulting from Section 727 was arbitrary or unjustifiable. Instead, China runs away from the food safety issues that lie at the core of this dispute.

5. Second, China's submission repeatedly mischaracterizes Section 727 as "denying access" to the U.S. procedures for authorizing the import of poultry products. Yet Section 727 had no such effect. Instead, it allowed ongoing work on the evaluation of food safety issues involving poultry products from China, and only restricted the establishment or implementation of rules authorizing importation. Even in the absence of Section 727, China has no basis for asserting that China necessarily would have succeeded in obtaining such authorizations. In any event, the restriction on the establishment or implementation of rules authorizing importation has now been removed, and the ongoing work continues. Thus, China overstates the effect of Section 727.

6. Finally, any claims by China under the SPS Agreement are not within the Panel's terms of reference. In its submission, China fails to rebut the fundamental point that China did not request consultations on any claims under the SPS Agreement. The United States has offered to cooperate on a procedural way forward in the event China would wish to consult on any SPS claims. However, China – perhaps for the same reason that its submission fails even to

acknowledge any relationship between Section 727 and food safety – has denied the offer. This is China's choice. But China cannot have it both ways – it cannot refuse to consult on SPS issues, while at the same time request that the Panel issue findings under the SPS Agreement.

II. SECTION 727 IS THE ONLY MEASURE AT ISSUE IN THIS DISPUTE

7. The argumentation in China's submission is addressed to alleged inconsistencies between Section 727 and provisions of the WTO Agreement. However, China also asserts that two other measures – an alleged "Moratorium" and Section 743 of the 2010 appropriations bill – are inconsistent with the WTO Agreement. These assertions do not and cannot expand the scope of this proceeding. The alleged "Moratorium" does not exist, and the subsequent appropriations provision is not in the Panel's terms of reference.

8. China alleges the existence of "the Moratorium." In particular, China alleges the existence of a measure that "*indefinitely* suspends: (a) the consideration of applications for approval, (b) the granting of approval, and (c) the implementation of approval for the import of poultry products from China under the United States system for regulating the importation of poultry products." No such measure ever existed.

9. China puts forth only two types of evidence to support its allegation, and neither shows the existence of an indefinite moratorium. First, China cites two related pieces of legislation: Section 733 (affecting fiscal year 2008) and Section 743 (affecting fiscal year 2010). Section 733 contains the same language as Section 727 and is also of limited duration. The fact that a time-limited funding restriction was created twice does not show the existence of an "*indefinite*" suspension of approvals. There is no basis for deriving a separate, distinct measure from the existence of discrete, time-limited measures. Moreover, Section 743 lifts any funding restriction. Thus, China fails to show the existence of an indefinite moratorium on approvals. The only other evidence China cites to support its allegation is that FSIS has not yet authorized the importation of poultry from China. This absence of an authorization is not separate from Section 727.

10. Finally, the alleged second measure was not identified in China's consultations request. As the Appellate Body has explained, DSU Articles 4 and 6 "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel." 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 the request for the establishment of a panel," the Appellate Body has emphasized that any such measures not precisely identified must not "change the essence of the [measures identified in the request for consultations]." The so-called "Moratorium" of indefinite duration does not, however, constitute such a measure whose "essence" is the same as the explicitly time-limited restriction in Section 727.

11. China's attempt to bring this second measure before this Panel also runs afoul of the Appellate Body's concern that a complaining party must "not expand the scope of the dispute" in its panel request beyond the matter identified in the consultations request. The allegation of the "Moratorium" would indeed expand the scope of the dispute beyond the measure identified in the request for consultations. Accordingly, the United States respectfully requests the Panel to find that the alleged "Moratorium" is outside the terms of reference of this Panel proceeding.

12. China's submission states that China has the "initial view" that Section 743 violates WTO provisions, and "that [China] reserves the right to more fully challenge, in later

submissions, the compliance of Section 743 with the United States' WTO obligations." The States does not understand how or why China would argue that Section 743 is WTO-inconsistent as Section 743 has resulted in a removal of the funding restriction contested by China. In any event, however, Section 743 is not within the Panel's terms of reference.

13. Here, China issued its consultation request on April 17, 2009, and Section 743 was adopted on October 21, 2009 – over six months later. Furthermore, the language of 743 evolved over time. The version enacted differed from versions under consideration at the time of panel establishment. Accordingly, China's request for consultations did not (and could not) specifically identify Section 743, and it was impossible for the parties to consult on its provisions.

14. Finally, although Section 743 is generally related to Section 727 in that it also involves funding for the implementation and establishment of rules governing importation of poultry products from China, Section 743 plainly changes the essence of Section 727. While Section 727 imposed a temporary funding restriction, the enactment of Section 743 has resulted in a removal of the restriction. Indeed, the fact that China's first submission only manages to state cursory, "initial views" on the WTO-consistency of Section 743 highlights the fundamental differences between the newly adopted Section 743 and Section 727.

III. CHINA MISCHARACTERIZES THE LEGAL EFFECT OF SECTION 727 IN U.S. DOMESTIC LAW

15. China asserts that Section 727 has the effect of banning imports of poultry from China. Further, China asserts "This funding restriction means that FSIS cannot engage in activities related to the establishment or implementation of any rule allowing Chinese poultry to enter the United States." China's characterization of the measure is incorrect as it fails to take account of the "scope and meaning" of legislative conditions contained in appropriations legislation in U.S. law generally, and of the particular conditions contained in Section 727 specifically.

16. When Congress inserts funding restrictions into appropriations legislation, it is exercising its oversight power over the executive branch. As such, each funding restriction is limited to its terms and only applies to the fiscal year covered by the appropriation. In addition, the funding restriction does not amend or modify the permanent law administered by an executive agency, and therefore, it does not prevent the agency from taking actions related to the prohibited act as long as the agency does not take the prohibited act itself.

17. Accordingly, Section 727 was limited to preventing USDA from "establishing" or "implementing" a rule allowing the import of poultry from China for a temporary period during the 2009 fiscal year. Section 727 did not create a permanent funding restriction or prohibit FSIS from using funds to implement or establish a rule after its expiration. There are no longer any restrictions on FSIS's ability to "use funds to implement or establish a rule allowing poultry products to be imported from China."

18. Section 727 also did not ban imports of poultry from China. Even without Section 727, USDA procedures required a review of the prior equivalence determination before imports of processed poultry could have been authorized due to a substantial time period between the 2006 processed poultry rule and China's designation of facilities eligible to export to the United States. With respect to slaughtered poultry, USDA had not completed an equivalence determination. Thus, the most that China can allege is that Section 727 prevented USDA from taking final actions 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 that period.

19. Finally, Section 727 did not prevent FSIS from engaging in activities under the Poultry Products Inspection Act (“PPIA”) related to the establishment or implementation of a rule allowing China to export poultry to the United States. Rather, Section 727 directed FSIS to engage in work related to China’s equivalency application, and FSIS did in fact engage in this work during the 2009 fiscal year.

IV. OF THE THREE CLAIMS PRESENTED BY CHINA, THE PANEL NEED ONLY CONSIDER THE CLAIM UNDER ARTICLE XI OF THE GATT 1994

20. The Panel’s consideration of China’s Article XI claim (and any needed defense under Article XX(b)) would serve to resolve this dispute. Accordingly, the Panel should not and need not make substantive findings under China’s Article I or Agreement on Agriculture claims.

21. China has not provided any basis for the Panel to make a finding under Article 1:1. China’s Article I claim misses the point, because it fails to recognize that Section 727 has no independent meaning, but only has meaning in the context of the overall operation of an equivalency-based food-safety regime under the PPIA. China does not challenge the PPIA, nor the right of a WTO Member to establish such equivalency-based regimes for the purposes of ensuring food safety. Yet, under an equivalency-based regime, products of different WTO Members are necessarily treated differently. Products of Members found to be equivalent may be imported, while similar products of Members not yet found equivalent may not be imported.

22. Section 727 temporarily prevented USDA from implementing or establishing a rule finding equivalence for poultry imports from China to ensure that additional safety issues could be evaluated. Section 727 is specific to one WTO Member, but so are many actions taken in implementing an equivalency-based food-safety regime. For example – a finding of equivalence, a failure to make a finding of equivalence, and a delay in making a finding to allow for further evaluation – all affect products of some WTO Members differently than apparently similar products of others. Thus, Section 727 is not inconsistent with MFN obligations because any differential treatment results from the underlying adoption of an equivalency-based regime that differentiates among WTO Members based on each Members’ particular food safety status.

23. China’s Article I claim also lacks essential legal and factual argumentation. China provides no explanation for why poultry products from China are “like products” to poultry products from other WTO Members, including those authorized to export poultry products to the United States. While China correctly notes that some panels have considered that a measure that distinguishes between products solely on the basis of origin can be considered to provide less favorable treatment to certain like products without the need for a separate “like product” analysis, none of those reports has applied this approach to a situation like this one. Health and safety systems vary from country to country and equivalency-based regimes respond to this fact. To be sure, China may believe that its poultry products present no particular safety issues as compared to products from any other WTO Member. But if so, that is an unsupported factual allegation which the United States does not accept, and there is no basis to assume it is true. Moreover, China conveniently ignores disputes such as *EC-Asbestos*, in which a panel examined issues of “likeness” in the context of products with different levels of safety.

24. However, the Panel need not address factual and legal issues under Article I to reach a resolution of this dispute. In particular, the core of this dispute involves whether Section 727 is justified by legitimate concerns with human and animal life and health. The most appropriate

analytic framework to consider these issues is to examine the measure under Article XI, followed (if necessary) by findings under Article XX(b). If the measure is justified by Article XX(b), such a finding would excuse any alleged breach of Article I. It would not promote the resolution of this dispute to venture into issues under Article I concerning its application to equivalency-based regulatory regimes or to the likeness of products with different levels of safety.

25. China has the burden of establishing the elements of the alleged breach of Article XI:1. However, if the Panel were to find the existence of an import restriction, such a finding would not be unusual or a matter of systemic concern. The nature of many health and safety regulations is to impose import restrictions. As Article XX(b) states, “nothing in [the GATT 1994] shall be construed to prevent the adoption or enforcement . . . of measures necessary to protect human, animal or plant life and health.” Section 727 meets all of the requirements of Article XX(b).

26. Article 4.2 of the Agriculture Agreement prohibits certain measures with respect to agricultural products. Article 4.2 provides that, with certain exceptions not relevant here, “Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties.” Footnote 1 to the Agriculture Agreement provides an illustrative list of measures subject to the prohibition in Article 4.2, as well as an illustrative list of measures to which the prohibition does not apply.

27. Footnote 1 specifically excludes from the scope of Article 4.2 “measures maintained under . . . general, non-agriculture-specific provisions of [the] GATT 1994.” Section 727 is a measure that the United States maintains consistently with GATT Article XX(b), which is a “general, non-agriculture-specific provision” of the GATT 1994. Therefore, Article 4.2 does not apply to Section 727, and the United States did not act inconsistently with Article 4.2.

V. SECTION 727 IS JUSTIFIED PURSUANT TO GATT ARTICLE XX(b)

28. To justify a measure under Article XX(b), the Appellate Body has explained that the responding party must demonstrate the measure (1) falls under the scope of the Article XX(b) exception and (2) satisfies the requirements of the Article XX chapeau. Two elements must be met for a measure to fall under the scope of the Article XX(b) exception: (1) the policy in respect of the measure for which the provision is invoked must fall within the range of policies designed to protect human, animal, or plant life or health; and (2) the inconsistent measure for which the exception is invoked must be necessary to fulfil the policy objective.

29. To determine whether a measure pursues a policy objective of protecting human and animal life and health, the Panel should first consider whether a risk to human and animal life and health exists. If a risk is found to exist, the Panel should determine whether the policy objective underlying the measure is to reduce that risk. If so, the Panel should conclude that the measure’s policy falls within the range of policies designed to protect human and animal life or health in accordance with Article XX(b).

30. It is clear that there is a risk to human and animal life and health from the importation of poultry products from China. This risk results from the inherent danger of consuming poultry not produced under sanitary conditions or inspected for contaminants, the risk from the import of poultry infected with avian influenza, and the particular risk that exists when importing food from China due to China’s history of food safety scandals and longstanding systemic issues.

31. First, notwithstanding country of origin, it is well established that poultry products can contain pathogenic bacteria and contaminants which can pose a potential risk to human life and health. Because it is impossible for FSIS to test all products at the border, FSIS's equivalence process is designed to ensure that poultry products are "subject to inspection, sanitary, quality, species verification, and residue standards that achieve a level of sanitary protection equivalent to that achieved under U.S. standards and have been processed in facilities and under conditions that achieve a level of sanitary protection equivalent to that achieved under U.S. standards" before they are allowed to be imported into the United States. It is noteworthy that FSIS's equivalence process under the PPIA is not being challenged by China.

32. It is also well established that imported poultry can pose a risk to human and animal life and health if the poultry is infected with a serious disease, such as avian influenza. If poultry or poultry products infected with this disease entered the United States, this could significantly threaten human and animal life and health. Again, it is noteworthy that China is not challenging APHIS's restrictions on the import of poultry from regions such as China that are classified as a region where the highly pathogenic avian influenza HPAI subtype H5N1 is considered to exist.

33. Third, the risk is exacerbated by significant problems with China's food safety system. China's food safety issues have been the subject of numerous studies by international agencies, governmental bodies, and academics noting China's disorganized governmental structure and its ongoing systemic problems with smuggling, corruption, and the inadequate enforcement of food safety laws. China has also been the source of multiple food safety scandals, many of which have occurred recently and have been directly related to China's systemic problems.

34. FSIS's experience with China during the equivalency process also highlighted problems with China's food safety system. FSIS found deficiencies in two of the four processing plants and serious sanitation problems in all three slaughter plants it visited in 2004. In addition, all four slaughter plants FSIS visited during 2005 failed to meet U.S. standards.

35. Section 727 was enacted with the policy objective of protecting against this risk to human and animal life and health posed by the importation of poultry products from China. The first sentence of the Joint Explanatory Statement ("JES") accompanying Section 727 makes that clear: "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." Similarly, the Committee Report accompanying the FY 2008 appropriations act also clearly demonstrates that Section 727's purpose is to protect human and animal life and health.

36. Statements by Section 727's author, Representative DeLauro, also indicate the measure was enacted to address this risk: "It is clear that the 2006 FSIS declaration that China's safety and inspection system was, quote, equivalent to the U.S. system for processed poultry products, was based on trade goals. From a public health and safety perspective, the equivalency determination was deeply flawed and cannot be relied on to protect U.S. consumer's safety."

37. Section 727 was also necessary to protect human and animal life and health from this risk. Imports of poultry from China pose a severe risk as a result of the broad systemic problems with China's food safety system. These problems include smuggling, corruption, and the inadequate enforcement of China's food safety laws, issues that FSIS is not typically faced with when making equivalency determinations. Moreover, many food safety scandals have originated

in China in recent years, including the melamine scandal that occurred in 2008 after FSIS issued a final rule on the equivalency of China's poultry processing system. Finally, some members of Congress were concerned about the process FSIS followed and believed that FSIS had not spent enough time considering the particular problems with food safety in China.

38. Given this situation, it was necessary to pause the equivalency process so that FSIS could thoroughly consider the particular risks posed by poultry products from China as well as the implications of recent food safety scandals and the overhaul of China's food safety regime that resulted from them.

39. The congressional enactment of Section 727 played a role analogous to an administrator or supervisor in a governmental agency who has the responsibility of reviewing (and, where appropriate, questioning) a decision made within the agency and asking for it to be considered at greater length in light of recent developments before moving forward. In fact, had a USDA administrator taken the same action as Congress did here to pause the process and evaluate the facts after becoming aware of new food safety scandals, it is unlikely that this dispute would be before this Panel. The administrator's action would have been viewed as reasonable and routine.

40. Likewise, Section 727 was reasonable and routine. Congress had many legitimate health and safety reasons to be concerned about the import of poultry products from China and was taking the necessary action to ensure that all of these issues were addressed before FSIS moved further. Accordingly, Section 727 was necessary to protect human and animal life and health.

41. The Panel should reach the same conclusion if it follows the method used by past panels when faced with the question of whether a measure is necessary. Other panels have engaged in "a process of weighing and balancing a series of factors," which include (1) the importance of the interests or values at stake; (2) the contribution made by the measure to its objective; and (3) the trade restrictiveness of the measure.

42. The first factor strongly weighs in favor of a determination that Section 727 was necessary. Section 727 was enacted to protect human and animal life and health from the risk posed by the import of poultry from China, including protection from the risks of eating poultry products not prepared in sanitary conditions or contaminated with disease. In *Brazil-Tyres*, the panel noted "the objective of protecting human health and life against life-threatening diseases . . . is both vital and important in the highest degree." The United States agrees. The risks posed to human life and health by consuming potentially contaminated poultry from China is of utmost importance as is the need to protect animal life and health from the threat of avian influenza.

43. The second factor also favors a determination that Section 727 was necessary. Section 727 has directly contributed to the protection of human and animal life and health by ensuring FSIS did not implement or establish a rule without focusing on the risks posed by China's food safety system or reexamine the issue in light of China's recent food safety scandals. Further, Section 727 also directed FSIS to develop an action plan to address food safety issues with China. As a result, Section 727 materially contributed to its objective of protecting human and animal life and health from the risk posed by consuming imported poultry products from China.

44. Section 727's limited trade restrictiveness also favors a determination that it was necessary. Because Section 727 was an appropriations measure, it did not change the underlying law and only applied temporarily. As the funding restriction has been lifted, FSIS is now able to move forward on implementing the rule for processed poultry products or establishing a rule for

cooked poultry products if it determines that this is the appropriate action to take under the PPIA.

45. Section 727 also only applied to the implementation or establishment of a rule regarding the importation of poultry products from China. It did not restrict FSIS from taking actions *related* to the importation of poultry products, such as the development of an action plan that contemplated the possibility of future imports and was designed to allow FSIS to move forward expeditiously when the funding restriction was lifted.

46. Additionally, even in Section 727's absence, it is highly unlikely that China could have exported any significant quantity of poultry products to the United States. While FSIS's equivalency determination for China's processed poultry inspection system would allow imports of processed poultry product from China (including raw processed as well as cooked processed poultry product), China would only be able to export poultry that was fully cooked due to APHIS's restrictions on countries with avian influenza. Moreover, since FSIS has not found China's slaughter inspection system equivalent, any cooked poultry exports from China would have to be produced from poultry slaughtered in the United States or another country with an equivalent slaughter inspection system. Trade under these circumstances is likely to be limited.

47. To justify a measure under Article XX(b), the responding party must also show that the measure meets the requirements of the Article XX chapeau. To do so, the Appellate Body has explained that the responding party must demonstrate that its measure (1) is not a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (2) a disguised restriction on international trade.

48. Previous Appellate Body reports have explained that a measure will be considered to be applied in a manner that results in arbitrary or unjustifiable discrimination if: (1) the application of the measure results in discrimination; (2) the discrimination is arbitrary or unjustifiable in character; and (3) the discrimination occurs between countries where the same conditions prevail.

49. These conditions are not met. Although Section 727 only applies to imports from China, it did not discriminate against Chinese products in an arbitrary or unjustifiable way. To show that any discrimination to a particular country is not "arbitrary or unjustifiable," past panels have required the responding party to show that its action is not "capricious or random." The panel in *Brazil-Tyres* also noted that an analysis under this element should focus "on the cause of the discrimination, or the rationale put forward to explain its existence." Thus, a responding party must provide a rationale for the measure that is not capricious, random, or indefensible.

50. There was a strong rationale for Section 727. There are many legitimate concerns about China's food safety system, and the equivalency process needed to be paused to give FSIS additional time to consider and address these concerns, including the food safety scandals that occurred after the final determination was made on a rule for processed poultry. Given this situation, it was certainly not arbitrary or capricious for Congress to exercise its oversight role.

51. In addition, there is no other country where the same conditions prevailed as they did for China at the time Section 727 was enacted. Besides China, there was no other country as far along in the equivalency process with recent food safety scandals and systemic problems with smuggling, corruption, and enforcement. Since no other country has presented the same set of challenges that the U.S. government faced with regard to China at the time of Section 727's enactment, there is no other country where it can be said that the same conditions prevail.

52. Finally, the evidence clearly demonstrates that Section 727 is not a disguised restriction on trade. The text of the measure, which 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.,” clearly indicates that the measure’s policy objective, or intent, was to protect human and animal life and health from the risk of poultry from China.

53. Further, the fact that the JES directs FSIS to take actions related to the rulemaking also demonstrates the measure was not enacted with protectionist intent. If Section 727's intent were to restrict trade, it would not have included language setting the stage for expeditious action on China’s equivalency application as soon as it expired. Statements by members of Congress further support the view that the policy objective of the measure was to protect human and animal life and health, not to protect a domestic industry. In this respect, the widespread opposition to the measure from the U.S. poultry industry is relevant. On April 30, 2009, 56 companies and trade associations representing the domestic industry wrote a letter to President Obama asking him to oppose Section 727. If Section 727's purpose were to protect the domestic industry, it is unlikely that many of the industry’s most influential members would be opposed.

VI. CHINA HAS NOT MADE A PRIMA FACIE CASE IN SUPPORT OF ITS CLAIMS UNDER THE SPS AGREEMENT

54. China’s SPS claims are outside the Panel’s terms of reference. Further, China fails to make a *prima facie* case in support of its claims.

55. In particular, China fails to demonstrate – or even to assert – that Section 727 is an SPS measure subject to the SPS Agreement. To demonstrate that a measure is inconsistent with a particular provision of the SPS Agreement, it is necessary first to show that the measure is an SPS measure that is subject to the particular provision with which an inconsistency is claimed. China makes no such showing with respect to Section 727 or any of SPS provisions it cites.

56. Indeed, China frames its complaint by asserting that, “to the extent that Section 727 and the Moratorium may be considered to be sanitary and phytosanitary measures within the meaning of the *SPS Agreement*, such measures would be inconsistent with Articles 2.3, 5.5, 5.1, 5.2, 2.2, 5.6 and 8 of the *SPS Agreement*.” In other words, China claims merely that if Section 727 is subject to the cited provisions of the SPS Agreement, then it would be inconsistent with them. But China does not assert that Section 727 is, in fact, subject to any of these provisions. Rather, China expressly avoids making such any assertion.

57. China explains that it framed its claims under the SPS Agreement as conditional claims or claims in the alternative. According to China, it considered that the United States might invoke Article 2.4 of the SPS Agreement in order to defend Section 727, and if so, it would be for the United States to “meet the threshold requirement of demonstrating that the measures at issue are sanitary or phytosanitary measures.” The United States does not agree that the invocation of Article 2.4 by a responding party in a dispute would shift the burden of proof with respect to the complaining party’s claims, as China appears to assert. However, the Panel need not decide this issue since the United States is not invoking Article 2.4 of the SPS Agreement.

58. Because China has chosen not to assert, let alone prove, one of the essential elements of a *prima facie* case in support of its claims, the United States does not address those claims. However, the United States reserves its right to respond to any further assertions in this regard,

should China choose to make them.

VII. REPLY TO CHINA’S RESPONSE AND THIRD PARTY COMMENTS ON U.S. PRELIMINARY RULING REQUEST OF OCTOBER 1

59. Although China states that it intended to make claims under the SPS Agreement in the alternative (that is, if the United States invoked Article 2.4 of the SPS Agreement as a defense), it is undeniable that China’s consultations request does not request consultations to pursue alternative claims, but makes the request for consultations conditional on future developments. This is the defect in China’s consultations request with respect to the SPS Agreement, and China’s subsequent attempts at clarification cannot cure the jurisdictional requirement set forth in DSU Article 1.1 that consultations must be requested pursuant to the consultation and dispute settlement provision of each covered agreement for which dispute settlement is sought.

60. Many other Members have properly invoked the consultation and dispute settlement provisions of a covered agreement to pursue alternative claims under that agreement. Canada recently requested consultations with the United States pursuant to a number of provisions, including Article 11 of the SPS Agreement, in order to pursue claims that certain measures were inconsistent with, “in the alternative, Articles 2, 5 and 7 of the SPS Agreement.” The United States had no objection to the invocation of the consultation and dispute settlement provision of a covered agreement in order to pursue an alternative claim under that agreement. It is the failure actually to invoke *the consultation and dispute settlement provision of a covered agreement* that gives rise to the jurisdictional problem with China’s consultation and panel request here.

61. There is no basis for China’s assertion that the United States is pursuing a preliminary ruling merely to delay the proceedings. The United States alerted China to the deficiency in China’s consultation request at the earliest possible moment, at which point China could have submitted an amended consultation request clearly requesting consultations under Article 11 of the SPS Agreement and indicating that it was raising its SPS claims in the alternative. That would have been the end of the matter. Even if China did not agree with the United States, China could have nonetheless decided that the most pragmatic way forward would be to amend its consultations request to put an end to the matter once and for all.

62. 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. If China’s approach were to be accepted, it could lead to more and potentially greater confusion in future disputes. A responding party and potential third parties would be unable to divine what the exact legal issues will be in a dispute. The DSU provisions are clear and were agreed – 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.” A complaining party is not free to say that it is not using as the basis for its complaint a particular covered agreement only to say later that it is. Clarity in the request for consultations is important for the overall operation of the dispute settlement system.

63. Finally, China argues that it provided an “indication” of the legal basis for its complaint under the SPS measures. While the United States does not agree with that assertion, more fundamentally, that is not the relevant issue before the Panel. The core issue before the Panel is whether, in its consultations request, China brought this dispute “pursuant to the consultation and dispute settlement provisions” of the SPS Agreement. China did not.