

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

(WT/DS392)

**SECOND WRITTEN SUBMISSION OF
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Short Form	Full Citation
<i>Brazil – Tyres (Panel)</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by the Appellate Body Report, WT/DS332/AB/R
<i>Brazil – Tyres (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>EC – Asbestos (Panel)</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R
<i>EC – Asbestos (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC – Biotech</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Shrimp (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998
<i>US – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005

I. INTRODUCTION

1. China's struggles with food safety, and enforcement issues in particular, are well known. They have been cited in reports from the Asian Development Bank, the World Health Organization, the U.S. Department of Agriculture, and countless academics. In fact, in March 2009, even China's Health Ministry admitted that China's food safety situation "remains grim, with high risks and contradictions."¹

2. China's food safety problems have led to numerous food safety crises in recent years - crises that have affected Chinese fish, Chinese produce, and Chinese poultry, among other products. However, foremost among all of these crises is the melamine incident that sickened thousands of pets in the United States and thousands of people across China in 2007 and 2008. As a result of its severity, the World Health Organization characterized the crisis as "one of the largest food safety events the agency has had to deal with in recent years."²

3. In an attempt to address its food safety problems, China passed a massive food safety law overhaul on February 28, 2009. It was against this background that, only 12 days later, Section 727 was enacted.

4. As the United States has explained in its First Written Submission and statements before the Panel, Section 727 was justified under GATT Article XX(b). The measure, which was enacted in the context of an ongoing equivalence determination, was necessary to protect human and animal life and health against the risk posed by Chinese poultry. Section 727 was necessary to ensure that FSIS thoroughly considered China's systemic food safety problems, its widespread food safety crises, and its enactment of a new food safety law before "implementing" or "establishing" rules that would allow China to export its potentially dangerous poultry to the United States.

5. Throughout this dispute, China has used many arguments to distract the Panel from the question of Section 727's necessity in the context of poultry products. For example, China has consistently implied that Section 727 was somehow unnecessary because the measure did not apply more broadly to all Chinese products. However, this argument is flawed because it completely ignores the fact that poultry was the only product subject to an imminent equivalence determination when Section 727 was enacted.

6. Similarly, China attempts to downplay the relevance of the many food safety crises that have plagued the country in recent years. But again, China ignores the concern that these numerous crises raise about its ability to enforce its food safety laws, an issue which is of particular importance in an equivalence regime.

¹ Exhibit US-37.

² Exhibit US-35.

7. China also continues to argue that Section 727 is arbitrarily or unjustifiably discriminatory. However, like China's other arguments, this argument also ignores a key fact - the distinction between China and all other countries who have tried to export poultry products to the United States.

8. In its submission,³ the United States will focus on the key issues that China has chosen to ignore. In doing so, the United States will rebut China's flawed arguments and again demonstrate Section 727's justification under GATT Article XX(b).

9. In addition, this submission will address China's arguments, first submitted in its oral statement at the first substantive meeting, that the U.S. measure is subject to the SPS Agreement and inconsistent with certain SPS Agreement obligations. As the United States has explained in its request for a preliminary ruling and subsequent submissions, any claims by China under the SPS Agreement are not within the terms of reference of this proceeding. Without prejudice to the jurisdictional issue, this submission will explain that China has failed to show either that the SPS Agreement provisions cited by China apply to the U.S. measure at issue, or that the U.S. measure is inconsistent with those provisions. Furthermore, given that the substantive arguments presented by China under its SPS claims are essentially the same as those presented in connection with Article XX(b) of the GATT 1994, there is no need for the Panel to address these additional claims under the SPS Agreement.

II. SECTION 727 IS JUSTIFIED UNDER GATT ARTICLE XX(B)

10. As the United States has demonstrated, Section 727 was justified under Article XX(b) of the GATT 1994. To be justified under Article XX(b), a measure must fall under the scope of the XX(b) exception and be consistent with the Article XX chapeau.⁴ Section 727 was within the scope of the XX(b) exception because the measure was necessary to protect against the risk posed by the importation of poultry products from China. At the same time, Section 727 was consistent with the chapeau because it was not applied against China in a manner resulting in arbitrary or unjustifiable discrimination, nor was it a disguised restriction on international trade.

A. Section 727 Falls Within the Scope of the Article XX(b) Exception

11. The Appellate Body and past panels have noted that two elements must be met for a measure to fall under the scope of the Article XX(b) exception.⁵ First, the policy in respect of the measure for which the provision is invoked must fall within the range of policies designed to

³ This submission also includes an Annex, which contains U.S. comments on certain of China's responses to the first set of questions from the Panel. Note that an absence of a comment on a particular response by China should not be construed as indicating U.S. agreement. In fact, the body of this submission, as well as prior U.S. written and oral submissions, also address a number of the matters raised in China's responses.

⁴ *US – Gasoline* (AB), p. 22; *Brazil – Tyres* (AB), para. 139.

⁵ *EC – Asbestos* (AB), paras. 155-163; *Brazil – Tyres* (Panel), para. 7.40.

protect human, animal or plant life or health. Second, the inconsistent measure for which the exception is invoked must be necessary to fulfil the policy objective.

12. The United States has demonstrated that Section 727 meets these two elements. As the United States explained in its First Written Submission, Section 727 was enacted with the policy objective of protecting human and animal life and health from the risk posed by Chinese poultry in accordance with the first element.⁶ Since the United States has laid out its position on this element in detail and China has not challenged it,⁷ the United States will not discuss it further in this submission. Instead, the United States will focus on issues related to the second element – Section 727's necessity.

B. Section 727 Was Necessary to Protect Human and Animal Life and Health From the Risk Posed by Poultry Products from China

13. As the United States has explained, Section 727 was necessary to protect against the risk posed by the importation of poultry products from China.⁸ China has struggled with corruption, smuggling, and the lax enforcement of its food safety laws. In addition, China is known as a country where highly pathogenic avian influenza (“avian influenza”) exists and China has suffered numerous food safety crises in past years. In part as a result of these crises, China was in the process of overhauling its food safety law when Section 727 was enacted. At the same time, China was also in the midst of an ongoing equivalence proceeding for poultry. Therefore, Section 727 was necessary to ensure that FSIS fully considered China’s systemic food safety problems before “establishing” or “implementing” rules that would allow China to export poultry products to the United States.

14. This conclusion is consistent with the analysis used by past panels and the Appellate Body to determine whether a measure is necessary. The Appellate Body has noted that a determination about a measure’s necessity involves a weighing and balancing of multiple factors, which include the importance of the interests or values at stake, the contribution a measure makes to its policy objective, and the measure’s trade restrictiveness.⁹ In conducting this analysis, the Appellate Body has also examined whether the complaining party has proposed a WTO-consistent reasonably available alternative measure that meets the responding Member’s desired objective.¹⁰

⁶ See First Written Submission of the United States (“US FWS”), paras. 112-122.

⁷ See Oral Statement of China to the First Meeting of the Panel (“China Oral Statement”), paras. 86-106, in which China discusses the U.S. defense under GATT Article XX(b), but does not challenge the U.S. position that Section 727 meets this first element. In fact, China’s entire discussion focuses on the second element - whether Section 727 was necessary.

⁸ US FWS, paras.123-139; Opening Statement of the United States at the First Panel Meeting (“US Oral Statement”), paras. 42-48.

⁹ *Brazil – Tyres (AB)*, para. 178.

¹⁰ *US – Gambling (AB)*, para. 308.

15. As the United States has noted, all of these factors support a determination that Section 727 was necessary. Section 727 was enacted to protect life and health, which the Appellate Body has noted is of vital interest.¹¹ The measure also directly contributed to its policy objective by ensuring that FSIS did not implement or establish equivalence rules for China without focusing on the systemic risks posed by China’s food safety system, China’s food safety crises, or its new food safety law. Further, Section 727 did not deny China access to the PPIA, but actually directed FSIS to take actions related to China’s equivalence application. Finally, China has not presented a WTO-consistent, reasonably available alternative that would achieve the U.S. objective of protecting human and animal life and health.

16. In the following paragraphs, the United States will further discuss Section 727’s necessity and respond to China’s arguments that attempt to rebut the U.S. position. The United States will focus on the material contribution that Section 727 made to its objective, why China’s widespread crises are relevant to the measure’s necessity, and why Section 727 only applied to poultry products and not other food products from China. In addition, the United States will also explain why China has not presented a reasonably available WTO-consistent alternative measure.

1. Section 727 Materially Contributed to the Protection of Human and Animal Life and Health

17. Section 727 has directly contributed to the protection of human and animal life and health by ensuring that FSIS did not “implement” or “establish” rules related to China’s equivalence without fully considering the systemic problems with China’s food safety system and their relevance to China’s poultry inspection system. Section 727 also ensured that FSIS would consider China’s recent food safety crises and China’s enactment of a new food safety law. In addition, Section 727 provided FSIS with an opportunity to improve its equivalence process, and it provided other parts of the U.S. Government the chance to examine FSIS’s equivalence process and its overall efforts to ensure that imported food is safe.

(a) FSIS Actions Related to China’s Equivalence Application While Section 727 Was In Effect

18. Section 727 directly contributed to the protection of human and animal life and health by ensuring FSIS more thoroughly considered the risks presented by China’s equivalence application. Before China’s application for equivalence, FSIS had never before been confronted with a situation that presented such severe systemic problems with food safety law enforcement or such numerous and widespread food safety crises. Therefore, Section 727 was necessary to ensure FSIS adequately dealt with these unique issues. To help accomplish this task, the Joint Explanatory Statement (“JES”) accompanying Section 727 specifically directed FSIS on how to move forward with China’s equivalence determinations.¹²

¹¹ *Brazil – Tyres* (Panel), para. 7.111.

¹² Exhibit CN-33.

19. In accordance with the JES, FSIS developed an action plan shortly after Section 727 took effect.¹³ The action plan included three initial steps to be taken with regard to China's equivalence application: (1) reaching out to the Chinese government; (2) conducting an inventory of documentation received from China in previous equivalence proceedings; and (3) transmitting a summary of the inventoried documentation to the Chinese government and requesting updates on relevant changes to China's food safety laws. After these steps were completed, FSIS planned to complete an on-site audit of China's poultry inspection system, to verify inspection procedures in the slaughter and processing facilities identified for export to the United States, and to audit laboratories and other control operations, among other steps.

20. While Section 727 was in effect, FSIS implemented the action plan's first three steps. FSIS reviewed and summarized all of the documentation related to China's equivalence application and reached out to China via letter on May 12, 2009.¹⁴ This letter included a summary of all of the documents that FSIS had uncovered during the inventory and requested China provide any changes to its relevant food safety laws to FSIS for review.

21. FSIS needed updated documentation from China to complete the document review step, a normal part of the equivalence process under the PPIA.¹⁵ However, because China did not respond to FSIS's letter and provide the requested information, FSIS has not been able to complete its document review or any of the action plan's subsequent steps, such as the on-site audits, which are also part of the PPIA. If China had provided this information, FSIS could have taken these further actions under the PPIA.

**(b) FSIS Actions To Improve the Equivalence Process While
Section 727 Was In Effect**

22. In response to its experience evaluating China's equivalence and Section 727, FSIS has reconsidered the extent to which the agency communicates with U.S. trading partners and the extent to which it considers food safety issues that do not directly involve meat, poultry, or egg products. In the past, FSIS limited its equivalence evaluations to the information provided by the country regarding its food regulatory systems for meat, poultry, or egg products. Based on this information, FSIS would evaluate a country's meat or poultry regulations and determine whether those regulations achieve the same level of sanitary protection as FSIS's regulations.

23. FSIS has expanded the scope of its equivalence review to consider information that does not directly involve the products it regulates but have a bearing on the integrity of the country's food safety system. This new process will apply to China's equivalence review as well as the review of other countries. The new information FSIS will consider includes information

¹³ Exhibit US-43.

¹⁴ Exhibit US-44.

¹⁵ See Exhibit CN-7, p.14.

obtained from a country's central competent authority and other reliable sources such as the World Health Organization (WHO) and other U.S. regulatory agencies, such as the U.S. Food and Drug Administration (FDA) and U.S. Centers for Disease Control and Prevention (CDC). FSIS will also consider reports from other countries. If FSIS concludes that the information it receives is relevant to its equivalence determination of a particular country's meat, poultry, or egg products system, it will consider this information in the decision it makes. FSIS believes that this will help address some of the issues raised by China's equivalence application and U.S. consumers will be better protected as a result.

24. In addition, during 2009, FSIS took other steps to improve the equivalence process as a whole. For initial equivalence determinations, FSIS revised the Self-Assessment Tool it asks exporting countries to submit as a part of their initial application.¹⁶ In particular, FSIS changed the risk areas it considers from five to six different areas, with the category "government oversight" listed as the first category of emphasis.¹⁷ These changes to the Self-Assessment Tool are designed to enhance the depth and scope of information used to make an equivalence determination. FSIS provided this new Self-Assessment Tool to China and requested China complete it so FSIS can continue to evaluate the initial equivalence of China's slaughter inspection system.¹⁸

25. Similarly, for ongoing monitoring of equivalent countries, FSIS improved its audit methodology to better ensure the ongoing adequacy of system controls after a country has been found equivalent. The key tool used to implement the new methodology is the Self-Reporting Tool (SRT).¹⁹ The new methodology asks eligible countries to electronically provide FSIS with documents related to all phases of their inspection system using the SRT before FSIS conducts the on-site audit. FSIS will then use this information to better identify any specific food safety concerns, such as lax enforcement by the government's central competent authority. Finally, FSIS will verify the information it has received in the SRTs during its on-site audit. FSIS believes this new process will be more effective and has requested all of its trading partners, including China, to fill out the SRT this year as a part of FSIS's verification.²⁰

(c) Other U.S. Government Actions While Section 727 Was In Effect

¹⁶ USDA Self Assessment for Initial Equivalence for Meat, Poultry and Egg Products (Mar. 2009) (Exhibit US-65).

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

¹⁸ FSIS Letter to China (Dec. 2, 2009) (Exhibit US-66).

¹⁹ Exhibit US-61.

²⁰ See Exhibit US-61.

26. In response to the issues raised by China's equivalence application, the rest of the U.S. Government has also taken action to evaluate and address the risks posed by imports of poultry from China and risks posed by imported food in general. Various parts of the U.S. Government took action while Section 727 was in effect.

27. On June 28, 2009, the Agriculture Appropriations Subcommittee in the U.S. House of Representatives held a hearing to examine "the process the U.S. Department of Agriculture used to determine China's equivalency to export processed poultry to the United States."²¹ In fact, in her opening statement, the Chairwoman of the Subcommittee noted that the hearing would attempt to address four specific questions which might be used to reform the equivalence process in the future:

First, can we come to a conclusion on whether the declaration of Chinese equivalency by the USDA was valid and well-founded, according to the standards of equivalency already outlined by the agency? Second: If not, why not? Is there a way or process we can establish equivalency using the standards that are currently in place? Third, do we know how to correct the problems that arose with China's equivalency based on how we currently determine equivalency with other countries, such as Chile, Canada, and Australia, to name a few? And finally, what do we need to change about the equivalency process more broadly, independent of the example of Chinese-processed poultry here?²²

28. In addition, USDA released a report thoroughly examining the safety of food imported from China while Section 727 was in effect.²³ While the primary emphasis of this report was on FDA's regulation of Chinese food products, the report also discussed many of China's highly publicized food safety crises and described food safety regulation and enforcement in China, issues relevant to the equivalence of China's poultry inspection system and the risk posed by Chinese poultry.

29. And from a broader standpoint, in March 2009, President Obama created a Food Safety Working Group within the executive branch. The Food Safety Working Group's mission focuses on enhancing U.S. food safety laws for the 21st century, including improving the United States' ability to ensure the safety of imported food from China and other countries.²⁴

30. Together, all of these actions demonstrate that work related to protecting human and animal life and health from the risk posed by potentially unsafe poultry and other imported food from China occurred while Section 727 was in effect. These actions all made a material

²¹ Exhibit US-54, p.1.

²² Exhibit US-54, p.2.

²³ Exhibit US-24, p.1.

²⁴ Information about the Food Safety Working Group can be found at the following web site:

<http://www.foodsafetyworkinggroup.gov/>.

contribution to the protection of human and animal life and health, the vitally important policy objective of Section 727.

2. China's Widespread Crises Support Section 727's Necessity for Poultry Products

31. As the United States has noted, Section 727 was necessary to protect human and animal life and health by ensuring that FSIS fully considered China's broad systemic problems before allowing Chinese poultry to be imported into the United States. China's broad systemic problems are perhaps best exemplified by the numerous food safety crises that have struck China over the past few years. Many of these crises were directly related to China's problems with the oversight and enforcement of its food safety laws and others were exacerbated by this issue. For example, a Xinhua article noted that the lack of efficiency in China's food monitoring system has "long been blamed for repeated food safety scandals."²⁵ Likewise, the World Health Organization (WHO) noted that China's disjointed food safety system helped prolong the melamine crisis.²⁶

32. While all of China's crises have been troubling, among the most alarming was the melamine crisis that struck China beginning in 2007. As the Panel will recall, this crisis led to the death of six infants and the illnesses of thousands of people.²⁷ This crisis was also directly cited by Congress as one of the events that led to the enactment of legislation relating to FSIS's equivalence determination for China.²⁸ Unfortunately, since the Panel's last meeting, the Chinese government has released additional information about another recent food safety crisis involving melamine.²⁹

33. The melamine crisis and other non-poultry crises of this nature are relevant to a decision about equivalence because they raise questions about a country's ability to enforce its own food safety laws. While enforcement problems are troubling in all contexts, they are particularly relevant in the context of an equivalence regime. The reason for this is that after FSIS has made its initial equivalence determination for a particular exporting country, it relies on that country to enforce its laws to ensure that the U.S. level of sanitary protection is being met. And if the exporting country fails to enforce its laws, it could pose a direct risk to the life and health of those who consume the poultry produced in potentially dangerous conditions.

²⁵ Exhibit US-39.

²⁶ Exhibit US-23.

²⁷ Exhibit US-38.

²⁸ Exhibit US-42.

²⁹ As recently as December 31, 2009, Chinese officials shut down a Shanghai milk company's production centers based on evidence that the company was intentionally spiking its products with the dangerous industrial chemical. Then, on January 6, 2010, Chinese officials with the Shanghai prosecutor's office revealed that the incident was "kept quiet for more than eight months." *China Admits It Concealed Contamination Of Dairy Products With Melamine Last April*, BNA (Jan. 8, 2010) (Exhibit US-67).

3. Section 727's Application Was Appropriately Confined to Poultry Products

34. The United States has demonstrated that Section 727 was necessary with regard to poultry in the context of an ongoing equivalence proceeding that applied to Chinese poultry. However, China argues that Section 727's necessity is undermined by the fact that the measure did not apply more broadly to other Chinese products.³⁰

35. In essence, China's argument appears to be that a Member may not take action to protect human or animal life or health from the risk posed by a particular product until after that Member has evaluated the risks posed by all products from the Member and any action must be comprehensive with respect to all products. But of course nothing in Article XX(b) says this, nor does Article XX(b) say that a Member must delay action to protect life or health until after such a comprehensive approach can be put in place. Not only does China's approach have no basis in the text of Article XX(b), but it does not make sense to say that Members agreed that they could not apply measures to protect life or health with respect to particular products, but only with respect to all products. It is clear that the delays inherent in such an approach, and the resultant risks to life and health, would not be acceptable to Members.

36. In addition, there were several very good reasons why Section 727 applied only to poultry. First, poultry products are subject to FSIS's equivalence regime, which is different from FDA's regime for ensuring the safety of the products under its jurisdiction, which include all of the food products China has exported to the United States to date. Second, China had never before tried to export a product under FSIS's jurisdiction to the United States. Third, Chinese poultry poses specific risks not posed by other Chinese products and China's poultry industry has suffered from food safety crises. Finally, despite China's assertions to the contrary, its increasing export of foods subject to FDA's jurisdiction do not indicate that Section 727 was not necessary.

(a) China's Enforcement Problems Pose Particular Concerns in the Context of FSIS's Equivalence Process

37. Responsibility for ensuring the safety for human consumption of food imported into the United States is divided between two primary agencies. The Food Safety Inspection Service (FSIS), a part of the U.S. Department of Agriculture (USDA), is primarily responsible for ensuring the safety of imported meat, poultry, and egg products.³¹ On the other hand, the Food and Drug Administration (FDA), a part of the U.S. Department of Health and Human Services (HHS), is primarily responsible for ensuring the safety of all other imported food products for human consumption.

³⁰ See, e.g., China Oral Statement, para. 92.

³¹ One exception to this general rule is that FSIS is also responsible for ensuring the safety of imported catfish. All other fish products are regulated by the FDA.

38. While FSIS and FDA share a similar goal – namely, ensuring that imported food is safe – they use different legal frameworks to achieve this goal. FSIS ensures the safety of the food it regulates using the equivalence process while FDA ensures the safety of the food its regulates under a very different system.

39. Under FSIS’s equivalence system, countries desiring to export an FSIS-regulated product to the United States must first apply to FSIS for approval. As the United States discussed in its First Written Submission,³² the approval process involves an examination of whether the applying country’s inspection system achieves the same level of sanitary protection as the U.S. system for the product in question. If FSIS determines that the foreign country’s system is equivalent, the country is then approved to export that particular product to the United States. Although FSIS conducts follow-up audits on an annual basis, FSIS generally relies on the exporting country to enforce its laws to ensure that its inspection system continues to achieve the U.S. level of sanitary protection after the initial determination is made. If a country fails effectively to enforce its laws, this level of sanitary protection may not be maintained.

40. By contrast, FDA’s system for ensuring the safety of imported food products under its jurisdiction is quite different. Most importantly, FDA does not require an exporting country’s system to be found equivalent to the U.S. regulatory system prior to allowing the entry of food products. Rather, FDA approaches compliance on a firm-by-firm basis, and any firm whose products comply with applicable FDA requirements can ship to the United States. When the product reaches the U.S. border, it is then examined for violations of FDA requirements. If a violation is found, FDA works with the firm to have the product brought into compliance. If the product cannot be brought into compliance, it is re-exported or destroyed. When the FDA believes there is a chance of future violative shipments, FDA adds the firm to an “Import Alert” that advises all FDA import districts of the potential violation so future shipments can be detained until compliance is shown.³³

41. These significant differences between FSIS’s and FDA’s method to ensure the safety of imported food are relevant to the question of Section 727’s necessity. As the United States has noted, China’s food safety system has suffered from broad systemic problems.³⁴ Of particular concern has been China’s lax enforcement of its food safety laws. Indeed, the Global Health Governance Study on China’s food safety noted 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

³² See US FWS, paras. 24-32.

³³ See USDA Report, Food Safety and Imports: An Analysis of FDA-Food Related Import Refusal Reports (Sep. 2008) (Exhibit US-68). Additional information on FDA’s import alerts can be found online at the following address: <http://www.fda.gov/ForIndustry/ImportProgram/ImportAlerts/default.htm>.

³⁴ See US FWS, paras. 49-59.

safety can be ensured consistently across the country.”³⁵ Likewise, the United Nations also released a study in 2008 highlighting problems with China’s food safety enforcement.³⁶

42. China’s lax enforcement of its food safety laws raises particular concerns in the context of an equivalence regime that relies on the exporting country to enforce its laws to ensure that the U.S. level of sanitary protection is maintained. Thus, Section 727 was necessary in the context of FSIS’s equivalence regime to ensure that China did not export potentially unsafe poultry to the United States.

(b) Poultry is the Only FSIS-Regulated Food Product China Has Attempted to Export to the United States

43. Poultry is the first FSIS-regulated product that China has attempted to export to the United States. To date, China has not submitted an equivalence application for meat or egg products. In fact, FDA, not FSIS, regulates all of China’s current food exports to the United States.

44. Before China’s poultry application, FSIS had never before been faced with a review of any food inspection system within China. Therefore, FSIS had never examined China’s food safety system and was not accustomed to dealing with a country with such severe food safety problems. Given the unique nature of the task FSIS was facing, Section 727 was necessary to ensure the agency thoroughly considered its ultimate determination on the equivalence of China’s poultry inspection systems.

45. Further, poultry was the only product from China with a pending equivalence application at the time Section 727 was enacted. Accordingly, Section 727 was narrowly targeted such that it only affected the equivalence of poultry products.

(c) Crises in China Have Affected Poultry Products

46. Section 727’s necessity is not solely based on concerns with China’s lax enforcement of its food safety laws or the unique implications of this concern in the context of FSIS’s equivalence regime. In fact, there are unique issues with Chinese poultry that also support the measure’s necessity.

47. There have been multiple crises related to poultry products from China. For instance, in 2008, melamine was found in animal feed that was consumed by chickens in China and in eggs laid by Chinese chickens.³⁷ As a result of this, China’s Health Secretary stated that China would begin testing chicken meat for melamine. Similarly, in 2006, ducks and hens in China’s Hebei

³⁵ Exhibit US-25, p.5.

³⁶ Exhibit US-22, p.16.

³⁷ Exhibit US-62.

and Zhejiang Provinces were fed carcinogenic red dye so their red-yolk eggs would sell for a higher price.³⁸ Poultry from China was also smuggled into the United States in 2006.³⁹

48. Another issue specific to poultry is China's designation as a country where highly pathogenic avian influenza is known to occur. This is of particular concern with respect to China due to China's problems with the lax enforcement of its food safety laws. Under APHIS regulations to prevent the spread of avian influenza, any poultry exported to the United States must be fully cooked or otherwise processed sufficiently to kill the avian influenza virus. Thus, China's poor enforcement track record raised concerns about whether Chinese authorities would enforce APHIS's requirements to protect against the potential spread of avian influenza into the United States.

**(d) The United States Has Taken Measures to Address Unsafe
Chinese Food Products Regulated by FDA**

49. Section 727 is not the only measure that the United States has had to take to address the risk posed by unsafe imports from China. In fact, FDA has issued numerous import alerts against Chinese products that it has determined are unsafe. Just a few of FDA's recent import alerts against Chinese products include the following:

- red melon seeds (illegal dyes);
- bean curd (insect filth);
- dried fungus and mushrooms (filth from animals and insects);
- fresh garlic (mold, decomposition, insect filth/damage);
- honey (residues);
- four types of farm-raised fish (drug residues);
- wheat gluten (intentional contamination);
- rice protein products (intentional contamination);
- shrimp (drug residues);
- eel (drug residues); and
- milk products (illegal contamination)⁴⁰

50. FDA refuses a much higher proportion of food from China than other countries. Indeed, during the 2007 fiscal year, China's share of import refusals was 8.6 percent, more than twice its 3.3 percent share of import lines.⁴¹ In other words, these statistics indicate that FDA on average refused nearly three times the number of Chinese entry lines as it did for other countries.

³⁸ Exhibit US-63.

³⁹ Exhibit US-30.

⁴⁰ See Exhibit US-24, pp.2, 15.

⁴¹ Exhibit US-24, p.10.

51. Further, FDA in 2007 also negotiated a Memorandum of Understanding (MOU) with China to address its concerns about the melamine crisis.⁴² This MOU was intended to try to prevent similar crises from inflicting additional harm on U.S. consumers and animals.

52. Despite the numerous problems that FDA has had with the Chinese imports under its jurisdiction, China continually refers to its increasing exports of these products in an attempt to undermine Section 727's necessity. For example, in its Oral Statement, China rhetorically asked why the United States continued to import "such massive quantities of food" and why Congress did not cut out funding to allow the import of products regulated by FDA.⁴³

53. Putting aside whether China believes it would be advisable for the United States to act in such a manner, the implication that the United States has not acted against other unsafe Chinese products is simply untrue. A thorough review of the record reveals that the United States will and does take appropriate measures to protect human life and health when it is necessary to do so. For example, as the United States has explained, Section 727 was necessary to achieve this goal in the context of poultry products. Likewise, FDA's numerous import alerts and an MOU were necessary in the context of other Chinese food products.

54. If the export statistics that China cites prove anything, it is that the United States is perfectly willing to trade with China when it can be confident that the products China is exporting are safe.

55. That said, the fact remains that FDA's treatment of products under its jurisdiction is simply not relevant to whether Section 727 was necessary to protect against the risk posed by poultry imports from China. The Panel need not examine whether the United States could have or did take additional steps to address concerns about other Chinese food products. The only question before the Panel is whether Section 727 was necessary to protect human and animal life and health based on concerns about Chinese poultry. As the United States has demonstrated, this was the case.

4. China Has Not Offered A Reasonably Available Alternative Measure

56. While the United States bears the burden to demonstrate that Section 727 was necessary to protect human and animal life and health in accordance with Article XX(b), it does not have to "show in the first instance, that there are no reasonable alternatives to achieve its objective."⁴⁴ Rather, the complaining party must put forward a reasonably available WTO-consistent

⁴² Agreement between the Department of Health and Human Services of the United States of America and the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China on the Safety of Food and Feed (Dec. 11, 2007) (Exhibit US-69).

⁴³ China Oral Submission, para. 24.

⁴⁴ *US – Gambling* (AB), para. 311.

alternative.⁴⁵ In response, the responding party then has the opportunity to show that the alternative presented by the complaining party is not a “genuine” or a “reasonable” alternative. If the responding party demonstrates that the proposed measure is either not genuine or not reasonable, “it follows that the measure at issue is necessary.”⁴⁶

57. In the instant dispute, China has failed to present a reasonably available alternative that achieves the U.S. level of protection, which requires that processed and slaughtered poultry be safe.⁴⁷ China’s proposed alternative – “the application of normal FSIS procedures”⁴⁸ – is not an alternative at all. Rather, China’s suggestion that the U.S. adopt this so-called “alternative” is simply another way of saying that Section 727 was not necessary in the first place. In this sense, China is making a circular argument.

58. In other words, China’s alternative is not a reasonable alternative to Section 727 because it does nothing to meet Section 727’s policy objective, which is to ensure that FSIS fully consider China’s systemic food safety problems before “establishing” or “implementing” a rule that would allow China to export poultry products to the United States. And as the United States has discussed at length, Section 727 was indeed necessary to accomplish this objective. Thus, because the alternative posed by China is not an alternative at all, China has not presented a reasonably available WTO-consistent alternative to Section 727.

C. Section 727 Complies with the GATT Article XX(b) Chapeau

59. To justify a measure under one of the Article XX exceptions, the measure must also meet the requirements of the Article XX chapeau.⁴⁹ To meet the chapeau’s requirements, 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.⁵⁰

60. As the United States has demonstrated, Section 727 is not applied in a manner that results in arbitrary or unjustifiable discrimination against China nor is the measure a disguised

⁴⁵ *US – Gambling* (AB), para. 308.

⁴⁶ *Brazil – Tyres* (AB), para. 156.

⁴⁷ The PPIA contains a more specific definition with regard to slaughtered poultry, which states that “no slaughtered poultry, or parts or products thereof, of any kind shall be imported into the United States unless they are healthful, wholesome, fit for human food, not adulterated, and contain no dye, chemical, preservative, or ingredient which renders them unhealthful, un-wholesome, adulterated, or unfit for human food.” PPIA, Sec. 466 (Exhibit CN-04). However, the PPIA’s detailed definition is simply a different way of saying that the United States requires imported and domestic poultry, whether slaughtered or processed, to be safe.

⁴⁸ China Oral Statement, para. 100.

⁴⁹ See, e.g., *US – Gasoline* (AB), p. 22; *US – Shrimp* (AB), paras. 119-120.

⁵⁰ See *Brazil – Tyres* (Panel), para 7.225, noting that the panel frequently considers “arbitrary” and “unjustifiable” discrimination together “in light of the close relationship between them.” The Panel in *Brazil – Tyres* also noted that this approach was followed in the Appellate Body Report on *US – Gasoline*, the Appellate Body Report in *US – Gambling*, and the Panel Report on *EC – Asbestos*, among others.

restriction on trade.⁵¹ Because China does not appear to be challenging Section 727 as a disguised restriction on trade, the United States will focus its discussion on the issue of discrimination.⁵² And in the paragraphs that follow, the United States will rebut China's arguments and again demonstrate why Section 727 did not discriminate against China in an arbitrary or unjustifiable manner.

D. Section 727 Does Not Arbitrarily or Unjustifiably Discriminate Against China

61. Section 727 did not discriminate against China in an arbitrary or unjustifiable manner. At the time the measure was enacted, Chinese poultry was the subject of an ongoing equivalence review. An action taken in the context of an equivalence review of a particular country's food inspection system will, by its very nature, make explicit reference to that country. The country-specific nature that is inherent in an equivalence review does not, as China seems to argue, automatically raise questions of arbitrary or unjustifiable discrimination.

62. In addition, Section 727 did not deny China access to the PPIA and the United States did not apply a different appropriate level of protection ("ALOP") to Chinese poultry products as was applied to poultry from any other WTO Member. Indeed, Section 727 was premised on the U.S. ALOP since it was designed to ensure that any imports of Chinese poultry products would be safe. Further, at the time Section 727 was enacted, the same conditions did not prevail in China as prevailed in any other Member seeking to export poultry to the United States. Thus, to the extent that China argues it received any differential treatment under Section 727 at all, it was not arbitrary or unjustifiable. To the contrary, the measure directed toward China was justified by the unique circumstances presented by China's equivalence application.

63. Despite these facts, China continues to argue that Section 727 discriminates against its products vis-a-vis other WTO Members.⁵³ However, China's arguments do not show that Section 727 was applied in a manner that resulted in arbitrary or unjustifiable discrimination.

1. China Was Not Denied Access to the PPIA

64. Contrary to China's repeated claim,⁵⁴ Section 727 did not deny China with access to the PPIA. As the United States has explained, the legal impact of an appropriations funding

⁵¹ US FWS, paras. 143-148; US Oral Statement, paras. 50-52.

⁵² See China Oral Statement, paras. 107-120, in which China argues that Section 727 does not comply with the chapeau, but does not argue that the measure is a disguised restriction on trade.

⁵³ In particular, China argues that it has been discriminated against vis-a-vis three different subsets of WTO Members: (1) those whose poultry inspections systems have been found equivalent, such as Canada and France; (2) those who allegedly have enforcement problems, such as Bangladesh; and (3) all other WTO Members. See China Oral Statement, paras. 15-17, 64.

⁵⁴ See, e.g., China FWS, para. 4; China Oral Statement, para. 7.

restriction is limited to its explicit terms.⁵⁵ In this instance, Section 727 states that “None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People’s Republic of China.”⁵⁶ Thus, Section 727’s legal effect is limited to prohibiting the “establishment” or “implementation” of an equivalence rule for Chinese poultry, nothing more.

65. In accordance with the action plan accompanying Section 727, FSIS was permitted to engage in activities related to the equivalence rulemaking during fiscal year 2009. This includes actions that are part of the PPIA.⁵⁷ Therefore, China was not discriminated against vis-a-vis other WTO Members because it was not denied access to the PPIA.

2. The United States Applied the Same ALOP to China as to Other Members Seeking Equivalence for Poultry Products

66. China also consistently argues that it has been discriminated against as a result of Section 727 because the United States is not applying the same ALOP to Chinese poultry as it is applying to poultry from other WTO Members.⁵⁸ China’s assertion is untrue.

67. The U.S. ALOP for Chinese poultry is the same as it is for poultry products from all other Members. In general, the United States requires that processed and slaughtered poultry products, whether imported or produced domestically, be safe.⁵⁹

68. However, requiring the same ALOP for all Members who are seeking to export poultry products to the United States does not mean that all of these Members will have identical experiences with the equivalence process. Some Members will take a long period of time to achieve equivalence, while others may never be found equivalent. These different experiences by Members seeking to export poultry products to the United States make sense. In order to ensure that its ALOP is met, the United States may have to take different steps in different circumstances in order to respond to the particular challenges that each application presents. And as the United States has articulated on numerous occasions, because of the unique challenges presented by China’s application, Section 727 was necessary to protect human life and health in accordance with the U.S. ALOP.

⁵⁵ See US FWS, paras. 13-22.

⁵⁶ Exhibit CN-01.

⁵⁷ See US Oral Statement, paras. 17-24.

⁵⁸ China Oral Statement, paras. 57-66, 117.

⁵⁹ The PPIA contains a more specific definition with regard to slaughtered poultry, which states that “no slaughtered poultry, or parts or products thereof, of any kind shall be imported into the United States unless they are healthful, wholesome, fit for human food, not adulterated, and contain no dye, chemical, preservative, or ingredient which renders them unhealthful, un-wholesome, adulterated, or unfit for human food.” PPIA, Sec. 466 (Exhibit CN-04). However, the PPIA’s detailed definition is simply a different way of saying that the United States requires imported and domestic poultry, whether slaughtered or processed, to be safe.

3. China Is Different From the WTO Members Whose Poultry Inspection Systems Have Been Found Equivalent

69. China also compares itself with those WTO Members who have achieved equivalence for their poultry inspection systems and are currently eligible to export poultry products to the United States in an attempt to show discrimination.⁶⁰ As the United States will demonstrate in the paragraphs that follow, Section 727 did not arbitrarily or unjustifiably discriminate against China vis-a-vis these “equivalent” Members because the same conditions did not prevail in any of them as prevailed in China when Section 727 was enacted.

(a) None of the Equivalent Members Have Experienced Widespread Food Safety Crises or Massive Systemic Problems With Food Safety Enforcement

70. At the time that Section 727 was enacted, FSIS had found the poultry inspection systems of Australia (ratites only), Canada, Chile, France, Great Britain, Hong Kong, Israel, Mexico (processed poultry only), and New Zealand (ratites only) to be equivalent.⁶¹ No other Members have subsequently been found equivalent for either processed or slaughtered poultry products.

71. From a broad standpoint, China is unlike any of the other Members whose poultry inspection system have been found equivalent with that of the United States. The reason for this is that none of these Members have experienced widespread food safety crises that have raised fundamental concerns about the Member’s ability to enforce its laws. In addition, none of these countries have dealt with an issue like the melamine crisis, which the head of the World Health Organization dubbed “one of the largest food safety events the agency has had to deal with in recent years.”⁶² Thus, it is not accurate to say that the same conditions prevail in these Members prevailed in China at the time that China was going through the equivalence process.

(b) Many of These Members Had a History of Providing Safe Poultry and Meat Products to the United States at the Time They Were Found Equivalent for Poultry

72. Another distinction between China and these equivalent Members is that many of them had been trading with the United States under an "equal to" regime for many years without significant incident before their applications for equivalence were considered. Indeed, FSIS's equivalence process only dates to 1995 and the adoption of the Uruguay Round Agreements Act. Before that time, Canada, France, Great Britain, Israel and Hong Kong had already been exporting poultry products to the United States under FSIS’s old regime and all of these countries

⁶⁰ See, e.g., China FWS, paras. 63-71.

⁶¹ This list excludes China, who had been found equivalent for processed poultry only but needed to undergo an equivalence determination review by FSIS due to the passage of time since the last audit.

⁶² Exhibit US-35.

had a history of supplying safe products without incident. Thus, at the time these WTO Members were subject to FSIS's equivalence process to determine whether they could continue to import poultry products to the United States, FSIS already had confidence in their systems for ensuring the safety of the poultry that they produced. Therefore, their situations were much different from that of China, who had never before exported poultry to the United States when it applied for equivalence in 2004.

73. In addition, many of these Members also had a history of exporting meat products to the United States at the time they applied for equivalence for poultry. As one example, Chile was found eligible to export meat products to the United States in 2005, two years before it was found eligible to export poultry products in 2007. Thus, at the time FSIS was examining Chile's poultry inspection system, it already had familiarity with Chile's inspection controls and had confidence that Chile could be relied upon to enforce its law to ensure that the poultry it exported to the United States was produced in conditions that met the U.S. level of sanitary protection. Similarly, both Australia and New Zealand had exported meat products at the time they were found equivalent for ratites.

(c) China is Different From Mexico

74. Among the equivalent Members that China compares itself with, it singles out Mexico. In particular, in its Oral Statement, China cites problems uncovered during audits of Mexican facilities that it claims prove that Mexico also has problems with the enforcement of its food safety laws.⁶³

75. While, as China points out, it is true that some deficiencies were found during FSIS's audits of Mexico's meat and processed poultry system in 2008,⁶⁴ it is not unusual to find at least some deficiencies during audits of food regulatory systems. In general, when deficiencies are found during audits, the Member is advised of the deficiencies, and the Member then initiates appropriate corrective actions. Proposed corrective actions to address the noted deficiencies are provided by the Member to FSIS in writing. During the next audit, FSIS verifies the effectiveness of the corrective actions taken by the country. This is the process that was followed after the Mexico audits. Because Mexico took immediate and appropriate actions, FSIS continues to have confidence in the ability of Mexico's meat and poultry inspection system to produce products for export to the United States that are wholesome and not adulterated.

76. Further, from a broad standpoint, the United States is also not aware of such widespread crises in Mexico as have occurred in China. At the same time, the United States is not aware of any broad systemic problems that raise significant questions about Mexico's ability to enforce its own laws to the extent that they do with China.

⁶³ See China Oral Statement, para. 60 and 64.

⁶⁴ China Oral Statement, para. 60.

77. Putting this aside, the United States finds it unusual that China has chosen to compare itself with Mexico in the first place. After all, Mexico is the only country other than China for which the United States has had to bifurcate its equivalence process due to issues with the country's slaughtered poultry system. And to date, Mexico's poultry slaughter inspection system, which was first submitted in 1996, has not been found equivalent. Thus, it is unclear why China would want to compare itself with a country whose poultry slaughter inspection system has not been found equivalent to demonstrate that its system does not pose risks to life and health.

4. China Is Different From the WTO Members That China Alleges Have Food Safety Enforcement Problems

78. China was also not discriminated against vis-a-vis the second set of countries with whom it compares itself – those countries that China alleges have food safety enforcement problems. For example, in its Oral Statement, China notes that “in Bangladesh, reports indicated that two children died and more than forty people were sickened with viral encephalitis contracted from eating poultry.”⁶⁵ China continues to note that Bangladesh, like many other developing countries, “fail to properly enforce existing food safety laws.”⁶⁶

79. As before, China's comparison fails to prove discrimination. The reason for this is simple – unlike China, Bangladesh has not filed an equivalence application for poultry with the United States and is not actively seeking to export to the United States. As a result, even if Bangladesh's food safety problems, and in particular its problems with enforcement, were established and shown to be of the same magnitude as China's, China is not being discriminated against vis-a-vis Bangladesh because Bangladesh is not actively seeking access to the U.S. market.

5. China Is Different From WTO Members Who Are Not Attempting To Export Poultry to the United States

80. Finally, China was not discriminated against vis a vis all 151 other WTO Members. First of all, as the United States has explained, China continued to have access to the PPIA. Therefore, in that regard, it was similarly situated to all of these Members.

81. Second, only a small subset of these 151 Members had submitted an equivalence application and shown an interest in exporting poultry to the United States. In fact, of the 141 WTO Members who are not currently equivalent to export any type of poultry product to the United States, only 28 of these Members have applied for equivalence since 1995.⁶⁷

⁶⁵ China Oral Statement, para. 60.

⁶⁶ China Oral Statement, para. 64.

⁶⁷ The 28 WTO Members who have applied for equivalence for poultry products since 1995 include Argentina, Belgium, Brazil, Bulgaria, Colombia, Costa Rica, Denmark, Ecuador, Egypt, Honduras, India, Jamaica, Jordan, Korea, Latvia, Lebanon, Lithuania, Malaysia, Pakistan, Panama, Peru, Poland, Singapore, Slovenia, South

82. Further, among the 28 Members seeking to export to the United States, none of them was nearly as far along in the process as China was at the time Section 727 was enacted such that action on their application could have been considered imminent. In fact, Honduras was the only country other than China whose application had progressed beyond the document analysis phase and into the on-site audit phase of the equivalence process at that time.⁶⁸ The only other WTO Member who has subsequently moved past the document analysis phase of the equivalence process since then is Korea. However, neither Honduras or Korea is yet equivalent for poultry products.

83. Among the vast majority of those Members who have submitted equivalence applications for poultry, and certainly among those whose applications have made significance progress, such as Honduras and Korea, the United States is not aware of problems of the same magnitude as exist in China. In its Oral Statement, China even cited Korea as an example of a WTO Member “known for requiring strict levels of sanitary protection.”⁶⁹ This fact alone would seem to distinguish Korea from China.

84. Thus, although China may compare itself to numerous other Members and claim that it is being discriminated against when compared with these Members, this is simply not the case. Section 727 was not applied against China in a manner that resulted in arbitrary or unjustifiable discrimination. To the contrary, the measure was justified by legitimate concerns that existed with regard to China, and the measure did not arbitrarily or unjustifiably discriminate against China vis a vis any other WTO Member.

III. CHINA HAS FAILED TO SHOW THAT SECTION 727 RESULTS IN A BREACH OF ANY OBLIGATION UNDER THE SPS AGREEMENT

85. In its first written submission, China characterized Section 727 as a “budgetary measure.”⁷⁰ China failed to acknowledge what China had known from the outset: namely, that Section 727 was an exercise of Congressional oversight in an ongoing food safety equivalence process under the PPIA, enacted for the purpose of ensuring that the process fully took account of enforcement problems in China’s food safety system.

86. In China’s oral statement to the first meeting of the Panel, China for the first time alleges that Section 727 was a measure enacted for food safety purposes, and, that Section 727 is subject to several different obligations under various provisions of the SPS Agreement.⁷¹ As the

Africa, Spain, Sweden, and Thailand. Russia has also applied for equivalence.

⁶⁸ As the United States discussed in its First Written Submission, the document analysis phase and on-site audit phase are the first two steps in an initial equivalence determination. *See* US FWS, paras. 25-28.

⁶⁹ China Oral Statement, para. 27.

⁷⁰ China FWS, para. 116.

⁷¹ China Oral Statement, paras. 37-42.

complaining party, China has the burden of proving that Section 727 meets the definition in the SPS Agreement of an SPS measure, and of explaining how each SPS provision cited by China applies to the measure. But China has not met its burden. China's SPS arguments – like its arguments under the GATT 1994 – are still framed as if Section 727 were an autonomous measure, not enacted in the context of an ongoing equivalence review. Perhaps as a result of China's decision on how it has chosen to characterize Section 727, China's arguments under the SPS Agreement do not explain how and why each cited provision of the SPS agreement might apply, and China mainly relies on inapposite provisions of the SPS Agreement.

87. In particular, the central provisions of the SPS Agreement on equivalence processes are contained in Article 4, *Equivalence*. Yet China has alleged no breach of Article 4, nor is Article 4 within the terms of reference of the Panel. Instead, China has primarily made allegations under provisions, such as Article 8, which do not relate to the operation of an equivalence-based food safety regime. Moreover, to the extent some of the more general SPS Agreement provisions cited by China are relevant to the operation of an equivalence system, those provisions (in the context of this dispute) appear to add nothing to the arguments already developed by the parties regarding the application of Article XX(b).

88. Before turning to the specific responses to China's claims under the SPS Agreement, the United States would emphasize that these responses are without prejudice to the U.S. position, as first stated to the Panel in the U.S. request for a preliminary ruling, that any claims under the SPS Agreement are not within the Panel's terms of reference because China never requested consultations under that agreement.

A. China Failed to Allege any Breach of Article 4, which is the Specific SPS Provision Governing Equivalence-Based Systems

89. In Article 4, the SPS Agreement recognizes that Members may adopt equivalence-based regimes to ensure the achievement of their ALOP, and provides certain obligations with respect to equivalence-based systems. SPS Article 4 provides as follows:

1. Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member's appropriate level of sanitary or phytosanitary protection. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.

2. Members shall, upon request, enter into consultations with the aim of achieving bilateral and multilateral agreements on recognition of the equivalence of specified sanitary or phytosanitary measures.⁷²

Note that equivalence systems, as described by Article 4, are premised on the differential treatment of products from different WTO Members. That is, under Article 4.1, importing Members need only accept the equivalence of SPS measures in exporting countries if the exporting Member objectively demonstrates that the measures meet the importing Member's appropriate level of protection. Likewise, under Article 4.2, recognition agreements need not be reached with all Members – bilateral or multilateral agreements are mentioned as a possibility.

90. On the other hand, Article 4 does provide protections for exporting Members – as noted, the importing Member shall accept the exporting Member's SPS measures if it is demonstrated that the exporting Member's SPS measures are equivalent.

91. As the United States has explained in its prior submissions, China's approach of characterizing this dispute as about "discrimination" misses the point of an equivalence-based food safety system.⁷³ And, the existence of SPS Article 4 helps show that China's basic approach is flawed. The question is not whether China is treated differently than other Members – indeed, the course of proceedings and the outcome of each equivalence determination necessarily will be based on the specific facts and circumstances of the exporting Member's SPS measures.

92. To the extent that China wished to invoke disciplines under the SPS Agreement, China had the option of claiming a breach of the fundamental equivalence provision under Article 4 of the SPS Agreement. China, however, chose not to cite Article 4. Instead, China cited other SPS provisions that are unrelated to equivalence determinations, or that, at most, do not add anything to the issues under Article XX that have been briefed by the parties.

93. The following subsections address in numerical order each of the SPS claims raised by China.

B. China Has Failed to Show a Breach of SPS Articles 2.2 and 5.1

94. China argues that Section 727 is inconsistent with U.S. obligations under Article 2.2 and 5.1 of the SPS Agreement.⁷⁴ China, however, has not shown that these SPS provisions apply to a

⁷² SPS Agreement, Art. 4.

⁷³ US Oral Statement, para. 5; US FWS paras. 95-97.

⁷⁴ China Oral Statement, paras. 69-74; China FWS, paras. 137-143. The United States has combined its discussion of Articles 2.2 and 5.1 in a single section, and has focused on the "scientific evidence" requirement of Article 2.2, because this is the manner in which China has presented its claims under these provisions. The United States also notes that China's First Written Submission mentions Article 5.2 (defining factors to be examined in a risk assessment), but the United States understands that China's mention of Article 5.2 is not a separate claim, but rather serves as support for China's argument regarding the alleged absence of a risk assessment.

measure – such as 727 – specifying the process to be used in the course of an ongoing equivalence determination.

95. These provisions state as follows:

2.2. Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

5.1. Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

96. China’s logic in citing these provisions is that Article 2.2 and 5.1 on their face apply to “SPS measures”, and that Section 727 is an “SPS measure” under Annex A because (1) it was adopted for purposes of food safety, (2) it fell within the category of types of measures – “relevant laws, decrees, regulations, requirements, and procedures”⁷⁵ – set out in Annex A. This type of reasoning, however, is vastly over-simplistic, ignores the context provided by the language of other provisions of the SPS Agreement, and (if applied) would result in absurd and often circular interpretations. As the panel discussed at length in the *EC – Biotech* dispute, the SPS Agreement cannot be applied in such a “mechanistic fashion.”⁷⁶

97. Consider, for example, a procedure or requirement adopted in the course of conducting a risk assessment being undertaken in the application of a food safety measure. By the type of mechanistic reading adopted by China, the risk assessment procedure would itself be an SPS measure, and would need to be based on scientific evidence and a risk assessment under Articles 2.2. and 5.1. And on it would go: any secondary procedure adopted to find a scientific basis for the initial risk assessment procedure would itself require a scientific basis. This absurd result cannot be the proper way to interpret the broad scope of Articles 2.2/5.1 (“any SPS measure”), combined with the broad definition of “SPS measure” in Annex A.

98. In *EC – Biotech*, the panel addressed this interpretive issue by examining the context of other SPS Articles, and finding that Article 5.1 was intended to require a scientific basis not for any measure that might fall under Annex A, but only for measures “applied for achieving the relevant Member’s appropriate level of sanitary or phytosanitary protection.”⁷⁷ In other words, a scientific basis is required for a substantive SPS measure – such as a product ban or a requirement for quarantine or border testing – which provides protection from an SPS risk, and

⁷⁵ China Oral Statement, para 38 (citing SPS Agreement, Annex A).

⁷⁶ *EC – Biotech*, para. 7.1337.

⁷⁷ *EC – Biotech*, para. 7.1388.

not to intermediate measures used in assessing risk and deciding on what substantive measures should be applied.

99. Applying this type of reasoning to the present dispute, it is the PPIA itself – not Section 727 – which achieves the U.S. ALOP by requiring equivalence of the regulatory regimes of exporting Members. Section 727 does not itself provide the level of protection; rather, Section 727 is a procedural requirement adopted in the course of an ongoing equivalency review. As such, the SPS Agreement cannot be mechanistically interpreted – as China suggests – as requiring that this measure be based on sufficient scientific evidence or a risk assessment.

100. Moreover, China has failed to address another difficulty in attempting to apply Articles 2.2 and 5.1 to the measure at issue. Namely, the process of determining equivalence for an exporting Member’s SPS measures is not the same as the process of performing a risk assessment of products imported from another Member. The determination that poultry products pose a risk of being unsafe, and therefore that measures are needed to protect against that risk, pre-dates Section 727 and applies regardless of origin (whether imported or domestically produced). Indeed, it is not contested in this dispute that imported poultry products can pose a risk of being unsafe. Accordingly, the issue is not whether there is a basis for measures to ensure that poultry products are safe. The only real issue for China is whether the proper procedure was being followed to make the determination as to whether China’s measures are equivalent to U.S. measures for poultry products. This is not an issue for Article 2.2 or 5.1, but rather for Article 4.

101. As noted above, Article 4 of the SPS Agreement is specifically addressed to equivalence determinations. But Article 4 provides for an “objective demonstration” of equivalence, it does not provide that equivalence determinations must be based on a “risk assessment,” as that term is used in the SPS Agreement.⁷⁸ In short, because Article 4 does not require risk assessments for equivalence determinations, China has not explained how Articles 2.2 and 5.1 could apply to a procedural requirement adopted in the course of an equivalency determination.

C. China Has Failed to Show a Breach of SPS Article 2.3

102. China alleges that Section 727 results in a breach of Article 2.3 of the SPS Agreement. As explained below, it is unclear whether Article 2.3 is intended to apply to a procedural requirement, rather than a substantive SPS measure, and China has presented no explanation of how Article 2.3 would apply. And in any event, the issues under Article 2.3 are essentially the same as those under the Article XX(b) chapeau. As the United States has explained at length, the United States has met its burden of showing that Section 727 falls within the scope of the Article

⁷⁸ This is not to imply that U.S. determinations on equivalency matters are not based on scientific principles. As the United States has noted, its determinations are based on rigorous investigations and scientific principles. Rather, the point is that the SPS Agreement does not impose this procedural requirement on equivalency determinations.

XX chapeau. Accordingly, in this dispute, there is no need for the panel to address China's separate claim under Article 2.3 of the SPS Agreement.

103. Article 2.3 provides:

3. Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.⁷⁹

104. As an initial matter, the United States notes that it is uncertain whether Article 2.3 is intended to apply to every procedural requirement adopted in the course of operating SPS measures, or whether – like Articles 2.2 and 5.1 – Article 2.3 should be applied to substantive SPS measures intended to achieve the importing Member's ALOP. It is questionable, for example, that a requirement that one exporting Member provide copies of a certain type of document, and another exporting Member provide copies of a different type of document, should be construed as a violation of the SPS Agreement.

105. Similarly, it is unclear whether, in the context of equivalency-based regimes, Article 2.3 was intended to apply in addition to the main SPS equivalence provision (Article 4.1). As noted, by their very nature, equivalence-based regimes must discriminate between different Members. Article 4.1 provides a specific type of claim that exporting Members may bring: namely, that they have objectively demonstrated equivalence to the importing Member's SPS measures. China's submissions have addressed none of these issues.

106. But, as noted, in the context of this dispute, the Panel has no need to reach any issue under Article 2.3. The language of Article 2.3 mirrors the language of the Article XX chapeau, and the United States has already explained why the U.S. measure meets the chapeau requirements.⁸⁰ Similarly, China's Article 2.3 arguments are essentially the same as China's position regarding the application of the Article XX chapeau.⁸¹

107. Thus, aside from the question of whether SPS Article 2.3 is pertinent to procedures adopted in the course of an equivalency review under SPS Article 4, in the context of this particular dispute, the Panel would have no need to address Article 2.3 because the very same issues have been examined under the Article XX chapeau.

D. China Has Failed to Show a Breach of SPS Article 5.5

⁷⁹ SPS Agreement, Art. 2.3.

⁸⁰ US FWS, paras. 140-154, US Oral Statement, paras. 49-58.

⁸¹ Compare China FWS, paras. 118-125 (Article 2.3 argument) with China Oral Statement, paras. 107-120 (Article XX(b) chapeau argument).

108. In China’s oral statement at the first substantive meeting, China presented a new argument as to why Section 727 is inconsistent with obligations under Article 5.5 of the SPS Agreement.⁸² China’s argument is without merit – it fundamentally misconstrues the SPS Agreement and the U.S. measure at issue.

109. In relevant part, Article 5.5 provides that:

5. With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

110. China has not shown, and cannot show, that Section 727 resulted in distinctions in levels of protection in different situations. China’s failure, again, returns to its basic error of ignoring that Section 727 was enacted in the context of an ongoing equivalency review of Chinese poultry under the PPIA. It is the PPIA that establishes the level of protection for imported poultry, not Section 727.

111. Although the PPIA itself is not at issue in this dispute, it is worth noting that the PPIA – as an equivalency-based regime – by its very nature does not establish different levels of protection as between the United States and other Members, or as between different exporting Members.⁸³ Rather, the basic question evaluated under the PPIA is whether each exporting Member’s poultry safety system will result in the same level of protection as the U.S. system. And indeed, this is the fundamental description of “equivalence” provided under Article 4 of the SPS Agreement.⁸⁴

112. The United States also notes that China’s Article 5.5 argument confuses the concepts of, on the one hand, the appropriate level of protection, and on the other hand, the measures applied to achieve the appropriate level of protection. Here, the ALOP under the PPIA is the same for all exporting Members, but the measure at issue (Section 727) applies only to China, for reasons the United States has explained are fully justified in light of the circumstances. To be sure, China does not accept those justifications. But a disagreement about whether, for example, a measure

⁸² China Oral Statement, paras. 44-68.

⁸³ The United States also notes that China has presented the novel argument that Article 5.5 forbids a WTO Member from adopting different levels of protection for different products from the same WTO Member, without any showing of discrimination. Although this matter is not before the panel because China has not established any differences in U.S. levels of protection, the United States notes that it does not accept China’s proposition.

⁸⁴ SPS Agreement, Art. 4.1 (“Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own or from those used by other Members trading in the same product, if the exporting Member objectively demonstrates to the importing Member that its measures achieve the importing Member’s appropriate level of sanitary or phytosanitary protection.”)

results in arbitrary discrimination under Article 2.3 or the Article XX chapeau does not automatically create a claim under Article 5.5 of the SPS Agreement.

113. In short, under China’s approach, any difference in the measures applied by a Member to various products would by definition mean that there is a distinction in the appropriate level of protection sought to be achieved by that Member. China’s approach is incorrect and without any basis under the SPS Agreement. Indeed, the SPS Agreement is clear that these two concepts are separate and distinct.

E. China Has Failed to Show a Breach of SPS Article 5.6

114. China alleges that Section 727 results in a breach of Article 5.6 of the SPS Agreement. The response of the United States to China’s Article 5.6 claim is similar to that with respect to China’s SPS Article 2.3 claim: China has not shown that Article 5.6 applies to a procedural requirement adopted in the context of an equivalency determination.

115. Article 5.6 provides:

6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility {Note 3}.⁸⁵

{3. For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.}

116. As an initial matter, the United States notes that Article 5.6 does not appear to apply to every procedural requirement adopted in the course of operating SPS measures. Instead, it appears to apply to substantive measures “establishing or maintaining” the importing Member’s ALOP. Furthermore, the context provided by note 3 – namely, that Article 5.6 is not breached unless there is another measure that achieves the appropriate level of protection – supports that Article 5.6 is intended to address substantive measures that achieve a level of protection, and not – as in this case – an allegedly unnecessary requirement involving the procedures used in adopting a substantive SPS measure.

⁸⁵ SPS Agreement, Art. 5.6 & n.3.

117. In addition, it is difficult to see how the language of Article 5.6 applies in the context of equivalence determinations. In an equivalence regime, it is the exporting Member that chooses the SPS measures intended to achieve a level of protection, and the question for the importing Member is whether those measures achieve the result of equivalence. In this context, it is hard to apply Article 5.6, which turns on whether SPS measures chosen by the importing Member are more trade restrictive than required.

F. China Has Failed to Show a Breach of SPS Article 8 and Annex C

118. China’s arguments regarding alleged “undue delay” under Article 8 and Annex C(1)(a) of the SPS Agreement are cursory,⁸⁶ and fail to show that Section 727 breaches those provisions. First, Article 8 and Annex C of the SPS Agreement apply to “control, inspection, and approval procedures,” which do not include equivalence determinations described under SPS Article 4. In addition, even aside from the fact that Annex C does not apply, China has not established the existence of any “undue delay.”

119. Article 8 provides:

Members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.⁸⁷

Three aspects of the language of Article 8 are especially important for evaluating China’s claim of undue delay under Annex C(1)(a).

120. First, Article 8 makes clear that Annex C does not apply to every SPS measure; rather, it only applies to a subset of SPS measures – namely, “control, inspection or approval procedures.” In this regard, a contrast with the Article 7/Annex B transparency provisions is instructive.

121. Second, although Article 8 mentions three specific types of SPS procedures, Article 8 makes no mention of procedures used in equivalence determinations. Although China asserts that Article 8 applies, China does not specify which of these three enumerated types of procedures might encompass procedures used in equivalence determinations.

122. Third, Article 8 provides context for what is meant in Article 8/Annex C by “control, inspection, and approval procedures.” In particular, Annex 8 provides two examples of the types

⁸⁶ China explains its Article 8 and Annex C claims in five paragraphs of its first written submission (paras. 156-160), and two paragraphs of its oral statement (paras. 77-78). Oddly, China’s oral statement refers to “conformity assessment procedures,” which is a term from the TBT Agreement, not the SPS Agreement.

⁸⁷ SPS Agreement, Art. 8.

of measures covered by the provision. Although the list is inclusive rather than exhaustive, the two examples do provide an indication of what types of measures are intended to be covered. In particular, Article 8 specifies (1) systems for approving the use of additives, and (2) systems for establishing tolerances for contaminants. Both of these examples relate to approving or controlling particular products or substances. In contrast, nothing in Article 8 indicates that control, inspection, or approval procedures were intended to involve an examination of an exporting Member's SPS measures.

123. The text of Annex C provides further context indicating that “control, inspection or approval” procedures involve particular products or substances, and not the evaluation of the equivalence of another Member's regulatory system. For example:

- Paragraph c(1)(a) provides that Members must ensure that “such [control, inspection, and approval] procedures are undertaken and completed without undue delay and in no less favourable manner for imported products than for like domestic products.”
- Paragraph c(1)(d) provides that Members must ensure that “the confidentiality of information about imported products arising from or supplied in connection with control, inspection and approval is respected in a way no less favourable than for domestic products and in such a manner that legitimate commercial interests are protected.”
- Paragraph c(1)(e) provides that Members must ensure that “any requirements for control, inspection and approval of individual specimens of a product are limited to what is reasonable and necessary.”
- Paragraph c(1)(f) provides that Members must ensure that “any fees imposed for the procedures on imported products are equitable in relation to any fees charged on like domestic products or products originating in any other Member and should be no higher than the actual cost of the service.”
- Paragraph c(1)(g) provides that Members must ensure that “the same criteria should be used in the siting of facilities used in the procedures and the selection of samples of imported products as for domestic products so as to minimize the inconvenience to applicants, importers, exporters or their agents.”
- Paragraph c(1)(h) provides that Members must ensure that “whenever specifications of a product are changed subsequent to its control and inspection in light of the applicable regulations, the procedure for the modified product is limited to what is necessary to determine whether

adequate confidence exists that the product still meets the regulations concerned.”

In sum, most of the specific requirements in Annex C apply to products. Indeed, these requirements would not even make sense if applied to procedures used in determining whether an exporting Member’s SPS measures were equivalent. Thus, the context provided by the language of Annex C further supports that procedures used for determining equivalence are not included within the meaning of the phrase “control, inspection, and approval procedures” used in Article 8 and Annex C of the SPS Agreement.

124. Finally, the United States notes that in this particular dispute, China’s Annex C “undue delay” claim (like many of its other SPS claims) adds very little, if anything, to the substance of China’s arguments. Rather, China’s Annex C argument is conclusory, merely stating that “China has already demonstrated, in connection with its other claims,” that Section 727 is lacking in “justification” and results in “discrimination.”⁸⁸ But to the contrary, as the United States has shown, Section 727 falls squarely within the Article XX(b) exception and is both necessary under the meaning of Article XX(b), and not discriminatory under the meaning of the chapeau.

IV. CONCLUSION

125. For the reasons set forth above, along with those set forth in the U.S. First Written Submission, oral statements at the first substantive meeting with the Panel, and responses to the Panel’s questions, the United States requests that the Panel reject China’s claims.

⁸⁸ China Oral Statement, para. 78.

ANNEX

Question 17

The Panel notes that China has made arguments with respect to the WTO inconsistency of Section 733 of the AAA 2008 in paragraphs 4, 6, 7, 10 and 13 of its oral statement. Is China making a specific claim with respect to Section 733?

126. In its response to Question 17 from the Panel, China asserts that Section 733 was identical to Section 727 and argues that this undermines the U.S. position that Section 727 was a temporary measure narrowly targeted to addressing the risk posed by the importation of potentially dangerous poultry products from China.⁸⁹

127. China's efforts to portray these measures as part of some broader policy are contradicted by the evidence presented by Section 743. Section 743 (in conjunction with USDA's November 12 letter) removed the funding restriction on FSIS's ability to establish or implement equivalence rules for Chinese poultry. The progression of these different measures addressed to the same issue demonstrates both the reasonableness of Congress' response to its concerns about Chinese poultry and Section 727's temporary nature.

Question 24

Could China please comment on its understanding of whether the activities described in paragraph 22 of the United States' oral statement actually took place? Could China please explain why it failed to answer the letter from the FSIS?

128. China repeatedly alleges that Section 727 denied it with access to FSIS's normal equivalence procedures.⁹⁰ Yet, the simple fact remains that China failed to respond when the United States attempted to obtain information about China's new food safety law which would have allowed FSIS to conduct the document review step, a normal step in its equivalence process under the PPIA.⁹¹

129. Further, China's claim that the U.S. letter was "not sent as part of FSIS activities under the normal FSIS equivalence determination and rule-making procedures"⁹² is incorrect. Regardless of whether Section 727 had been in effect, FSIS needed to conduct an equivalence determination review of China's processed poultry inspection system before China could export processed poultry to the United States due to the time that had passed since FSIS had last conducted an on-site audit. In addition, it is also part of FSIS's normal procedures to review new

⁸⁹ See Responses by China to the First Set of Questions from the Panel ("China Responses"), para. 42.

⁹⁰ See, e.g., China First Written Submission ("China FWS"), para. 1; China Oral Statement, paras. 2-16.

⁹¹ See Exhibit CN-7, p.14.

⁹² Responses by China to the First Set of Questions from the Panel ("China Responses"), para. 55.

food safety measures passed by any country that is equivalent or that is requesting equivalence in order to understand the implications of that law. Thus, contrary to China's assertion, the letter was part of FSIS's normal procedures, and it was China's failure to respond to the letter, not Section 727, that prevented FSIS from taking steps that were part of the normal equivalence process.

Question 27

In paragraph 68 of its first written submission, the United States explains that there is no longer a freezing of the funds for the FSIS to examine equivalence requests from China because Section 727 of the AAA 2009 has expired and the letter sent by the Secretary of Agriculture on 12 November 2009 to Congress means that the prohibition instituted on funding by Section 743 of the AAA 2010 is lifted. Could China comment on this?

130. The United States would like to respond to China's misleading claim that "the funding could potentially be halted again at any time if, for example, Congress were to find a defect in the 12 November 2009 notification, or if the notification were to be withdrawn."⁹³ As the United States noted in its response to Question 28 from the Panel, "the only legal requirement contained in Section 743(a) is for the Secretary to notify Congress that USDA plans to follow Section 743's various elements."⁹⁴ In other words, once the Secretary made this notification to Congress, the funding restriction ended. The United States could, of course, at any time enact legislation halting funding on any regulatory activity of the Federal Government. There is nothing unique about Section 743 in that regard. Therefore, China's arguments that the Secretary's notification could be withdrawn or that Congress could find a defect in the notification prove nothing.

131. In addition, China's answer to this question overstates the potential impact of Section 743(b). China asserts that "the operation of Section 743(b) would appear to have the potential of halting all funding..."⁹⁵ However, as the United States will discuss in relation to Question 30, this statement is inaccurate.

Question 30

In paragraph 129 of its oral statement, China states that Section 743 requires the FSIS to follow the procedures for significant rules specified in Executive Order 12866 with respect to imports of slaughtered poultry from China. What are the procedures for significant rules specified in Executive Order 12866? Please provide them to the Panel?

⁹³ China Responses, para. 60.

⁹⁴ Answers of the United States of America to the First Set of Questions from the Panel to the Parties ("US Answers"), para. 39.

⁹⁵ China Responses, para. 60.

132. Executive Order 12866 provides a mechanism for centralized executive branch review of federal regulatory actions when this type of review is deemed appropriate based on the facts and circumstances of the particular rule in question. The Office of Management and Budget (OMB), the agency responsible for this centralized review, may take up to 90 days to conduct this task.⁹⁶

133. The United States has two additional comments with regard to this issue that the Panel may find relevant.

134. First, Section 743(b)'s application to any potential proposed rule related to slaughtered poultry products from China would not, as a practical matter, affect the rule's treatment. OMB had already treated China's processed poultry proposed rule as significant and was expected to treat the rule regarding slaughtered poultry the same way.

135. Second, OMB's designation of a rule as significant often has little impact on the time that it takes to prepare a given rule to be published in the Federal Register. For example, OMB only reviewed a "significant" rule regarding the importation of boneless beef from Japan for 16 days⁹⁷ and a "significant" rule regarding the importation of avocados from Mexico for 20 days.⁹⁸

Question 44

In paragraph 122 of its first written submission, China argues that "identical or similar" conditions prevail in China on the one hand, and in all other poultry-exporting WTO Members on the other hand. The United States, however, in paragraph 148 of its first written submission argues that "there was no other country that was as far along in the equivalency process that had experienced recent food safety scandals and had systemic problems with smuggling, corruption and enforcement". It also argued that no other country presented the same set of challenges, therefore there is no other country where it could be said that the same conditions prevail. Could China comment on this?

136. In its response to Question 44 from the Panel, China contends that "similar or identical conditions exist in China and other WTO Members desiring to export poultry to the United States."⁹⁹ Further, China makes several arguments in an attempt to undermine the U.S. point that "there was no other country that was as far along in the equivalency process that had experienced recent food safety crises and had systemic problems with smuggling, corruption and enforcement."¹⁰⁰ Most of China's comments are off-point and none of them are persuasive.

⁹⁶ See Exhibit CN-60.

⁹⁷ This rule was sent to OMB for review on July 27, 2005, and the review was completed by August 12, 2005.

⁹⁸ This rule was sent to OMB for review on April 26, 2006, and the review was completed by May 15, 2006.

⁹⁹ China Responses, para. 101.

¹⁰⁰ US FWS, para. 148.

137. First, China appears to misstate the text of the Article XX chapeau. The Article XX chapeau prohibits measures from being “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail,” not between countries where “similar conditions” prevail, as China suggests.

138. Second, the United States does not believe that the Appellate Body Report in *US – Shrimp* adopts China’s reading of the chapeau either. The Appellate Body in that dispute did not find that *any* differential treatment between the countries who desired to access the U.S. shrimp market was unjustified. Rather, the Appellate Body noted the opposite – that the way the United States treated these individual member states was unjustified because the United States failed to take into consideration the different conditions in their territories and instead applied the same approach to all of them regardless of their differences.¹⁰¹ And as the United States discussed in its answer to Question 76 from the Panel, Section 727 did not suffer from that same flaw.¹⁰² In fact, Section 727 was narrowly tailored to address concerns about China based on conditions in China that raised questions about China’s ability to enforce its own laws to ensure that the U.S. level of sanitary protection would be met.

139. In addition, China also argues that “none of the alleged problems with food safety in China referred to by the United States in its first written submission and opening oral statement relate to poultry.”¹⁰³ The United States has affirmatively responded to this argument in this submission and will not spend more time on it here other than to note that these broad crises are directly relevant to the safety of Chinese poultry because they raise questions about China’s ability to enforce its food safety laws. And, as the United States has pointed out, lax enforcement is of particular importance in the context of an equivalence regime that relies on the exporting country to enforce its laws once an initial determination about equivalence has been made.

140. Further, China again compares itself with other types of countries in order to prove discrimination, including Bangladesh, numerous unspecified “African countries,” and other countries whose poultry inspection systems have been found equivalent with the United States.¹⁰⁴ As the United States pointed out in this submission, the comparisons with Bangladesh and these other unspecified countries do not appear to be apt since none of these countries are currently seeking to export poultry products to the United States. Further, as the United States has also pointed out, none of the comparisons to countries with equivalent systems prove discrimination since the United States is not aware of broad crises or widespread, systemic food safety law enforcement issues in any of these limited number of countries. As a result, Section 727 is not arbitrarily or unjustifiably discriminatory.

¹⁰¹ See *US – Shrimp* (AB), para. 164.

¹⁰² US Answers, paras. 105-109.

¹⁰³ China Responses, para. 102.

¹⁰⁴ China Responses, para. 103 and 106.

141. Finally, China also argues that there was no urgency for Congress to enact Section 727 because the United States has noted elsewhere that “even in the absence of Section 727, FSIS would not have necessarily allowed China to export poultry to the United States.”¹⁰⁵ China’s argument misses the point and misstates the necessity test.

142. As the United States noted in its response to Question 78 from the Panel, the necessity test in Article XX(b) examines whether a measure is necessary to protect life and health.¹⁰⁶ Even though it may have been unlikely that China would have exported significant amounts of poultry to the United States during Fiscal Year 2009, this is very different from saying that China would not have exported any poultry at all. Section 727’s objective was to protect against the risk posed by the importation of potentially dangerous poultry products from China, a risk that attaches to the consumption of even one shipment of contaminated poultry. Thus, whether the amount of poultry exported to the United States was significant or more limited, the risk remains.

Question 48

Please tell the Panel what China believes is the United States’ appropriate level of protection (ALOP) for poultry imports. Please tell the Panel from where you derived your conclusion.

143. In its response to Question 48 from the Panel, China contends that “the United States’ ALOP for imported poultry is lower than its ALOP for imported poultry from China.”¹⁰⁷ China continues to note that Section 727 reflects a risk tolerance of “less than zero” for Chinese poultry.¹⁰⁸ These statements are incorrect.

144. As the United States noted in paragraphs 67-69 of this submission, the U.S. ALOP for Chinese poultry is the same as it is for poultry products from all other countries. In general, the United States requires that processed and slaughtered poultry products, whether imported or produced domestically, be safe.

145. However, requiring the same ALOP for all countries who are seeking to export poultry products to the United States does not mean that all of these countries will have identical experiences with the equivalence process. In order to ensure that its ALOP is met, the United States may have to take different steps in different circumstances in order to respond to the particular challenges that each application presents. And, based on the unique challenges presented by China’s application, Section 727 was necessary to protect human life and health in accordance with the U.S. ALOP.

¹⁰⁵ China Responses, para. 106 (quoting US FWS, para. 126).

¹⁰⁶ US Answers, para. 113.

¹⁰⁷ China Responses, para. 125.

¹⁰⁸ China Responses, para. 125.

Question 52

In paragraph 27 of its oral statement, China mentions that China exports to other Members known for requiring strict levels of sanitary protection. Is China arguing that the ALOPs of these Members and the measures applied by them are relevant to an analysis of whether the US measure meets the US ALOP? If so, please explain the basis for your position.

146. The United States agrees with China that WTO Members, including the United States, are entitled to determine their own ALOPs. The United States also agrees that it is true that other Members' ALOPs should not affect an analysis of a measure, such as Section 727, that was enacted to ensure that the U.S. ALOP was being met. Further, while the United States is not in a position to comment on the ALOPs of the three Members that China referenced, the United States would note that one of these Members – the European Union – banned the import of poultry products from China in 2002 until 2004 due to contaminants found in Chinese imports.¹⁰⁹ Subsequently, the EU extended its ban until 2008 due to concerns about avian influenza in poultry imported from China.¹¹⁰

Question 53

In paragraph 50 of its oral statement, China argues that "because a prohibition on granting import approval under the relevant procedures is applied only in relation to Chinese poultry, there is no doubt that a higher level of sanitary protection is applied to poultry than to other Chinese food measures". Is China arguing that in order to achieve the same ALOP for different products, the United States would have to apply the same measures to those products? If so, what is the legal basis for this position?

147. As the United States indicated in its response to Question 48, the United States applied the same ALOP to imports of poultry from China as it does with regard to imports of poultry from other countries. Namely, the United States requires that the poultry it imports is safe.

Question 64

Given that the FSIS began a document review of China legislation in May 2009 and the funding restriction was lifted on 12 November 2009, would China agree that the reasonably available alternative it has suggested has actually been taken by the United States? _

148. In its response to this question from the Panel, China continues to make a few of the same faulty assertions that it has made elsewhere. First, China again proposes that a reasonable

¹⁰⁹ Exhibit US-25, p.2.

¹¹⁰ *EU may lift animal imports ban on China*, China Daily (July 20, 2004) (Exhibit US-70).

alternative to Section 727 would have been to apply the “normal” FSIS procedures. However, as the United States has noted elsewhere, this is simply another way of asserting that China does not believe the U.S. measure was necessary. China’s argument is circular, and China continues to fail to meet its burden of proposing a reasonable alternative to Section 727.

149. In addition, China asserts that it “continues to be the only WTO Member without access to normal FSIS procedures.”¹¹¹ Putting aside the fact that Section 727 never actually denied China with access to the PPIA, China’s argument bears no resemblance to reality today. After all, as the United States has pointed out, there is currently no funding restriction on FSIS with regard to China’s equivalence application.

Question 73

Can both parties please explain their view on how the Panel should conduct the weighing and balancing of the contribution of the measure against its degree of trade restrictiveness given the relevant jurisprudence?

150. In response to China’s answer to Question 73 from the Panel, the United States would like to make two comments.

151. First, the United States has demonstrated the relevance of China’s widespread crises to the measure taken with regard to poultry products on multiple occasions in this submission.¹¹² Similarly, the United States has also responded to the question of why Section 727 only applied to poultry products in paragraphs 34 and 35 above, and would also respectfully direct the Panel to these paragraphs for a better understanding of this issue.

152. Second, the United States would like to comment in some greater detail on China’s argument that “the comprehensive FSIS procedures already in place are adequate to address any and all risks posed by poultry from any exporting country.”¹¹³ China’s contention is incorrect because it fails to account for the fact that China’s poultry application was the first ever application China had presented to FSIS, and thus FSIS’s evaluation of China’s poultry inspection system represented the first time that FSIS had examined China’s food safety system in great detail.

153. And given the unprecedented nature of China’s food safety problems, including the lax enforcement of its laws and the widespread crises that it had experienced, FSIS has never before been asked to make an equivalence determination for a country with such severe problems as China. Further, at the time that Section 727 was enacted, China was in the midst of the ongoing melamine crisis and was planning to enact a new food safety law. Given these developments,

¹¹¹ China Responses, para. 149.

¹¹² See paras. 31-33.

¹¹³ China Responses, para. 169.

and a concern by some in Congress that FSIS did not spend enough time considering China's broad systemic issues, Section 727's enactment was necessary to ensure that human and animal life and health was protected from the risk posed by potentially dangerous poultry products from China and the U.S. level of sanitary protection was maintained.

LIST OF U.S. EXHIBITS

<u>U.S. Exhibit</u>	<u>Description</u>
US-65	USDA Self Assessment for Initial Equivalence for Meat, Poultry and Egg Products (Mar. 2009)
US-66	FSIS Letter to China (Dec. 2, 2009)
US-67	<i>China Admits It Concealed Contamination Of Dairy Products With Melamine Last April</i> , BNA (Jan. 8, 2010)
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US-69	Agreement between the Department of Health and Human Services of the United States of America and the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China on the Safety of Food and Feed (Dec. 11, 2007)
US-70	<i>EU may lift animal imports ban on China</i> , China Daily (July 20, 2004)