

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

(WT/DS392)

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

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<i>Brazil – Aircraft (AB)</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999
<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>Korea – Beef (AB)</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Cotton Subsidies (AB)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005
<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>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 – German Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002
<i>US – 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. INTRODUCTION

1. In 2007, adulterants added to pet food ingredients by Chinese producers led to the deaths of thousands of U.S. domestic animals. In 2008, adulterants added to milk by Chinese processors sickened hundreds of thousands of persons, and led to the deaths of over a dozen children. The contamination of these products was not allowed under China's food safety laws.¹ Rather, these food safety crises arose from massive failures in China's system of food safety enforcement. Earlier this year China attempted to address these and other enforcement failures by adopting a comprehensive overhaul of its food safety regime.²

2. In response to such failures of food safety enforcement in China, and in the context of pending administrative proceedings concerning the authorization of the import of Chinese poultry products, the United States Congress enacted the measure at issue in this dispute: namely, Section 727 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2009 ("Section 727").³ Section 727 imposed a six and a half month funding restriction that prevented the establishment or implementation of rules approving the importation of certain poultry products from China, thereby ensuring an additional period of time for review of food safety issues relating to China's enforcement problems. Section 727 expired as of September 30, 2009. Moreover, under a subsequent appropriations bill, the funding restriction has been lifted, effective November 12, 2009. Accordingly, as of the time of this submission, U.S. food safety regulators no longer face any restriction on the establishment or implementation of rules allowing the importation of Chinese poultry products.

3. The temporary, now-expired, restriction on the establishment or implementation of rules accepting the equivalence of poultry imports from China was a measured reaction to the particular issues presented by China's major problems of food-safety enforcement. As explained below, Section 727 falls squarely within the Article XX(b) exception in the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") for measures necessary to protect human or animal life or health. Section 727 also meets the elements of the Article XX chapeau. It imposes no arbitrary or unjustifiable discrimination between countries where the same conditions prevail; indeed, no other country subject to a U.S. poultry-product safety assessment had major crises of food safety enforcement. And Section 727 was not an instance of a disguised restriction on trade. In fact, the U.S. poultry industry opposed it. For these reasons, China cannot establish that Section 727 is inconsistent with any U.S. obligations under the GATT 1994.

¹ For purposes of brevity, this introduction will refer to laws governing the safety of food and the safety of animal feed as food safety laws.

² The failures of China's food safety enforcement system are described more fully in Part II of this submission.

³ Exhibit CN-1.

4. As explained in the body of this submission, the United States disagrees with most of the factual and legal assertions in China’s First Written Submission. Before addressing those matters in detail, the United States has two over-arching comments on China’s submission.

5. First, the opening sentence of China’s First Written Submission asserts that “This is a case about arbitrary discrimination.”⁴ China repeats this theme throughout its submission. China, however, is well aware of its own problems of food safety enforcement, and of the food safety rationale for the temporary restriction imposed by Section 727. Yet, China’s submission addresses none of these issues – indeed, it misleadingly implies that Section 727 was adopted only for “budgetary” reasons.⁵ Thus, despite its repeated assertions of “arbitrary discrimination,” China’s first submission fails to explain why any alleged discrimination resulting from Section 727 was arbitrary or unjustifiable. Instead, China’s submission runs away from the food safety issues that lie at the core of this dispute.

6. Second, China’s First Written Submission repeatedly mischaracterizes the U.S. measure as “denying access” to the U.S. procedures for authorizing the import of poultry products.⁶ As explained in detail below, Section 727 had no such effect. Instead, it allowed – and indeed contemplated – ongoing work on the evaluation of food safety issues involving Chinese poultry products, and only restricted the establishment or implementation of rules authorizing importation. And even in the absence of the restriction imposed by Section 727, China has no basis for asserting that China necessarily would have succeeded in obtaining such authorizations. In any event, the restriction on the establishment or implementation of rules authorizing importation has now been removed, and the ongoing work continues. Thus, China’s submission vastly overstates the effect of Section 727 on the ongoing evaluation of the equivalency of China’s food safety regime governing poultry products.

7. Finally, the last section of this submission returns to the outstanding U.S. request for a preliminary ruling that any claims by China under the SPS Agreement are not within the Panel’s terms of reference. As explained below, China’s response fails to rebut the fundamental point that China did not request consultations on any claims under the SPS Agreement. The United States has offered to cooperate on a procedural way forward in the event China would wish to consult on any SPS Agreement claims. However, China – perhaps for the same reason that its first submission fails even to acknowledge any relationship between Section 727 and food safety objectives – has denied the U.S. offer. This is China’s choice. But China cannot have it both ways – it cannot refuse to consult on SPS issues, while at the same time request that the Panel issue findings under the SPS Agreement.

⁴ China First Written Submission (“FWS”), para. 1.

⁵ China FWS, para. 116.

⁶ *See, e.g.*, China FWS, para. 1.

II. FACTUAL BACKGROUND

8. In Part II of this submission, the United States provides important factual background against which China’s claims regarding Section 727 should be considered.

9. First, in section A, we describe the respective roles of the U.S. legislative and executive branches in the U.S. system of governance. Congress plays an important oversight role over the actions of the executive branch agencies, and often uses its “power of the purse” to influence rulemakings and other agency actions. A better understanding of this system of checks and balances and the relationship between Congress and the Department of Agriculture (“USDA”) is very helpful in fully understanding both Section 727’s limited legal impact under U.S. domestic law and the routine nature of Congress’ decision to enact it.

10. Next, in section B, we describe the Poultry Products Inspection Act (PPIA) and other regulations relevant to the importation of poultry. This description is intended to provide the relevant context for section C, which discusses China’s application for equivalency under the PPIA and includes a discussion of some of the troubling issues surrounding China’s food safety system that FSIS confronted during the equivalency process and other concerns that were highlighted in the public comments on the rulemaking.

11. Section D further expounds upon China’s food safety problems, discussing both the systemic issues and the recent food safety scandals that were fresh in Congress’ mind when it enacted Section 727.

12. Finally, Section E provides the legislative history surrounding the enactment of Section 727 and other appropriations measures related to USDA’s establishment or implementation of rules that would allow China to import poultry products to the United States.

A. The Roles of the U.S. Legislative and Executive Branch Authorities in Regulating Imports of Poultry Products

13. The United States Constitution separates the legislative, executive, and judicial powers of government into three independent, coequal branches. Legislative powers are vested in the U.S. Congress,⁷ while executive powers are vested in the President.⁸

14. Among the powers of the Congress are to “provide for the common defense and general welfare of the United States” and to “regulate commerce with foreign nations, and among the

⁷ U.S. Constitution, Article I, s. 1.

⁸ U.S. Constitution, Article II, s. 1.

several states.”⁹ In addition, the U.S. Constitution provides that “[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law.”¹⁰ In turn, the President is required to “take care that the laws be faithfully executed,” a power that he exercises both directly and through the executive branch agencies.¹¹

15. Consistently with this constitutional scheme, Congress has enacted legislation creating executive agencies responsible, *inter alia*, for drafting and implementing sanitary regulations with respect to poultry products, whether produced domestically or imported. The executive agencies relevant to the present dispute include the Food Safety and Inspection Service (FSIS), the Animal and Plant Health Inspection Service (APHIS), and Customs and Border Protection (CBP). Both FSIS and APHIS are agencies within USDA, while CBP is located in the Department of Homeland Security (DHS). In the course of administering the laws, executive agencies may take actions (generally called “regulations” or “rules”) with general application that have the force of law.

16. These agencies are, through the Secretary of the relevant Department, responsible to the President in the context of his constitutional obligation to execute the laws enacted by Congress. There remain, however, several mechanisms through which Congress retains significant authority over regulations or rules issued by executive agencies. These oversight mechanisms include:

specifically delineating in the underlying statutes how regulations are to be written, statutory requirements delineating the analytical and procedural steps that must be followed in the development of proposed and final rules, oversight hearings on particular rules or rulemaking requirements, confirmation hearings for the heads of regulatory agencies, restrictions on rulemaking in authorizing legislation, and provisions included in the text of agencies’ appropriations bills.¹²

In addition, the Congressional Review Act provides that Congress may, through a resolution of disapproval, use its oversight power to prevent a rule from taking effect after it has been promulgated by the relevant agency.¹³

17. Because, as a constitutional matter, no money can be spent by an agency from the U.S. Treasury without an appropriation by Congress, Congress often uses the provision of funds – and

⁹ U.S. Constitution, Article I, s. 8.

¹⁰ U.S. Constitution, Article I, s. 9.

¹¹ U.S. Constitution, Article II, s. 3.

¹² Congressional Research Service, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, at 1-2 (Aug. 5, 2008) (Exhibit US-2).

¹³ 5 U.S.C. §§ 801-808 (Exhibit US-3).

any conditions placed on the use of funds – as a means of exercising authority or oversight over executive agencies. As an authoritative handbook on appropriations law explains:

It is also well established that Congress can, within constitutional limits, determine the terms and conditions under which an appropriation may be used. Thus, Congress can decree, either in the appropriation itself or by separate statutory provisions, what will be required to make the appropriation “legally available” for any expenditure. It can, for example, describe the purposes for which the funds may be used, the length of time the funds may remain available for these uses, and the maximum amount an agency may spend on particular elements of a program. In this manner, Congress may, and often does, use its appropriation power to accomplish policy objectives and to establish priorities among federal programs.¹⁴

18. Importantly, where Congress imposes restrictions on an executive agency’s actions through a funding restriction, the funding restriction does not – as a matter of U.S. law – repeal or amend the agency’s organic statute. As a result, a funding restriction’s impact is limited to the language of the measure itself and it does not prohibit an agency from carrying out any other actions under that statute that are not themselves contrary to the language of the measure. Further, funding restrictions only apply for the period of time for which the underlying appropriations bill is in effect, and as soon as the legislation expires at the end of the U.S. fiscal year, an agency is immediately free to take the action that was previously prohibited. Several recent U.S. court decisions shed light on this principle.

19. For example, in *Atlantic Fish Spotters Association v. Evans*,¹⁵ a U.S. Court of Appeals examined a funding restriction that prevented the Secretary of Commerce from using appropriated funds to issue licenses authorizing the harvest of such tuna with aerial spotting equipment. The court in that case stressed the longstanding interpretative principle that “appropriations bills have no more effect on existing law than that which is manifest in the language of any particular provision”¹⁶ and explained that “[a] provision in an annual appropriations bill presumptively applies only during the fiscal year to which the bill pertains,” unless Congress explicitly states otherwise.¹⁷ According to the court, this principle is “deeply rooted” in U.S. jurisprudence.¹⁸ Indeed, the court relies on prior rulings of the U.S. Supreme

¹⁴ U.S. General Accounting Office, *Principles of Federal Appropriations Law*, vol. I, at I-5 (3d ed. 2004) (citations omitted) (Exhibit US-4).

¹⁵ 321 F.3d 220 (1st Cir. 2003) (Exhibit US-5).

¹⁶ 321 F.3d at 224 (Exhibit US-5).

¹⁷ 321 F.3d at 224 (Exhibit US-5).

¹⁸ 321 F.3d at 224 (Exhibit US-5).

Court establishing that “in the course of interpreting appropriations bills, courts may compare enactments in one year to corresponding enactments in other years in order to discern congressional intent.”¹⁹ Specifically, “if Congress annually reenacts a provision, common sense suggests – and courts are free to presume – that Congress did not consider the language as creating permanent law.”²⁰

20. In another case, *Environmental Defense Center v. Babbitt*, a U.S. Court of Appeals examined a funding restriction that prevented the Secretary of the Interior from making a determination within the mandatory timetable for responding to certain petitions established under the Endangered Species Act.²¹ The court found that a funding restriction in an appropriations measure prevented the Secretary from making the required final determination:

The Secretary admits that he has completed the necessary scientific studies and field work to make a final determination. The only action that apparently remains to be taken is in-house review and decisionmaking. However, even though completion of the process may require only a slight expenditure of funds, we agree with the Secretary that taking final action on the California red-legged frog listing proposal would necessarily require the use of appropriated funds. The use of any government resources – whether salaries, employees, paper, or buildings – to accomplish a final listing would entail government expenditure. The government cannot make expenditures, and therefore cannot act, other than by appropriation.²²

At the same time, the court found that the appropriations legislation, by its terms, “only temporarily removes the funds available for carrying out the duty” and did not indefinitely prohibit the Secretary from making the final determination required under the Endangered Species Act.²³ Accordingly, the court directed that the Secretary of Interior to make the required determination within “a reasonable time after appropriated funds are made available.”²⁴

21. These cases demonstrate that as a matter of U.S. law, when Congress includes in appropriations legislation a particular restriction or condition on an agency’s use of funds appropriated in that legislation, such restriction or condition is limited to its terms and is

¹⁹ 321 F.3d at 227 (Exhibit US-5).

²⁰ 321 F.3d at 227 (Exhibit US-5).

²¹ 73 F.3d 867 (9th Cir. 1995) (Exhibit US-6).

²² 73 F.3d at 871-72 (Exhibit US-6).

²³ 73 F.3d at 871 (Exhibit US-6).

²⁴ 73 F.3d at 872 (Exhibit US-6).

presumed only to apply to the fiscal year covered by the appropriation. In addition, it is presumed not to amend or modify the permanent law administered by an executive agency, and therefore, it does not prevent the agency from taking actions related to the prohibited act as long as the agency does not take the prohibited act itself. In sum, appropriations restrictions are a mechanism frequently used by the U.S. Congress to set priorities or otherwise affect specific actions of executive agencies on a temporary and limited basis, without effecting a change in permanent law.

22. Turning to the measure at issue here, Section 727's effect in U.S. domestic law was limited to the explicit terms of that law. Section 727 was not a ban on the import of poultry products from China but instead a temporary restriction on USDA's ability to use appropriated funds to implement or establish a rule allowing poultry products to be imported into the United States during the 2009 fiscal year. Section 727 did not modify the underlying statute, was not permanent, and did not prevent USDA from taking any actions related to an equivalency rulemaking that were not explicitly prohibited by the terms of the measure. In fact, as will be explained below, while Section 727 was in effect, USDA took actions related to the rulemaking as directed by the Joint Explanatory Statement ("JES") accompanying the measure.

B. The Poultry Products Inspection Act and Its Implementation

1. Regulation of Domestic Products

23. In 1957, Congress passed the Poultry Products Inspection Act (PPIA) to protect the consuming public from adulterated or misbranded poultry or poultry products and to ensure that poultry and poultry products²⁵ are slaughtered and processed under sanitary conditions. FSIS is responsible for implementing the PPIA. Under the PPIA, as amended, and the regulations

²⁵ "Poultry products" for purposes of the PPIA are considered to be any poultry carcass, or part thereof, or any product which is made wholly or in part from any poultry carcass or part thereof, capable of use as human food. Exempted from this definition are certain food articles that contain only a relatively small proportion of poultry ingredients or historically have not been considered by consumers as products of the poultry food industry. See 21 U.S.C. § 453(f), 9 C.F.R. §§ 381.1(b), 381.15.

promulgated by FSIS to implement the PPIA's requirements,²⁶ domestically produced poultry²⁷ and poultry products may not be sold in the United States unless they are produced under sanitary conditions that comply with federal government requirements and are subject to government inspection.

2. Regulation of Imported Products

24. The PPIA and its implementing regulations require an assessment of other countries' inspection systems before those countries can export poultry and poultry products to the United States. The PPIA allows poultry and poultry products to be imported if they have been processed in facilities under conditions and subject to standards that achieve the same level of sanitary protection as that achieved under U.S. standards.²⁸ FSIS is the executive branch agency that has authority to determine whether another country's system achieves such equivalent protection.²⁹

(a) Initial Equivalence Determination

25. When determining whether another country's poultry inspection system achieves an equivalent level of sanitary protection as the U.S. system,³⁰ FSIS looks to see whether the other country's system can ensure that all establishments that will be exporting to the United States, and their products comply with requirements equivalent to all the requirements that apply to U.S. establishments and products.³¹ The United States must also be able to rely on the other country's

²⁶ See generally Title 9 of the Code of Federal Regulations Part 381 ("Poultry Products Inspection Regulations"), Part 416 ("Sanitation:), Part 417 ("Hazard Analysis And Critical Control Point (HACCP) Systems"), Part 424 ("Preparation and Processing Operations"), Part 430 ("Requirements for Specific Classes of Product"), Part 439 ("Accreditation of Non-Federal Chemistry Laboratories"), Part 441 ("Consumer Protection Standards: Raw Products"), Part 442 ("Quantity of Contents Labeling and Procedures and Requirements for Accurate Weights"), and Part 500 ("Rules of Practice"). The Code of Federal Regulations (CFR) is the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the U.S. Government.

²⁷ Poultry is defined as any domesticated bird (chickens, turkeys, ducks, geese, guineas, ratites, or squabs, also termed young pigeons from one to about thirty days of age), whether live or dead. 21 U.S.C. § 453(e), 9 C.F.R. § 381.1(b).

²⁸ See 21 U.S.C. § 466(d)(1).

²⁹ The PPIA authorizes the Secretary of Agriculture to implement the PPIA. See 21 U.S.C. § 463(a), (b). The Secretary in turn has delegated his responsibilities to implement the PPIA to FSIS. See 7 C.F.R. §§ 2.18, 2.53.

³⁰ See generally 9 C.F.R. § 381.196 ("Eligibility of foreign countries for importation of poultry products into the United States").

³¹ See 9 C.F.R. § 381.196(a)(1).

certifications that each of its exporting establishments is in full compliance with all requisite equivalent requirements.³²

26. To begin the process of an initial equivalence determination, FSIS sends an application questionnaire to the other country and, upon receiving the response, conducts an initial document analysis and on-site audit. FSIS will, upon request, provide advice and guidance to governments concerning any aspect of the application process. In many cases, further information or clarification is needed even after the other country turns in its “completed” application, and FSIS works collaboratively with its counterparts in the other country to facilitate finalizing the application.

27. After the initial document analysis and on-site audit have been completed to FSIS’s satisfaction, the next step for FSIS normally involves evaluating the results of both steps and making an initial determination on equivalency. If FSIS believes that the system is equivalent, it publishes a proposed rule in the Federal Register proposing to add the country to its list of eligible exporters in the Code of Federal Regulations. The proposed rule provides the public an opportunity to submit comments on the rule. Only after receiving and considering all public comments does FSIS make a final decision about system equivalence based upon all available information. If the decision is favorable, FSIS publishes a final rule in the Federal Register announcing the country’s eligibility. It is important to note that FSIS’s equivalency determination is not considered complete until after FSIS has reviewed all of the comments it has received, taken these comments into consideration, and then actually issued the final rule.

28. If FSIS finds the other country’s poultry inspection system equivalent, the other country’s inspection authorities must provide FSIS with a list of establishments that the other country’s inspection system certifies fully meet all requisite equivalent requirements and standards required by the PPIA and its implementing regulations.³³ Only these certified establishments are eligible to export poultry product to the United States. The other country’s inspection authorities must renew certifications of establishments and provide a list of certified establishments to FSIS annually.

(b) Maintenance of Equivalence

29. Once another country’s poultry inspection system has been deemed to be equivalent, such system must maintain a program to assure that all equivalent requirements continue to be met.³⁴ To allow FSIS to make this determination, the other country must make its poultry inspection system available for periodic on-site audits by FSIS auditors and timely submit such documents

³² See 9 C.F.R. § 381.196(a)(1).

³³ See 9 C.F.R. § 381.196(a)(3).

³⁴ See 9 C.F.R. § 381.196(a)(2)(iv).

and other information related to the conduct of its inspection system as FSIS may request.³⁵ In addition, FSIS generally uses a recurring document analysis and continuous port-of-entry reinspection of imports to verify that the other country's system continues to be equivalent.

30. The equivalency of another country's system may be withdrawn (or suspended) whenever FSIS determines that: (1) the system does not assure compliance with requisite equivalent requirements and/or standards; (2) reliance cannot be placed upon certificates issued by the authorities of the foreign country; or (3) the country should be required to reestablish its equivalency due to lack of current information concerning its poultry inspection system.³⁶ With respect to the latter situation, however, FSIS's current practice is not to withdraw or suspend equivalence determinations of countries that have not recently exported to the United States, even though FSIS lacks current information concerning the country's poultry inspection system. Rather, if a country for whom the United States does not have recent information were to certify to FSIS a list of establishments eligible to export to the United States, FSIS would first conduct an equivalency determination review to confirm that these countries' systems continue to meet all U.S. equivalence requirements and that the countries' competent authorities are capable of operating and maintaining an equivalent inspection system before allowing imports from those establishments.

(c) Other Relevant Regulations Applicable to Imported Poultry Products

31. Poultry and poultry products from countries for which equivalence has been recognized and whose maintenance is up to date, can only be imported if they also comply with all other relevant U.S. requirements, including, among others, the regulations promulgated by APHIS.³⁷ APHIS is the USDA agency primarily responsible for preventing the introduction of animal diseases into the United States and their dissemination. APHIS animal health regulations are separate and independent from FSIS regulations. Thus, even if a country is listed in FSIS regulations as equivalent and is eligible to export poultry or poultry products, those exports must also comply with and are subject to restrictions set forth by APHIS.³⁸

³⁵ See 9 C.F.R. § 381.196(a)(2)(iii). FSIS policy is to conduct on-site audits on an annual basis for each equivalent country. Where circumstances warrant, however, FSIS may conduct audits more or less frequently.

³⁶ See 9 C.F.R. § 381.196(a)(4).

³⁷ Other U.S. requirements would include, for example, applicable customs rules and procedures, marking requirements, and similar requirements of U.S. Customs and Border Protection, as well as applicable requirements of the U.S. Food and Drug Administration.

³⁸ See 9 C.F.R. § 94.6(e). Poultry is defined in this APHIS regulation as "chickens, turkeys, swans, partridges, guinea fowl, pea fowl; nonmigratory ducks, geese, pigeons, and doves; commercial, domestic, or pen-raised grouse, pheasants, and quail." Birds are defined as "[a]ll members of the class Aves (other than poultry or game birds)." 9 C.F.R. § 94.0.

32. In particular, for issues involved in this dispute, APHIS prohibits the importation of unprocessed carcasses, and parts or products of unprocessed carcasses, of poultry from China since it has been classified as a region where the highly pathogenic avian influenza (HPAI) subtype H5N1 exists.³⁹ Products or byproducts of poultry may be imported from China only if APHIS has determined that the importation can be made under conditions that will prevent the introduction of HPAI subtype H5N1 into the United States and APHIS has issued the requisite permit to the importer.⁴⁰ Thus, as long as the disease conditions continue, in a situation where FSIS found China's poultry inspection system to be equivalent for every type of poultry and poultry products, China would only be able to export certain processed poultry or poultry products to the United States, such as poultry cooked to the required temperature or otherwise processed in a manner sufficient to destroy the H5N1 virus, due to APHIS animal health restrictions.

C. China's Application for Equivalence Under the PPIA

33. Any country (or separate customs territory) can apply to FSIS for an equivalence determination. Normally, the application process begins with a letter from the government of the country requesting approval to export its products to the United States. In China's case, however, the request was initially conveyed orally. During an April 20, 2004 meeting between the U.S. Secretary of Agriculture and China's Minister of Agriculture, China requested an initial equivalence determination to export poultry and poultry products to the United States.⁴¹

1. Initial Equivalence Determination for China's Poultry Inspection System as a Whole

34. With respect to China's initial equivalence application, FSIS devoted substantial time and resources to assist China. For example, to help China better understand and prepare its application, a team of FSIS technical experts traveled to Beijing from May 10 to May 28, 2004, to provide an on-site question and answer forum for Chinese officials to respond to any questions that China had regarding the questionnaires and how to complete them. In addition, while in China, FSIS experts also performed a brief assessment of the Chinese poultry inspection system

³⁹ See 9 C.F.R. § 94.6(d).

⁴⁰ See 9 C.F.R. § 95.30.

⁴¹ Prior to China's formal request, on December 5, 2003, USDA provided China with FSIS's standard initial equivalence application package, which contained a series of questionnaires designed to collect detailed information about the foreign poultry inspection system and copies of pertinent U.S. laws, FSIS regulations and other documents that set forth U.S. poultry food regulatory policy.

in practice to provide FSIS and China with a preliminary indication of where China's system was at that point in achieving equivalency with the U.S. system.⁴²

35. FSIS officials subsequently conducted an on-site audit of the Chinese poultry inspection system from December 1 to December 17, 2004. The scope of the audit included central, regional and local oversight offices, three slaughter plants, four processing plants, four microbiological laboratories, and four residue laboratories. FSIS found deficiencies in two of the four processing plants and serious sanitation issues in all three slaughter plants. On May 17, 2005, FSIS issued its final report on the December 2004 audit.⁴³ Among the notable conclusions that can be drawn from FSIS's final report are the following:

- AQSIQ did not exercise control over all of the food processing establishments under its jurisdiction;
- AQSIQ veterinarians did not consistently enforce food safety standards equivalent to those in the United States;
- Residue testing methodologies differed from those used in the United States, and in one laboratory, the sampling procedures could lead to cross-contamination; and
- Testing for salmonella was not being consistently performed.⁴⁴

36. Following the on-site audit and the completion of the initial document analysis, FSIS notified China that it would make the preliminary determination that China's processing system was equivalent upon receipt of additional documentation related to two of the deficiencies related to the audit: (1) daily inspection in the processing facilities would be conducted only by AQSIQ personnel; and (2) the methods of analysis for microbiological pathogens would be conducted as prescribed. These issues were subsequently resolved to FSIS's satisfaction, allowing FSIS to move to the next step in the process. At the same time, FSIS informed China that it also had more significant ongoing concerns related to its slaughtering system. To try to resolve these issues, FSIS informed China that an additional on-site audit of its poultry slaughter inspection system would be necessary.⁴⁵

⁴² In the assessment, FSIS experts reviewed one slaughter plant, one processing plant, two microbiological laboratories, and two residue laboratories.

⁴³ See Final Report of an Initial Equivalence Audit Carried Out in China Covering China's Poultry Inspection System, December 1-17, 2004 (Exhibit CN-13).

⁴⁴ See Final Report of an Initial Equivalence Audit Carried Out in China Covering China's Poultry Inspection System, December 1-17, 2004 (Exhibit CN-13).

⁴⁵ See Letter from FSIS to China (June 13, 2005) (Exhibit US-7).

37. The additional on-site audit of China's poultry slaughter inspection system was conducted from July 27 to August 12, 2005. According to the audit, all four slaughter establishments visited did not meet U.S. standards. For all four, the audit noted "If this establishment was certified to export to the U.S., this establishment would be immediately delisted."⁴⁶

38. Subsequently, in a September 2005 teleconference, FSIS informed Chinese officials that it made a preliminary determination that China's processing inspection system was equivalent, but that it had not found China's slaughter inspection system equivalent. In the call, FSIS and China discussed how to proceed with China's equivalence request, and the two sides agreed that the most expeditious path forward would be to issue two separate equivalence determinations: one for the processing of poultry and one for the slaughter of poultry. Accordingly, China's equivalence application then proceeded on two tracks.

2. Rulemaking for China's Poultry Processing Inspection System

39. On the basis of the May 2005 final audit report and the initial document analysis, FSIS made a preliminary determination that China's poultry processing inspection system was equivalent. As a result, on November 23, 2005, FSIS published a proposed rule in the Federal Register proposing to add China to the list of countries eligible to export processed poultry and poultry products to the United States.

40. The comment period for the proposed rule ended on January 23, 2006. During this period, FSIS received 33 substantive comments from U.S. and Chinese individuals, the U.S. poultry and Chinese food industries, and trade organizations.⁴⁷ Unlike other recent equivalency rulemakings where support was widespread,⁴⁸ a majority of the comments on the rule opposed adding China to the list of countries eligible to export processed poultry and poultry products to the United States. The comments opposed to the rule expressed numerous concerns, including the potential commingling of poultry slaughtered in China with poultry slaughtered in countries with poultry slaughter inspection systems that FSIS has determined to be equivalent with the United States, which could lead to unsafe poultry entering the United States, as well as the potential for smuggling and the potential spread of avian influenza.

41. A letter from the South Dakota Department of Agriculture is illustrative of the typical concerns that were raised:

⁴⁶ Final Report of an Initial Equivalence Audit Carried Out in China Covering China's Poultry Slaughter Inspection System, July 27 Through August 12, 2005 (Exhibit CN-16).

⁴⁷ All of the public comments received with respect to the proposed rule are available online at <http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=94306916390+0+2+0&WAISaction=retrieve>.

⁴⁸ For instance, the most recent equivalency rulemaking, which was done for Chile in 2007, only engendered one comment in opposition compared with 12 comments in support.

FSIS assumes the poultry shipments from China will actually contain no poultry produced in China or other Asian countries where the bird flu is present. If we are to predict the future based upon facts from the past, the opposite assumption would be supported. Facts from the past would support the conclusion that Hong Kong traders will mislabel products, which will then go to unregulated food processors of China, who have smuggled prohibited poultry into the United States. Your assumptions clearly are that poultry will not pass through Hong Kong (as it traditionally has) and will not be mislabeled (as it has been) and will not be smuggled from country to country (as it has been) and that everyone (including 900,000 food processors in China) will suddenly begin to follow all the rules. Such a proposition is pure speculation bordering upon absurdity. The facts as they really exist support the opposite conclusion: American consumers won't have the faintest idea where those birds came from and will possibly include banned Asian birds.

...

Poultry from China has been smuggled illegally into the United States in large quantities. Most of the poultry trade with China goes through Hong Kong, where some shipments have false USDA labels. China cannot adequately regulate and monitor its food processing industry or the traders in Hong Kong. China is estimated to have nine hundred thousand food processors and only about five percent of those are regulated and monitored by the government.⁴⁹

42. In addition, FSIS received five letters from members of Congress who were opposed to the rule⁵⁰ and five additional letters from members of Congress forwarding letters from their constituents expressing concerns about the proposed rule.⁵¹ The concerns expressed in the congressional letters were similar to the concerns expressed by the other interested parties. A letter from Senator Tom Harkin, the Ranking Member of the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, is illustrative of the common concerns expressed in the letters from members of Congress:

⁴⁹ Letter from the South Dakota Department of Agriculture (Jan. 9, 2006) (Exhibit US-8).

⁵⁰ See Letter from Senator Tom Harkin (Jan. 26, 2006) (Exhibit US-9); Letter from Representative Thomas M. Reynolds (Feb. 2, 2006) (Exhibit US-10); Letter from Representative John R. Kuhl, Jr. (Feb. 16, 2006) (Exhibit US-11); Letter from Representative Ginny Brown-Waite (Feb. 16, 2006) (Exhibit US-12); Letter from Representative Mark E. Souder (Mar. 2, 2006) (Exhibit US-13).

⁵¹ See Letter from Senator Richard G. Lugar (Jan. 25, 2006) (Exhibit US-14); Letter from Congressman Dennis Moore (Feb. 1, 2006) (Exhibit US-15); Letter from Senator Herb Kohl (Feb. 2, 2006) (Exhibit US-16); Letter from Congressman Peter J. Visclosky (Feb. 2, 2006) (Exhibit US-17); Letter from Senator Bill Nelson (Feb. 24, 2006) (Exhibit US-18). Senator Bill Nelson's letter included negative comments from two constituents.

The proposed rule is designed to facilitate China serving as a conduit for poultry from the United States, or other countries without avian influenza, to be processed and then shipped to the United States. It is quite unclear how FSIS will ensure that poultry products processed in China for export to the United States will contain no poultry that was raised or slaughtered in China. It is my understanding that China's poultry plants often process both domestic poultry and poultry from other countries. The proposed rule contains no prohibition against a Chinese plant handling and processing both poultry products eligible for export to the United States and poultry raised or slaughtered in China. In an establishment processing both domestic Chinese poultry and poultry from other countries, how will it be possible for FSIS to make certain that the plant segregates poultry according to country of origin so that no errors are made in exports to the United States? FSIS should not finalize the proposed rule, nor should it approve any Chinese poultry processing establishment or exporter of poultry products, unless it is certain there can be no mixing of domestic Chinese poultry with products exported to the United States.⁵²

43. Similarly, a letter from Representative Mark Souder, also highlights similar concerns about commingling, smuggling, and the potential spread of avian influenza:

[D]espite the safety measures contained in the proposed rule, I am skeptical that USDA would realistically be able to ensure the safety of Chinese poultry imports. Under the rule, the certified Chinese poultry processors would be required to acquire the raw poultry products from other countries-prohibiting them from using poultry raised in their own country. However, there is no doubt that Chinese producers would be tempted by the low prices and easy accessibility of domestically produced poultry. There are numerous reports of illegal smuggling of poultry products from areas affected by avian flu. There have also been reports of infected poultry products being shipped to other countries. Chinese producers would have obvious incentives to break the rules, imperiling the safety of our own U.S. poultry products in the process.⁵³

44. This level of congressional opposition to an FSIS equivalence determination is unprecedented, since no FSIS equivalency determination since the Uruguay Round besides this one generated any congressional opposition at all. In fact, the only congressional comment submitted regarding a poultry equivalency determination outside of the rule for China expressed support for the equivalency determination in question.⁵⁴

⁵² Letter from Senator Tom Harkin (Jan. 26, 2006) (Exhibit US-9).

⁵³ Letter from Representative Mark E. Souder (Mar. 2, 2006) (Exhibit US-13).

⁵⁴ Senator Norm Coleman expressed support for FSIS's proposed rule to add Chile to the list of countries eligible to export poultry products to the United States. Letter from Senator Norm Coleman of Minnesota to USDA (Apr. 25, 2007) (Exhibit US-19).

45. After reviewing the comments received from all interested parties, FSIS concluded that China's processing inspection system was equivalent, and on April 24, 2006, FSIS published a final rule adding China to the list of countries eligible to export processed poultry and poultry products to the United States. The final rule made clear that only poultry slaughtered in U.S. facilities or in certified slaughter establishments in other countries could be processed in China for export to the United States because China's slaughter inspection system had not been determined to be equivalent.

46. In a May 9, 2006 letter, FSIS reminded China of two steps that had to be completed before China could export processed poultry to the United States: (1) the provision to FSIS of a list of establishments certified by the Chinese inspection service as eligible to export product to the United States; and (2) the submission of product labels by certified establishments in China for review by the Labeling and Consumer Protection staff of FSIS.⁵⁵

47. China took no steps to begin exporting processed poultry to the United States until almost two years later, on March 12, 2008, when China submitted to FSIS a list of certified establishments for processed poultry. Given the length of time since the prior on-site audits, FSIS would have needed to conduct an equivalence review before completing the second step and allowing these establishments to begin exporting to the United States.

3. Equivalence Determination for China's Poultry Slaughter Inspection System

48. At the same time as the equivalence determination for processed poultry was being considered, FSIS continued working with China on the equivalence of its poultry slaughter inspection system. After receiving additional information from China regarding its residue analysis methods, FSIS made a preliminary determination that China's poultry slaughter inspection system was equivalent to the U.S. system.⁵⁶ To date, however, FSIS has not published a proposed rule for slaughter equivalence and has not made a final determination with regard to the equivalence of China's poultry slaughter inspection system.

D. Additional Concerns over China's Food Safety System

⁵⁵ See Letter from FSIS to China (May 9, 2006) (Exhibit US-20).

⁵⁶ Contrary to para. 52 in China's First Written Submission, FSIS had not "concluded" that China's system for slaughtering poultry was equivalent to that of the United States. Rather, FSIS had made a preliminary determination on the matter that was subject to modification pending the outcome of the rulemaking process. FSIS does not reach a final determination or "conclusion" of any kind until after it has received public comments and taken them into consideration.

49. Problems with China’s food safety system extend far beyond the problems discussed in the preceding section. China’s problems are of a broad, systemic nature, and prominently include problems with smuggling, corruption, and the inadequate enforcement of its food safety laws. As the enactment of Section 727 was based in large part on Congress’ strong concerns about China’s food safety system, including recent food safety scandals, such as the melamine crisis that occurred after FSIS made its final equivalency determination for processed poultry, China’s broad systemic food safety issues will be discussed in greater detail here before moving on to a discussion of the legislative history surrounding the enactment of Section 727.

50. China’s food safety problems have been written about at length in reports from international organizations and governmental bodies, and they have also been the subject of academic study. For example, an Asian Development Bank Policy Note released in 2007 states: “[A]t present, unsafe food in the PRC remains a serious threat to public health. Considerable problems remain in the food safety regulatory system, and there is a pressing need for further reform.”⁵⁷

51. Similarly, in 2008, the United Nations released a study citing numerous deficiencies in China’s food safety system, including inadequate enforcement:

Enforcement in China of food control places an excessive reliance on end-product testing with very little use of auditing as an inspection tool. This is wasteful of resources and both inefficient and ineffective in protecting public health and the interests of consumers. This is a significant challenge and will require an enormous effort by the Government to change the thinking and attitudes into those needed to bring about appropriate behavioural change.⁵⁸

At the time of the release of the UN study, the World Health Organization’s food safety chief also characterized China’s food safety system as “disjointed,” noting that this feature of the system helped prolong the melamine crisis in 2008.⁵⁹

52. Likewise, a 2009 USDA report elaborates on the problems with China’s food safety system and cites some of the specific safety risks posed by imports from China:

Many safety risks associated with foods imported from China are introduced in the manufacturing and handling of food. Poor handling and storage may introduce bacteria,

⁵⁷ Asian Development Bank, “Suggestions on Strengthening Food Safety in the PRC,” ADB Observations and Suggestions policy note , p.1 (Nov. 21, 2006) (revised Jan. 22, 2007) (Exhibit US-21).

⁵⁸ United Nations in China, “Occasional Paper: Advancing Food Safety in China,” p.16 (Mar. 2008) (Exhibit US-22).

⁵⁹ *U.N. Criticizes China on Food Safety*, Wall Street Journal (Oct. 23, 2008) (Exhibit US-23).

viruses, parasites, fungi, and their toxins. Perishable vegetables and meat have traditionally been sold by small vendors the same day they are picked or slaughtered. Produce is typically transported in small open trucks. Refrigerated storage and transport equipment is relatively scarce. When temperature-controlled infrastructure is available, power outages, railroad delays, and differing temperature standards may lead to spoilage. Awareness of foodborne illness risks is relatively low in China, and the incidence of such illnesses reported by official statistics is probably underestimated [citation omitted]. Many food processors use unsafe additives, toxic dyes, or fake ingredients to preserve food, cut production costs, or improve product appearance. The melamine-adulterated milk powder and pet food incidents brought attention to the widespread practice of adding melamine to feed and milk to artificially raise the apparent protein content. A presentation by officials overseeing food safety in the southern province of Guangdong cites a long list of problems found in food manufacturers, including outdated facilities with inadequate building materials, old rusty equipment, poor control of worker health and hygiene, weak monitoring of raw materials, contaminated water, and nonexistent or fraudulent recordkeeping [citation omitted]. Food labels often lack proper descriptions of ingredients and nutritional information or are otherwise inadequate.⁶⁰

53. The USDA report also notes that China accounts for a disproportionate percentage of import refusals⁶¹ resulting from over 50 different types of food safety violations, the most common of which include “general filth, unsafe additives or chemicals, microbial contamination, inadequate labeling, and lack of proper manufacturer registrations.”⁶²

54. Additionally, the USDA report explains some of the problems with China’s current system for verifying the safety of its exports, which failed to detect these numerous shipments of unsafe products to the United States:

In theory, restricting imports to suppliers within the AQSIQ system may improve food safety. However, considerable resources will be required to continually monitor so many companies and production bases and keep the information up to date. A journalists’ investigation of the export registration in Shaanxi Province noted that some exporters’ monitoring of raw material sources had not kept pace with their upgrade of facilities and expanded scale of operations [citation omitted]. Exporter lists on the AQSIQ site were

⁶⁰ Fred Gale and Jean C. Buzby, United States Department of Agriculture, “Imports from China and Food Safety Issues,” Economic Research Service, Economic Information Bulletin No. 52, July 2009, p.3 (“USDA Report”) (Exhibit US-24).

⁶¹ See USDA Report, p.10, pointing out that China’s share of import refusals (8.6 percent) was more than twice its 3.3 percent share of entry lines. Further, the Report notes that in 2007 FDA found excessive drug residues in 25 percent of samples of fish and shrimp, and melamine in 44 percent of wheat gluten samples and 32 percent of rice protein concentrate samples of imports from China (Exhibit US-24).

⁶² USDA Report, p. 14 (Exhibit US-24).

about 2 years old when ERS checked them in March 2009. The AQSIQ site listed over 1,000 export-approved aquaculture “production bases” controlled by nearly 400 companies and nearly 400 poultry production bases controlled by 90 companies. While these are a small percentage of all producers in China, regular inspections and audits of this many companies and farms would require substantial human and financial resources. Other difficulties include changes of name and/or location, varying English translations of Chinese company names, and multiple companies with the same owner. Some lists were translated into English, but much of the material is published only in Chinese.

To investigate potential problems, ERS cross-checked FDA refusal reports with the list of aquatic product exporters. FDA’s import refusal reports for August 2008 listed refusals of shrimp at ports in Florida, Los Angeles, and New York from two Chinese companies in the city of Zhanjiang in Guangdong Province. Neither of these companies was on the list of approved aquatic product exporters, although the list included dozens of companies in the same city. The web site of one of the companies with rejected shrimp (<http://www.zjlw.com.cn>) notes that the founder owns five seafood companies with distinctly different names. A company with products placed on an alert potentially could ship the same products under the name of a related company.”⁶³

55. An academic study published by *Global Health Governance* reaches many of the same conclusions, expounding at length on some of the problems with enforcement of China’s food safety laws as well as corruption:

Food safety enforcement is complicated by weak government capacity, particularly at local levels where many food processors operate. Often, new regulations and dictates from Beijing are unfunded mandates which are ignored by local officials who argue they lack resources to carry out directives. Where some local governments might have the will to enforce regulations and standards, they often lack the means. Local level officials face contradictions in attempting to enforce standards among cottage processors. Rural food processing is encouraged by local authorities as a means to increase rural incomes, a policy strongly endorsed, but poorly supported, by central government authorities. Local officials are reluctant to close businesses that contribute to employment in rural areas, where other economic opportunities are limited. This reluctance to enforce standards or regulations set at the provincial or national level makes it unlikely that food safety can be ensured consistently across the country.

Corruption within the Chinese government poses a further challenge. Local officials often collude with local companies, stymieing attempts by higher level authorities to enforce safety regulations. Corruption in China extends from grass-roots cadres to the highest levels. The State Food and Drug Administration (SFDA) in China has been

⁶³ USDA Report, p. 20-21 (Exhibit US-24).

wracked by a corruption scandal involving its founding director which extends to provincial food and drug administrations.

Unscrupulous food and drug producers were able to buy various licenses from the national agency and its provincial and local branches. The astonishing scope of the administration's inability to effectively monitor industry was revealed when the government reported in 2005 that they had discovered 114,000 unlicensed drug manufacturers and demolished 461 offending factories. Companies that had been issued "Good Manufacturing Practice" (GMP) certificates were later found to be shipping unsafe products."⁶⁴

56. To those who have followed China's food safety woes over the past few years, these troubling reports do not come as a surprise. In fact, numerous high-profile scandals have threatened the health of consumers and have led to bans on products from China. A few of the recent scandals include: the EU's ban on all products of animal origin from China after finding residues of veterinary medicines in imports in 2002;⁶⁵ Japan's ban on imports of spinach from China after finding pesticides in two batches that were 180 times higher than Japanese standards in 2002;⁶⁶ a counterfeit baby formula scandal that killed six infants in China's Anhui Province in 2004;⁶⁷ a ban on seafood from China by South Korea, Japan, and Singapore after a cancer-causing anti-fungal agent was found in farmed fish in 2005;⁶⁸ the intentional contamination of hundreds of different food products with a banned hazardous food additive known as Sudan red dye in 2005;⁶⁹ Hong Kong's ban on contaminated turbot fish from China in 2006;⁷⁰ the sale of pork tainted with clenbuterol, a banned feed additive in 2006 and 2009;⁷¹ and a smuggling scandal involving corruption at the highest levels of China's State Food and Drug Administration (SFDA) in 2007.⁷²

⁶⁴ Drew Thompson and Hu Ying, *Food Safety in China: New Strategies*, Global Health Governance, Vol. I, No. 2, p. 5-6 (Fall 2007) (Exhibit US-25).

⁶⁵ Thompson and Ying, p. 2 (Exhibit US-25).

⁶⁶ Thompson and Ying, p. 2 (Exhibit US-25).

⁶⁷ *Milk powder kills babies in Anhui*, China Daily (Apr. 20, 2004) (Exhibit US-26).

⁶⁸ Thompson and Ying, p.2 (Exhibit US-25).

⁶⁹ *Red Dye 'A Food For Thought'*, China Daily (Mar. 31, 2005) (Exhibit US-27).

⁷⁰ Thompson and Ying, p. 6-8 (Exhibit US-25).

⁷¹ *China tainted pork makes 70 sick*, BBC News (Feb. 23, 2009) (Exhibit US-28).

⁷² *China Executes Ex-Food and Drug Chief*, NPR Online (July 10, 2007) (Exhibit US-29).

57. Other incidents related to China's food safety problems have directly impacted the United States. For example, in late 2005, it was reported that USDA inspectors seized 165,000 pounds of smuggled poultry, much of which came from China, and which potentially put consumers at risk for avian influenza.⁷³ Similarly, in 2006, at least 3,500 more pounds of poultry from China was caught being smuggled into the United States.⁷⁴ Then, in 2007, the longstanding Chinese practice of using melamine to "adulterate feed and gain bigger profits" led to the deaths of numerous U.S. household pets, with unofficial figures indicating the practice responsible for the death of up to 4,000 cats and dogs.⁷⁵ Most recently, in 2008, it was discovered that melamine was also being used in products intended for human consumption, such as baby formula, milk and eggs, among other items.⁷⁶ Consumption of melamine-tainted products led to over 300,000 illnesses and the deaths of at least 14 infants, and as a result of its far-reaching scope, the World Health Organization dubbed it "one of the largest food safety events the agency has had to deal with in recent years."⁷⁷

58. China's central government even recently acknowledged the extent of its problems with food safety. For example, China's Ministry of Health stated in a March 2009 news release that "China's food security situation remains grim, with high risks and contradictions."⁷⁸ Just the week before the Ministry's release, an unnamed Chinese lawmaker was quoted as saying "The tainted dairy scandal exposed the loopholes of the food safety monitoring network, the failure of the pre-warning, reporting, inspection systems."⁷⁹ As an acknowledgment of the vast problems

⁷³ *Inspectors, alert to flu threat, find smuggled poultry*, St. Louis Dispatch (reprinted in the Arizona Daily Star) (Nov. 20, 2005) (Exhibit US-30).

⁷⁴ *Bird Flu Virus May Be Spread By Smuggling*, New York Times (Apr. 15, 2006) (Exhibit US-31); *Discovery of Smuggled Poultry Prompts Search of Restaurants and Grocery Stores*, ABC News (July 17, 2006) (Exhibit US-32). Also see Testimony of Asst. Comr. Daniel Baldwin, Office of International Trade, U.S. Customs and Border Control, U.S. Department of Homeland Security at the hearing *Federal Efforts to Mitigate Vulnerabilities in the Food Supply Chain*, Before the Subcommittee on Emerging Threats, Cybersecurity, and Science and Technology of the U.S. House of Representatives, Committee on Homeland Security, at 4 (July 24, 2007) (Exhibit US-33). At the hearing, Asst. Comr. Dan Baldwin stated the following: "In 2006, CBP was involved in the detection of numerous incidents of food contamination or smuggling of prohibited food products from China. A significant number of shipments of Chinese poultry products was seized including 45 containers smuggling prohibited product."

⁷⁵ *Second chemical eyed in Chinese pet food scandal*, New York Times (May 8, 2007) (Exhibit US-34).

⁷⁶ *See China's Melamine Crisis Creates Crisis of Confidence*, Voice Of America (Sep. 26, 2008) (Exhibit US-35); *Tainted Eggs from China Discovered in Hong Kong*, New York Times (Oct. 27, 2008) (Exhibit US-36).

⁷⁷ *China's Melamine Crisis Creates Crisis of Confidence* (Exhibit US-35).

⁷⁸ *New Law Fights 'Grim' Situation in Food Safety*, Xinhua/Shanghai Daily (Mar. 3, 2009) (Exhibit US-37); *Months After Melamine, China Food Security 'Grim'*, Reuters Online (Mar. 2, 2009) (Exhibit US-38).

⁷⁹ *China to set up central food safety commission*, Xinhua/China Daily (Feb. 25, 2009) (Exhibit US-39).

with its food safety system, China was forced to pass a comprehensive overall of the system earlier this year.⁸⁰

59. China's new food safety law is a significant development. In light of the elimination of the funding restriction on the implementation or establishment of an equivalency rule in the Fiscal Year (FY) 2010 appropriations bill, FSIS anticipates reviewing the law as part of the standard equivalence determination review that FSIS would need to conduct of China's poultry products inspection system to confirm that the system has maintained equivalence since FSIS's last on-site audit in 2004. FSIS also anticipates reviewing the law in the context of an initial equivalence determination for China's poultry slaughter inspection system. Such a review, however, is dependent on China's cooperation. FSIS cannot consider the new food safety law until China specifically submits it to FSIS officially for review.

E. Appropriations Legislation

60. Beginning in 2006, the Agriculture Subcommittee of the Committee on Appropriations in the U.S. House of Representatives began raising questions during its hearings about actions taken with respect to poultry products from China, primarily due to major concerns about the problems with China's food safety system.⁸¹ These hearings ultimately led to the enactment of a funding restriction in the agricultural appropriations legislation for FY 2008, which took effect on December 26, 2007.⁸²

61. The Committee on Appropriations, which originated the funding restriction provision, explained its purpose in these terms:

The Committee has included a general provision barring the use of funds in the bill to establish or implement any rule allowing poultry products from China into the U.S. This would apply both to the rule currently in effect that would allow poultry from the U.S. to be processed in China and shipped back and to a rule that the Department is drafting that would allow China to export processed poultry products made from animals raised in China.

⁸⁰ China's National People's Congress (NPC) Standing Committee passed a new Food Safety Law on February 28, 2009. The new law went into effect on June 1, 2009. Food Safety Law of the People's Republic of China 2009, English translation by USDA Foreign Agriculture Service (Mar. 11, 2009) (Exhibit US-40).

⁸¹ See *Hearing on the Fiscal Year 2007 Appropriations for the Agriculture Department*, Before the Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies of the House Committee on Appropriations, at 30-31 (Feb. 15, 2006) (Exhibit US-41).

⁸² Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act 2008, § 733, Public Law 110-161, div. A (Dec. 26, 2007) (Exhibit CN-8).

Given the recent situation involving pet foods contaminated with melamine from China and the repeated, serious food contamination incidents within China, it is clear that we cannot rely on the Chinese government to ensure its plants adhere to U.S. standards in processing. Weak government controls in China, coupled with the high incidence of H5N1 in that country, provide no assurance that the returned product is actually from U.S. poultry or that poultry carrying the H5N1 virus is not used instead of U.S.-produced poultry. While FSIS has said that the products would be safe because processing would kill any H5N1 viruses, U.S. inspectors will not be standing over the shoulders of Chinese workers; in fact, U.S. inspectors would visit the Chinese plants at most once a year.⁸³

62. Although the FY 2008 appropriations legislation expired at the end of the U.S. fiscal year on September 30, 2008, new appropriations legislation for FY 2009 covering a number of agencies, including USDA, was not completed until March 11, 2009. A series of “continuing resolutions” provided funding on a temporary basis, generally under the same conditions as in FY 2008, until the enactment of the final FY 2009 legislation.

63. On March 11, 2009, the measure at issue in this dispute, Section 727 took effect upon the enactment of the final FY 2009 appropriations legislation.⁸⁴ The measure was only in effect for six and a half months until the end of the 2009 U.S. fiscal year on September 30, 2009.

64. The JES accompanying the final appropriations legislation for FY 2009 explained the rationale of the House and Senate Committees on Appropriations in enacting the funding restriction. It also called on USDA and FSIS to engage in a further analysis of China’s food safety system, including recent legislative changes to that system,⁸⁵ and instructed them to develop a plan of action with respect to the safety of potential imports of poultry products from China and make reports to Congress in this regard. The JES stated:

There remain very serious concerns about contaminated foods from China and therefore the bill retains language prohibiting FSIS from using funds to move forward with rules that would allow for the importation of poultry products from China into the U.S. It is noted that China has enacted revisions to its food safety law. USDA is urged to submit a report to the Committees on the implications of those changes on the safety of imported poultry products from China within one year. The Department is also directed to submit a plan of action to the

⁸³ House Report 110-258, at 54 (July 24, 2007) (Exhibit US-42).

⁸⁴ Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act 2009, § 727, Public Law 111-8, div. A (Mar. 11, 2009) (Exhibit CN-1).

⁸⁵ See Food Safety Law of the People’s Republic of China 2009, English translation by USDA Foreign Agriculture Service (Mar. 11, 2009) (Exhibit US-40).

Committees to guarantee the safety of poultry products from China. Such plan should include the systematic audit of inspection systems, and audits of all poultry and slaughter facilities that China would certify to export to the U.S. The plan also should include the systematic audit of laboratories and other control operations, expanded port-of-entry inspection, and creation of an information sharing program with other major countries importing poultry products that have conducted audits and plant inspections[,] among other actions. This plan should be made public on the Food Safety and Inspection Service web site upon its completion.⁸⁶

65. Although China sometimes suggests otherwise in its First Written Submission,⁸⁷ Section 727 by its terms only affected existing and potential rules “allowing poultry products to be imported from the People’s Republic of China.”⁸⁸ Under Section 727, USDA was not permitted to use funds appropriated for FY 2009 to “implement,” for example, the 2006 Rule providing for the importation of certain processed poultry products from China or to “establish,” for example, a new rule providing for the importation of certain other poultry products from China. However, as mentioned above, Section 727 did not prevent USDA from using appropriated funds for the purpose of evaluating recent changes to China’s food safety inspection system or from developing a plan of action for ensuring the safety of imported poultry products from China. Indeed, as noted above, the JES of the congressional appropriations committees specifically directed USDA to undertake these actions. Thus, the statutory text must be interpreted so as to allow USDA to use appropriated funds for the actions set forth in the JES.

66. After the FY 2009 legislation was enacted, USDA began to undertake the actions provided for in the JES. USDA prepared a work plan and submitted it to Congress in the spring of 2009.⁸⁹ In addition, FSIS sent a formal request to China’s food safety authorities on May 12, 2009, requesting updated information on China’s food safety legislation in order to facilitate the review process required under the JES.⁹⁰ China did not respond to FSIS’s request.

67. Section 727 was the sole legal instrument that restricted USDA’s use of appropriated funds from the date of its enactment (March 11, 2009) until the end of FY 2009 (September 30,

⁸⁶ JES, at 82 (Exhibit CN-33).

⁸⁷ *E.g.*, China FWS, para. 15 (suggesting that the “rules” applying to poultry products in general, for example those set forth in 9 C.F.R. § 381.196, are “impacted by Section 727”).

⁸⁸ Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act 2009, § 727, Public Law 111-8, div. A (Mar. 11, 2009) (Exhibit CN-1).

⁸⁹ FSIS Action Plan for Creation of Congressionally-Mandated China Poultry Inspection System, as submitted to Congress (2009) (Exhibit US-43).

⁹⁰ Letter from FSIS to China (May 12, 2009) (Exhibit US-44).

2009) – a period of less than seven months. The request for consultations in this dispute was received on April 17, 2009, and this Panel was established on July 31, 2009. Any subsequent measures affecting USDA’s future appropriations were not yet in existence at those times, and they are not within the Panel’s terms of reference. Nonetheless, it is important to review subsequent events that have transpired to understand fully the temporary nature of Section 727.

68. Because final appropriations legislation for several agencies, including USDA, was not completed by the end of FY 2009 in September 2009, a continuing resolution provided for a temporary extension of USDA funding beginning October 1, 2009, based on the same conditions (including Section 727) as in the prior legislation.⁹¹ The final agriculture appropriations law for FY 2010, enacted on October 21, 2009, permits the use of appropriated funds with respect to imports of poultry products from China, provided that the Secretary of Agriculture makes certain commitments to Congress.⁹² A letter from the Secretary of Agriculture setting forth these commitments was sent to Congress on November 12, 2009.⁹³ As of the date of this submission, there are no longer any funding restrictions preventing FSIS from establishing or implementing rules with respect to the importation of poultry products from China.

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

69. The argumentation in China’s First Written Submission is addressed to alleged inconsistencies between Section 727 and various provisions of the WTO Agreement. However, China also asserts that two other measures – an alleged “indefinite moratorium” and the subsequently enacted Section 743 of the 2010 appropriations bill – also are, or also may be, inconsistent with the WTO Agreement. These assertions do not and cannot expand the scope of this proceeding. The alleged “indefinite moratorium” does not exist, and the subsequent appropriations provision is not in the Panel’s terms of reference. Thus, Section 727 is the only measure at issue in this dispute.

A. A Second Measure Alleged by China – Consisting of an Alleged Indefinite Moratorium on the Import of Chinese Poultry – Does Not Exist

70. China alleges the existence of a second measure – distinct from Section 727 – which it calls “the Moratorium.” In particular, China alleges the existence of a measure that “*indefinitely* suspends: (a) the consideration of applications for approval, (b) the granting of approval, and (c)

⁹¹ Continuing Appropriations Resolution, Public Law 111-68, div. B (Oct. 1, 2009) (Exhibit CN-2).

⁹² Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act 2010, § 743, Public Law 111-80 (Oct. 21, 2009) (Exhibit CN-3).

⁹³ Letter from USDA to Congress (Nov. 12, 2009) (Exhibit US-45), formally notifying Congress that the steps outlined in Section 743(a) of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010, will be taken by USDA, thereby removing the funding restriction.

the implementation of approval for the import of poultry products from China under the United States system for regulating the importation of poultry products.”⁹⁴ No such measure ever existed.

71. China’s argumentation in support of the existence of this supposed, second measure is remarkably scarce. China never even acknowledges the fundamental point that it has the burden of establishing the existence of such a new, separate measure with a legal effect distinct from that of the actual, express measures from which it supposedly derives. China puts forth only two types of evidence in an effort to support its allegation, and neither shows the existence of an indefinite moratorium.

72. First, China cites to two related pieces of appropriations legislation: Section 733 (affecting fiscal year 2008 appropriations) and Section 743 (affecting fiscal year 2010 appropriations).

73. Section 733 contains the same language as Section 727, and – like 727 – is of limited duration. The fact that a time-limited funding restriction was created twice does not show the existence of an “*indefinite*” suspension of approvals. Indeed, there is no basis for deriving any such separate, distinct measure from the existence of discrete, time-limited measures. And, simply attaching a general label to individual, time-limited measures and capitalizing that general label does not result in a new, independent measure.

74. Moreover, the second and more recent provision cited by China – Section 743 – disproves China’s claim of the existence of an “*indefinite*” suspension of approvals. As noted above, Section 743 lifts any funding restriction upon the Secretary of Agriculture’s issuance of a letter to Congress; that letter was sent on November 12, 2009, and the funding restriction was removed as of that date. Thus, the legislative provisions cited by China fail to show the existence of an indefinite moratorium on approvals.

75. The only other evidence cited by China in support of its allegation of a “Moratorium” is that FSIS has not yet authorized the importation of poultry products from China.⁹⁵ But again, this absence of an authorization is not separate from Section 727, the measure at issue.

76. In sum, it is China’s burden to show the existence of an independent measure imposing an indefinite suspension of approvals, and the evidence submitted by China – to the extent it has any probative value – disproves the existence of an indefinite suspension.

⁹⁴ China FWS, para. 24 (emphasis in original).

⁹⁵ China FWS, para. 28.

77. Finally, the United States notes a fundamental procedural defect in China’s allegation of a second, distinct measure consisting of a “Moratorium”: the alleged measure was not identified in China’s request for consultations.⁹⁶ As the Appellate Body has explained, Articles 4 and 6 of the DSU “set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel.”⁹⁷ Moreover, although these provisions do not “require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel,” the Appellate Body has emphasized that any such measures not precisely identified must not “change the essence of the [measures identified in the request for consultations].”⁹⁸ The so-called “Moratorium” of indefinite duration does not, however, constitute such a measure whose “essence” is the same as the explicitly time-limited restriction in the measure (Section 727) cited in China’s request for consultations.

78. In addition to giving no excuse for adding the so-called “Moratorium” to its panel request without having requested consultations over it, China’s attempt to bring it before this Panel runs afoul of the Appellate Body’s concern that a complaining party must “not expand the scope of the dispute” in its panel request beyond the matter identified in the request for consultations.⁹⁹ The allegation of the existence of an independent measure of indefinite duration would indeed expand the scope of the dispute beyond the measure identified in the request for consultations. Accordingly, the United States respectfully requests the Panel to find that the alleged “Moratorium” is outside the terms of reference of this Panel proceeding.

79. Nonetheless, the United States would re-emphasize that the problems with China’s claim of an alleged “Moratorium” go far beyond issues of procedure. As explained, China has not and cannot show the existence of such a measure.

B. The Subsequently Enacted Section 743 is Not within the Terms of Reference of this Dispute

80. China’s First Written Submission states that China has the “initial view” that Section 743 violates WTO provisions, and “that [China] reserves the right to more fully challenge, in later submissions, the compliance of Section 743 with the United States’ WTO obligations.”¹⁰⁰ As a

⁹⁶ China identified the alleged “Moratorium” for the first time as an independent measure subject to challenge in this dispute in its panel request. Panel Request by China, WT/DS392/2, para. 6 (June 23, 2009).

⁹⁷ *US – Cotton Subsidies (AB)*, para. 285 (quoting *Brazil – Aircraft (AB)*, paras. 131-132) (emphasis deleted).

⁹⁸ *US – Cotton Subsidies (AB)*, n. 244.

⁹⁹ *US – Cotton Subsidies (AB)*, para. 293.

¹⁰⁰ China FWS, para. 8.

preliminary matter, the United States does not understand how or why China would argue that Section 743 is WTO-inconsistent; as noted above, Section 743 has resulted in a removal of the funding restriction contested by China. In any event, however, Section 743 is not within the Panel's terms of reference.

81. As discussed above, the Appellate Body has emphasized the systemic importance of holding consultations on measures before such measures may be referred to the DSB. The Appellate Body emphasized that any measures not precisely identified in the request for consultations must not "change the essence" of those measures that have been identified.

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

83. Furthermore, although Section 743 is generally related to Section 727 in that it also involves funding for the implementation and establishment of rules governing importation of poultry products from China, Section 743 plainly changes the essence of Section 727. While Section 727 imposed a temporary funding restriction, the enactment of Section 737 has resulted in a removal of the restriction. Indeed, the fact that China's first submission only manages to state cursory, "initial views" on the WTO-consistency of Section 743 highlights the fundamental differences between the newly adopted Section 743 and the measure (Section 727) identified in the request for consultations.

84. In short, neither Section 743 nor any measure with the same essence as Section 743 was ever consulted upon, and accordingly Section 743 is not within the Panel's terms of reference. This result, which is required under the DSB, is more than a procedural technicality. This result is essential for ensuring that only actual disputes, and not mere misunderstandings and speculations, are brought before WTO panels. In fact, the United States believes that if the parties were to hold consultations on the specific provisions of Section 743, China would reach a final view that Section 743 presents no issue of WTO-consistency.

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

85. China asserts that the only measure at issue in this dispute, Section 727, has the effect of banning imports of poultry products from China. Further, China asserts that "This funding restriction means that FSIS cannot engage in activities related to the establishment or

implementation of any rule allowing Chinese poultry to enter the United States.”¹⁰¹ China’s characterization of the measure is incorrect.

86. As the Appellate Body has recognized, “The party asserting that another party’s municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.”¹⁰² In this proceeding, therefore, China has the burden of demonstrating the “scope and meaning” of Section 727 as a matter of U.S. municipal law. China sets forth its interpretation of Section 727 primarily in paragraphs 11-23 of its First Written Submission.

87. China recognizes that Section 727 was a provision in U.S. legislation appropriating funds for USDA and other agencies for the remainder of U.S. fiscal year 2009.¹⁰³ However, China’s submission fails to take account of the “scope and meaning” of legislative conditions contained in appropriations legislation in U.S. law generally, and of the particular conditions contained in Section 727 specifically.

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

89. Applying these general principles here, Section 727’s legal meaning was limited to preventing USDA from “establishing” or “implementing” a rule allowing poultry from China to enter the United States for a temporary six and a half month period during the 2009 fiscal year.¹⁰⁴ Section 727 did not create a permanent funding restriction, and did not prohibit FSIS from using appropriated funds to implement or establish a rule after its expiration. Indeed, as a consequence of Section 743 and the letter USDA sent to Congress on November 12, 2009, there are no longer any restrictions on FSIS’s ability to “use funds to implement or establish a rule allowing poultry products to be imported from China.”¹⁰⁵

¹⁰¹ China FWS, para. 22.

¹⁰² *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 168 (quoting *US – German Steel (AB)*, para. 157).

¹⁰³ See China FWS, para. 21.

¹⁰⁴ Section 727 was in effect from March 11, 2009 until September 30, 2009.

¹⁰⁵ See Letter from USDA to Congress (Nov. 12, 2009) (Exhibit US-45).

90. Section 727 did not – as China asserts – ban imports of poultry from China. Rather, the import prohibition was imposed by the PPIA – a measure which is not at issue in this dispute. Even in the absence of Section 727, USDA procedures required a review of the prior equivalence determination before any imports of processed poultry could have been authorized, as a result of the substantial length of time between the issuance of the 2006 rule for processed poultry and China’s designation of facilities eligible to export to the United States. And with respect to slaughtered poultry, USDA had not even completed an equivalence determination. Thus, the most that China can allege is that Section 727 prevented USDA from taking final actions during fiscal year 2009 that *might* have otherwise occurred; China has no basis for alleging how, if at all, any final actions would have differed during the period covered by Section 727.

91. Finally, Section 727 did not, as China alleges,¹⁰⁶ prevent FSIS from engaging in activities under the PPIA that are related to the establishment or implementation of a rule that would allow China to export poultry products to the United States. Rather, the measure directed FSIS to engage in work related to China’s equivalency application, and – as is exemplified by the action plan that FSIS sent to Congress regarding China’s equivalency application – FSIS did in fact engage in this work during the U.S. 2009 fiscal year.¹⁰⁷

92. For these reasons, China’s First Written Submission mischaracterizes the legal effect of Section 727.

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

93. China’s request for the establishment of a panel presents three claims: under Article I of the GATT 1994, under Article XI of the GATT 1994, and under Article 4.2 of the Agreement on Agriculture. As explained below, the Panel’s consideration of the Article XI claim (and any needed defense under Article XX(b)) would serve to resolve this dispute, and accordingly the Panel need not and should not make substantive findings under China’s Article I claim or its claim under the Agreement on Agriculture.

A. China Provides No Basis for a Finding under Article I:1 of the GATT 1994

94. China has not provided any basis for the Panel to make a finding under Article 1:1 of the GATT 1994. China’s Article I claim misses the point, lacks essential legal and factual argumentation, and is unnecessary for a resolution of this dispute.

¹⁰⁶ See China FWS, para. 22, alleging that “This funding restriction means that FSIS cannot engage in any activities related to the establishment or implementation of any rule allowing Chinese poultry to enter the United States.”

¹⁰⁷ See FSIS Action Plan for Creation of Congressionally-Mandated China Poultry Inspection System, as submitted to Congress (2009) (Exhibit US-43).

95. China’s Article I claim misses the point, because it fails to recognize that Section 727 has no independent meaning – rather, it only has meaning in the context of the overall operation of an equivalency-based food-safety regime under the PPIA. In particular, under the PPIA, poultry products capable of use as human food may be imported only if they are “subject to inspection, sanitary, quality, species verification, and residue standards that achieve a level of sanitary protection equivalent to that achieved under United States standards” and “have been processed in facilities and under conditions that achieve a level of sanitary protection equivalent to that achieved under United States standards.”¹⁰⁸ China does not challenge the PPIA, nor the right of a WTO Member to establish such equivalency-based regimes for the purposes of ensuring food safety.¹⁰⁹

96. Yet, under an equivalency-based regime, products of different WTO Members are necessarily treated differently: that is products of Members that are found to be equivalent may be imported, while similar products of Members that have yet to be found equivalent may not be imported.

97. Section 727 – enacted by Congress in its oversight role – temporarily prevented USDA from implementing or establishing a rule finding equivalence for imports from China of poultry products. The temporary pause under Section 727 was in order to ensure that additional safety issues could be evaluated. To be sure, Section 727 is specific to one WTO Member, but so are many other actions taken in implementing an equivalency-based food-safety regime. For example – a finding of equivalence, a failure to make a finding of equivalence, and a delay in making a finding to allow for further evaluation – all by their very nature affect products of some WTO Members differently than apparently similar products of other WTO Members. Thus, China’s Article I argument misses the point – Section 727 is not inconsistent with MFN obligations under Article I because any differential treatment under Section 727 – like many other country-specific actions of various WTO Members taken in connection with the implementation of an equivalency-based food-safety regime – results from the underlying adoption of an equivalency-based regime that differentiates among WTO Members based on the particular food safety status of individual Members.

98. China’s Article I claim is also missing essential legal and factual argumentation. In particular, China’s first submission provides no explanation for why poultry products from China are “like products” to poultry products from other WTO Members, including those already authorized to export poultry products to the United States. China invokes what it calls a

¹⁰⁸ PPIA § 17(d)(1) (21 U.S.C. § 466(d)(1)) (Exhibit CN-4).

¹⁰⁹ China FWS, para. 4 (“Like any other WTO Member, the United States has the right to determine which poultry products meet its food safety standards, and to grant and implement approval for only those products that meet its requirements. In this dispute, China neither challenges nor accepts the WTO consistency of the underlying US procedures for evaluating equivalence and approving imports of poultry products. . .”).

“hypothetical like product” approach. While China is correct to note that, in some circumstances, panels have considered that a measure that distinguishes between products solely on the basis of origin can be considered to provide less favorable treatment to certain like products without the need for a separate “like product” analysis, none of those panel or Appellate Body reports has applied this approach to a situation such as the one in this dispute. Health and safety systems vary from country to country. As mentioned above, equivalency-based regimes respond to this fact. To be sure, China may believe that its poultry products present no particular safety issues as compared to products from any other WTO Member. But if so, that is an unsupported factual allegation which the United States does not accept, and there is no basis to assume it is true. Moreover, China conveniently ignores disputes such as *EC-Asbestos*, in which a panel examined issues of “likeness” in the context of products with different levels of safety.¹¹⁰

99. However, and finally, the United States submits that the Panel need not address factual and legal issues under Article I to reach a resolution of this dispute. In particular, the core of this dispute involves whether Section 727 – as the United States will show below – is justified by legitimate concerns with human and animal life and health. The most appropriate analytic framework to consider these issues under the GATT 1994 is for the Panel to examine the measure under Article XI, followed (if necessary) by findings under Article XX(b). If, as the United States submits, the measure at issue falls within the scope of Article XX(b), such a finding also would excuse any alleged breach of Article I. And, it would not promote the resolution of this dispute for the Panel to venture into issues under Article I concerning its application to equivalency-based regulatory regimes, or to the likeness of products with different levels of safety.

100. For all of these reasons, China has not provided any basis for the Panel to make findings under Article I:1 of the GATT 1994.

B. China has the Burden of Establishing a Breach under GATT Article XI

101. As for any claim, China – as the complaining party – has the burden of establishing all of the elements of the alleged breach of Article XI:1 of the GATT 1994.¹¹¹

102. The United States would note, however, that if the Panel were to find the existence of an import restriction within the meaning of GATT Article XI, such a finding would be neither unusual or a matter of systemic concern. The very nature of many health and safety regulations is to impose restrictions on imports. And as Article XX(b) states, “nothing in [the GATT 1994] shall be construed to prevent the adoption or enforcement . . . of measures necessary to protect human, animal or plant life and health.”

¹¹⁰ The only cases on “like products” cited by China, *Colombia – Ports of Entry* and *Canada – Autos*, are not pertinent; these disputes did not involve differences in safety between products of different WTO Members.

¹¹¹ *Brazil – Tyres (Panel)*, para. 7.20.

103. The United States will show below that the measure at issue indeed meets all of the requirements of Article XX(b) of the GATT 1994.

C. Section 727 is Not Subject to the Prohibition in Article 4.2 of the Agriculture Agreement

104. Article 4.2 of the Agriculture Agreement prohibits certain measures with respect to agricultural products.¹¹² Article 4.2 provides that, with certain exceptions not relevant here, “Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties.” Footnote 1 to the Agriculture Agreement provides an illustrative list of measures subject to the prohibition in Article 4.2, as well as an illustrative list of measures to which the prohibition does not apply.

105. Footnote 1 specifically excludes from the scope of Article 4.2 “measures maintained under . . . general, non-agriculture-specific provisions of [the] GATT 1994.” As explained in detail in Part VI of this submission, Section 727 is a measure that the United States maintains consistently with Article XX(b) of the GATT 1994. Article XX(b) is a “general, non-agriculture-specific provision” of the GATT 1994.¹¹³ Therefore, Article 4.2 does not apply to Section 727, and the United States did not act inconsistently with Article 4.2 by maintaining Section 727.

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

106. As noted above, any inconsistency between Articles I or XI of the GATT 1994 and , Section 727 is justified pursuant to GATT Article XX(b).

107. GATT Article XX(b) provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

....

¹¹² The United States does not dispute that poultry products are agricultural products. *See* China FWS, para. 108 & n.198.

¹¹³ For example, in *EC – Asbestos (AB)*, the Appellate Body upheld the panel’s conclusion that a French measure with respect to asbestos, which is not an agricultural product, was justified as a measure “necessary to protect human...life or health” under Article XX(b) of the GATT 1994. *EC – Asbestos (AB)*, para. 175.

(b) necessary to protect human, animal, or plant life or health...¹¹⁴

108. To justify a measure under Article XX(b), the Appellate Body has previously explained that the responding party must demonstrate that the measure (1) falls under the scope of the Article XX(b) exception and (2) satisfies the requirements of the Article XX chapeau.¹¹⁵

109. In this instance, Section 727 falls under the scope of Article XX(b) since the measure was “necessary” to protect human and animal life and health from the risk posed from the importation of poultry products from China. In addition, the measure is “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” nor is it “a disguised restriction on international trade.” Therefore, Section 727 is also consistent with the Article XX chapeau.

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

110. Past panels have indicated that two elements must be met for a measure to fall under the scope of the Article XX(b) exception: (1) the policy in respect of the measure for which the provision is invoked must fall within the range of policies designed to protect human, animal or plant life or health; and (2) the inconsistent measure for which the exception is invoked must be necessary to fulfil the policy objective.¹¹⁶

111. As the United States will demonstrate in the sections that follow, Section 727 falls under the scope of the Article XX(b) exception. The measure was enacted in order to protect human and animal life and health from the risk posed by the importation of poultry products from China. Further, Section 727 was necessary to ensure that poultry products from China would not enter the United States until a thorough analysis of the proposed action’s implications could be considered in light of China’s food safety scandals and systemic concerns raised about China’s food safety system.

1. Section 727 Pursued a Policy Objective of Protecting Human and Animal Life and Health

112. To determine whether a measure pursues a policy objective of protecting human and animal life and health, the Panel should first consider whether a risk to human and animal life and health exists. If a risk is found to exist, the Panel should next determine whether the policy objective underlying the measure is to reduce that risk. If so, the Panel should conclude that the measure’s policy falls within the range of policies designed to protect human and animal life or

¹¹⁴ GATT 1994, art. XX(b).

¹¹⁵ See, e.g., *US – Gasoline (AB)*, p. 22; *US – Shrimp (AB)*, paras. 119-120.

¹¹⁶ *Brazil – Tyres (Panel)*, para. 7.40; *EC – Asbestos (Panel)*, para. 8.169.

health in accordance with Article XX(b). This is consistent with the panel’s approach in *Brazil – Tyres*.¹¹⁷

(a) There is a Risk to Human and Animal Life and Health from the Importation of Poultry Products from China

113. In the instant dispute, it is clear that there is a risk to human and animal life and health from the importation of poultry products from China. This risk results from both the inherent danger of consuming poultry that is not produced under sanitary conditions or thoroughly inspected for contaminants, the risk to animal life and health from the import of poultry infected with avian influenza, and the particular risk that exists when importing food from China due to China’s history of food safety scandals and longstanding systemic issues with smuggling, corruption, and the inadequate enforcement of its food safety laws.

114. First, notwithstanding country of origin, it is well established that poultry products can contain pathogenic bacteria and contaminants which can pose a potential risk to human life and health.¹¹⁸ Further, because it is impossible for FSIS to test all products at the border for such bacteria and other contaminants, FSIS’s equivalence process is designed to ensure that poultry products are “subject to inspection, sanitary, quality, species verification, and residue standards that achieve a level of sanitary protection equivalent to that achieved under United States standards and have been processed in facilities and under conditions that achieve a level of sanitary protection equivalent to that achieved under United States standards”¹¹⁹ before they are allowed to be imported into the United States. And it is noteworthy that FSIS’s equivalence process under the PPIA is not being challenged by China.

115. Similarly, it is also well established that imported poultry can pose a risk to human and animal life and health if the poultry is infected with a serious disease, such as avian influenza. If poultry or poultry products infected with this disease entered the United States, it is undisputed that this could significantly threaten the health and life of U.S. poultry as well as human life and health.¹²⁰ And again, it is noteworthy that China is not challenging APHIS’s restrictions on the

¹¹⁷ *Brazil – Tyres (Panel)*, para. 7.43.

¹¹⁸ Among the pathogenic bacteria potentially present in poultry that can pose a risk to human life and health are Salmonella, Campylobacter, and Listeria monocytogenes. See, e.g., USDA Fact Sheet, *Salmonella Questions and Answers* (Exhibit US-46); USDA Fact Sheet, *Campylobacter Questions and Answers* (Exhibit US-47); USDA Fact Sheet, *FSIS Rule Designed to Reduce Listeria monocytogenes in Ready-to-Eat Meat & Poultry* (Exhibit US-48).

¹¹⁹ 21 U.S.C. § 466(d)(1)(A)-(B).

¹²⁰ *Outbreaks of Avian Influenza A (H5N1) in Asia and Interim Recommendations for Evaluation and Reporting of Suspected Cases --- United States, 2004*, Center for Disease Control (CDC) Morbidity and Mortality Weekly Report (MMWR) (Feb. 13, 2004) (Exhibit US-49).

import of poultry from regions such as China that are classified as a region where the highly pathogenic avian influenza HPAI subtype H5N1 is considered to exist.¹²¹

116. Third, the risk to human and animal life and health associated with imported poultry is exacerbated by the fact that the poultry is being shipped to the United States from China and there are significant problems with China's food safety system. As discussed previously, China's food safety issues have been the subject of numerous studies by international agencies, governmental bodies, and academics, all of whom have noted China's disorganized governmental structure as well as its ongoing systemic problems with smuggling, corruption, and the inadequate enforcement of food safety laws.¹²² Further, China has been the source of multiple food safety scandals, many of which occurred in the past few years and have been directly related to China's systemic problems.¹²³ As a result, poultry imported from China poses a high risk to health and safety.

117. FSIS's experience with China during the equivalency process also highlighted problems with China's food safety system. As noted in Part II, FSIS found deficiencies in two of the four processing plants and serious sanitation problems in all three slaughter plants it visited during China's initial equivalence audit for processed and slaughtered poultry products in 2004. In addition, all four slaughter plants FSIS visited during a 2005 follow-up audit failed to meet U.S. inspection standards. In fact, the bifurcation of China's application for equivalence demonstrates a recognition by both countries at the time that particular issues with China's poultry slaughter inspection system would require additional time to address.

118. As this section demonstrates, there is a significant risk to human and animal life and health from the importation of poultry products from China. Further, some members of Congress expressed concerns that these issues should have been examined in greater detail by FSIS before it moved forward with its equivalency rulemakings for processed and slaughtered poultry. As will be discussed in the section that follows, these numerous concerns about the risk posed by the importation of poultry products from China, compounded by additional information coming to light after FSIS took its regulatory actions, created concerns about the process taken with regard to China and motivated Congress to enact Section 727.

(b) Section 727's Policy Objective was to Protect Against the Risk to Human and Animal Life and Health Posed by the

¹²¹ In order to import poultry from a region classified as one where the highly pathogenic avian influenza (HPAI) subtype H5N1 is considered to exist, the country must seek a determination from APHIS that the importation can be made under conditions that will prevent the introduction of HPAI subtype H5N1 into the United States.

¹²² See *supra* Part II.D.

¹²³ See *supra* Part II.D. For example, the WHO indicated that the melamine crisis was exacerbated by China's disorganized food safety system.

Importation of Poultry Products from China

119. Section 727 was enacted with the policy objective of protecting against the risk to human and animal life and health posed by the importation of poultry products from China. The first sentence of the JES accompanying Section 727 makes that clear:

There remain very serious concerns about contaminated foods from China and therefore the bill retains language prohibiting FSIS from using funds to move forward with rules that would allow for the importation of poultry products from China into the U.S.¹²⁴

120. Section 727's policy objective is also clearly reflected in the FY 2008 Omnibus Appropriations Act Committee Report. Although Section 733 of the FY 2008 appropriations act is not a measure at issue in this dispute, it is the first iteration of a congressional funding restriction on FSIS as it relates to the implementation or establishment of an equivalency rule for China, and therefore, is an indication of the intent underlying this section is relevant to an assessment of the intent underlying Section 727. And like the textual language related to Section 727, the Committee Report accompanying the FY 2008 appropriations act clearly demonstrates that Section 727's purpose is to protect human and animal life and health:

The Committee has included a general provision barring the use of funds in the bill to establish or implement any rule allowing poultry products from China into the U.S. This would apply both to the rule currently in effect that would allow poultry from the U.S. to be processed in China and shipped back and to a rule that the Department is drafting that would allow China to export processed poultry products made from animals raised in China.

Given the recent situation involving pet foods contaminated with melamine from China and the repeated, serious food contamination incidents within China, it is clear that we cannot rely on the Chinese government to ensure its plants adhere to U.S. standards in processing. Weak government controls in China, coupled with the high incidence of H5N1 in that country, provide no assurance that the returned product is actually from U.S. poultry or that poultry carrying the H5N1 virus is not used instead of U.S.-produced poultry. While FSIS has said that the products would be safe because processing would kill any H5N1 viruses, U.S. inspectors will not be standing over the shoulders of Chinese workers; in fact, U.S. inspectors would visit the Chinese plants at most once a year.¹²⁵

121. Likewise, statements from the author of the measure, Representative Rosa DeLauro, also

¹²⁴ JES, at 82 (Exhibit CN-33).

¹²⁵ House Report 110-258, at 54 (July 24, 2007) (Exhibit US-42).

indicate that Congress enacted Section 727 with the policy objective of addressing concerns about the risk to human and animal life and health posed by the importation of poultry products from China. For example, during debate on the floor of the U.S. House of Representatives, Representative DeLauro stated the following in responding to an inquiry about the funding restriction at issue in this dispute:

Well, certainly, we have had a discussion about it over time. And I think the gentleman knows my position on this issue, and my position has not changed in a number of years.

And it's my view that the decisions about the importation of food products from China are a public health issue that must not be entangled in trade discussions. And I understand that Chinese officials are suggesting a quid pro quo, if you will, and they are trying to link the exportation of poultry products with reopening U.S. beef exports to the People's Republic of China.

Those talks, in my view, should be separate and distinct. My position in this area has to do with the public health of the Nation. It is clear that the 2006 FSIS declaration that China's safety and inspection system was, quote, equivalent to the U.S. system for processed poultry products, was based on trade goals. From a public health and safety perspective, the equivalency determination was deeply flawed and cannot be relied on to protect U.S. consumer's safety.

Equivalency was granted in the face of overwhelming evidence of contamination in Chinese processing plants and Chinese slaughterhouses.¹²⁶

122. Thus, based on the explicit language of the text accompanying the measure and the related legislative history, it is clear that the policy objective underlying Section 727 was to address the risk posed to human and animal life and health from the importation of poultry products from China.

2. Section 727 was Necessary to Protect Human and Animal Life and Health

123. As the previous sections make clear, Section 727 falls within the scope of the Article XX(b) exception. Furthermore, Section 727 was necessary to protect human and animal life and health from the identified risk.

124. In determining the meaning of the word "necessary," the Panel should apply the ordinary meaning of the term, which the Appellate Body described as follows:

¹²⁶ Statement of Rep. DeLauro, 155 Congressional Record H7804 (July 8, 2009) (Exhibit US-50).

The word “necessary” normally denotes something “that cannot be dispensed with or done without, requisite, essential, needful”. We note, however, that a standard law dictionary cautions that:

[t]his word must be considered in the connection in which it is used, as it is a word susceptible of various meanings. It may import absolute physical necessity or inevitability, or it may import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought. It is an adjective expressing degrees, and may express mere convenience or that which is indispensable or an absolute physical necessity.¹²⁷

125. This ordinary meaning of “the word ‘necessary’ is not limited to that which is ‘indispensable’ or ‘of absolute necessity’ or ‘inevitable.’”¹²⁸

126. As has been detailed in this submission, imports of poultry from China pose a severe risk as a result of the broad systemic problems with China’s food safety system. Among other issues, these problems include smuggling, corruption, and the inadequate enforcement of China’s food safety laws, issues that FSIS is not typically faced with when making equivalency determinations.¹²⁹ Moreover, many food safety scandals have originated in China in recent years, including the melamine scandal that occurred shortly after FSIS made a final determination about the equivalency of China’s poultry processing system and a preliminary decision about the equivalency of China’s poultry slaughter inspection system. Finally, some members of Congress were concerned about the process that FSIS followed in its equivalency determination and believed that FSIS had not spent enough time considering the particular problems with food safety in China.¹³⁰

¹²⁷ *Korea – Beef (AB)*, para. 160.

¹²⁸ *Korea – Beef (AB)*, para. 161.

¹²⁹ As discussed in Part II, one of the issues that FSIS focused on when considering the equivalency of China’s poultry system was the equivalency of China’s residue analysis methods. These are the types of issues that FSIS is used to addressing during the equivalency process rather than the broad systemic problems that exist in China’s food safety system. By contrast, FSIS is not used to addressing issues such as smuggling and the final rule notes that “[t]he U.S. Customs and Border Protection, rather than FSIS, addresses smuggling.” See Federal Register Notice v. 71(78) at 20869 (Exhibit CN-14).

¹³⁰ See *Calls for USDA to Halt Rule Allowing Chinese Chicken into the US*, Press Release from the Office of Congresswoman Rosa L. DeLauro (May 2, 2007) (Exhibit US-51), which includes the following quotation from a letter Representative DeLauro sent to USDA Secretary Mike Johanns on May 1, 2007:

Perhaps the most troubling aspect about the rules was how it was expedited through the regulatory process so that it could be presented to PRC President Hu Jintao during his visit to the White House in April 2006. FSIS published the proposed rule on November 23, 2005, closed the public comment period of January 23,

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

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

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

130. The United States believes the Panel should reach the same conclusion if it follows the method used by past panels to determine whether a measure is necessary under one of the Article XX exceptions. When faced with the question of whether a measure is necessary, other panels have engaged in "a process of weighing and balancing a series of factors," which include (1) the importance of the interests or values at stake; (2) the contribution made by the measure to its objective; and (3) the trade restrictiveness of the measure.¹³¹ Indeed, all three of these factors weigh in favor of a determination that Section 727 was necessary to protect human and animal life and health from the risks posed by the importation of poultry products from China.

(a) The Protection of Human and Animal Life and Health is of Vital Importance

131. The first of three factors that panels generally examine to determine whether a measure is necessary is the importance of the interests or values at stake. If the interest at stake is of fundamental importance, past panels have been more inclined to determine that a measure is

2006, and approved the rule on April 20, 2006. This is an alarming rate considering the food safety implications of the rule.

¹³¹ *Brazil – Tyres (AB)*, para. 178.

necessary to achieve its stated objective.¹³²

132. As discussed above, Section 727 was enacted to protect human and animal life and health from the risk posed by the importation of poultry products from China, which includes protection from risks to life and health associated with eating poultry products that have not been prepared in sanitary conditions or are contaminated with disease. In *Brazil-Tyres*, the panel noted “the objective of protecting human health and life against life-threatening diseases ... is both vital and important in the highest degree.”¹³³ The United States agrees with the panel’s assessment. The risks posed to human life and health by consuming potentially contaminated poultry products from China is of utmost importance, as is the need to protect animal life and health from the threat of avian influenza. Therefore, consideration of this factor strongly weighs in favor of a determination that Section 727 was necessary.

(b) Section 727 Directly Contributes to the Protection of Human and Animal Life and Health

133. A second factor that panels have weighed to determine whether a measure is necessary to achieve a certain objective is the measure’s contribution to the achievement of that objective. A contribution exists when there is a genuine relationship of the ends and means between the objective pursued and the measure at issue.¹³⁴ As before, if a panel finds a genuine relationship between the measure and the policy goal it intends to pursue, panels are more inclined to consider the measure in question necessary.¹³⁵

134. A consideration of this second factor also weighs heavily in favor of a determination that Section 727 was necessary to achieve its objective. Section 727 has directly contributed to the protection of human and animal life and health by ensuring that FSIS did not move forward to the next stage in the equivalency process and actually implement or establish a rule that would allow for the importation of poultry products from China without focusing on the unique risks posed by China’s food safety system or reexamining the issue in light of food safety scandals that occurred in China after the processed poultry rule was issued in 2006. Further, Section 727 also directed FSIS to develop an action plan to address food safety issues with China. As a result, Section 727 materially contributed to its objective of protecting human and animal life and health from the risk posed by consuming imported poultry products from China.

(c) Section 727’s Trade Restrictive Effects

¹³² *EC – Asbestos (AB)*, para. 172.

¹³³ *Brazil – Tyres (Panel)*, para. 7.111.

¹³⁴ *Brazil – Tyres (AB)*, para. 145.

¹³⁵ *See Brazil – Tyres (AB)*, para. 151.

135. A third factor that panels have considered to decide whether a measure is necessary to achieve its stated objective is the measure's trade restrictiveness. The more restrictive a measure is, the more carefully it may need to be reviewed to determine whether it is necessary to achieve a particular objective. However, a restrictive measure may still be considered necessary based on the context of the situation in which the Article XX(b) defense is invoked.¹³⁶ The Panel should consider the following factors as it evaluates this point:

136. First, because Section 727 was an appropriations measure, it did not change the underlying law and only applied on a temporary basis of less than seven months. As a result, now that the funding restriction has been lifted, FSIS is able to move forward on implementing the rule for processed poultry products or establishing a rule for cooked poultry products if it determines that this is the appropriate action to take under the PPIA.

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

138. Additionally, it is relevant to note that even in Section 727's absence, it would be highly unlikely that China could export any significant quantity of poultry products to the United States. While FSIS's equivalency determination for China's processed poultry inspection system would allow imports of processed poultry product from China (including raw processed as well as cooked processed poultry product), China would nevertheless not be able to export any poultry product that was not fully cooked due to APHIS's restrictions applicable to all countries identified as having avian influenza. Consequently, even without Section 727, China's trade would have been limited to poultry product fully cooked to APHIS's requirements. Moreover, since FSIS has not found China's slaughter inspection system to be equivalent, any cooked poultry product exported to the United States would have to be produced from poultry slaughtered in the United States or in another country whose slaughter inspection system has been found to be equivalent with the United States. Trade under these circumstances is likely to be limited given the complicated logistics of shipping poultry to China from the United States or another equivalent country, processing it, and then shipping it back to the United States.

139. Thus, like the other two factors, the limited trade restrictiveness of the measure also favors a determination that Section 727 was necessary to protect human life and health. As a

¹³⁶ See *US – Gambling (AB)*, para. 323, noting that it was appropriate for the panel in the dispute to downplay the trade restrictiveness of the measure in question given the specific context in which the measure was enacted.

result, Section 727 meets the requirements of the Article XX(b) exception.

B. Section 727 Meets the Requirements of the GATT 1994 Article XX(b) Chapeau

140. To justify a measure under GATT 1994 Article XX(b), the Appellate Body has explained that the responding party must also show that the measure meets the requirements of the Article XX chapeau.¹³⁷

141. Specifically, the chapeau prohibits a measure from being “applied in a manner which would constitute a means of arbitrary and unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on international trade ...”. Thus, to meet the requirements of the chapeau, past Appellate Body reports have explained that the responding party must demonstrate that its measure (1) is not a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; or (2) a disguised restriction on international trade.¹³⁸

142. As the United States will demonstrate below, Section 727 meets the requirements of the Article XX chapeau; therefore, it is justified by the Article XX(b) exception.

1. Section 727 is Not a Means of Arbitrary or Unjustifiable Discrimination Between Countries Where the Same Conditions Prevail

143. Previous Appellate Body reports have explained that a measure will be considered to be applied in a manner that results in arbitrary or unjustifiable discrimination if three conditions are met: (1) the application of the measure results in discrimination; (2) the discrimination is arbitrary or unjustifiable in character; and (3) the discrimination occurs between countries where the same conditions prevail.¹³⁹

144. In the instant dispute, these conditions are not met. In particular, any differential treatment received by Chinese products in the equivalence process was justified due to serious concerns about China’s food safety system, concerns that do not exist with any other country for which action on an equivalency determination was imminent. Therefore, Section 727 does not

¹³⁷ See, e.g., *US – Gasoline (AB)*, p. 22; *US – Shrimp (AB)*, paras. 119-120.

¹³⁸ 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.

¹³⁹ *Brazil – Tyres (AB)*, para. 215.

discriminate against Chinese products in an arbitrary or unjustifiable manner.

(a) Section 727 Does Not Discriminate in an Arbitrary or Unjustifiable Manner

145. Although the United States acknowledges that Section 727 only applies to imports from China, the measure did not discriminate against Chinese products in an arbitrary or unjustifiable way.

146. The New Shorter Oxford English Dictionary defines “arbitrary” as “based on mere opinion or preference as opp. to the real nature of things; capricious, unpredictable, inconsistent.”¹⁴⁰ Likewise, “unjustifiable” is defined as “not justifiable, indefensible.”¹⁴¹ In a similar fashion, past panel reports have required that in order for the responding party to show that any discrimination or differential treatment to a particular country is not “arbitrary or unjustifiable,” it must show that its action is not “capricious or random.”¹⁴² The panel in *Brazil-Tyres* also noted that the question of whether this element is met should focus “on the cause of the discrimination, or the rationale put forward to explain its existence.”¹⁴³ Thus, if a responding party provides a rationale for the measure that is not capricious, random, or indefensible, the measure will not run afoul of this element of the chapeau.

147. In this instance, there was indeed a strong rationale for enacting Section 727. As the United States has discussed at length in this submission, there are many legitimate concerns about China’s food safety system, and the equivalency process needed to be paused to give FSIS additional time to consider fully and adequately address these concerns, including the food safety scandals that occurred after the final determination was made on a rule for processed poultry. Given this situation, it was reasonable, and certainly not arbitrary or capricious, for Congress to exercise its oversight role. This provides a strong rationale for Section 727 and supports the notion that the measure’s application to Chinese products was not arbitrary or unjustifiable.

(b) The Conditions Prevailing in China at the Time Section 727 was Enacted Have Not Applied in Any Other Country For Whom an Equivalency Determination Was Imminent

148. In addition to being based on a strong rationale that is not arbitrary or unjustifiable, Section 727 meets the chapeau because there is no other country where the same conditions

¹⁴⁰ See *New Shorter Oxford English Dictionary*, p. 107 (Exhibit US-52).

¹⁴¹ See *New Shorter Oxford English Dictionary*, p. 3493 (Exhibit US-53).

¹⁴² *Brazil – Tyres (AB)*, para. 232.

¹⁴³ *Brazil – Tyres (AB)*, para. 226.

prevailed as they did for China at the time Section 727 was enacted. Besides China, 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. Since no other country has presented the same set of challenges that the U.S. government faced with regard to China at the time of Section 727's enactment, there is no other country where it can be said that the same conditions prevail. Therefore, the application of Section 727 meets this element of the chapeau as well.

2. Section 727 is Not a Disguised Restriction on International Trade

149. The final requirement for a measure to be justified under the chapeau and GATT Article XX(b) is that it must not be a disguised restriction on international trade. An examination of a measure's intent to determine whether it has "protectionist objectives" is relevant to this issue.¹⁴⁴ If a measure's intent is protectionist in nature, it will likely be considered a disguised restriction on trade and will not meet the requirements of the chapeau.

150. In this instance, the evidence clearly demonstrates that Section 727 is not a disguised restriction on trade. As described above, the text of the measure, which states "There remain very serious concerns about contaminated foods from China and therefore the bill retains language prohibiting FSIS from using funds to move forward with rules that would allow for the importation of poultry products from China into the U.S.," clearly indicates that the measure's policy objective, or intent, was to protect human and animal life and health from the risk of imported poultry from China.

151. Further, the fact that the JES provides a work plan to allow FSIS to take actions related to the rulemaking also demonstrates that the measure was not enacted with protectionist intent. After all, if the intent of Section 727 were to restrict trade, it would not have included language requiring FSIS to develop a work plan to take action related to the equivalency determination to set the stage for expeditious action on China's application for equivalency for its slaughtered poultry system as soon as the measure expired.

152. Statements by members of Congress directly involved with Section 727's enactment further supports the view that the policy objective, or intent, of the measure was to protect human and animal life and health, not to protect a domestic industry. For example, Representative DeLauro recently noted the following regarding the processed poultry rule:

It is my belief – and my concern – that this granting of equivalency to China was extremely flawed, and based on trade promotion rather than public health concerns. Decisions about the importation of food products – from China or anywhere else – are a public health issue that cannot and must not be entangled in and subordinated to trade

¹⁴⁴ See *EC-Asbestos (Panel)*, para. 8.238.

discussions¹⁴⁵

153. Another factor weighing against characterizing the measure as a disguised restriction on trade is the widespread opposition to the measure from the U.S. domestic poultry industry. In fact, on April 30, 2009, 56 companies and trade associations representing the domestic industry wrote a letter to President Obama asking him to oppose Section 727.¹⁴⁶ These groups included some of the largest poultry producers in the United States, such as Pilgrim's Pride Corporation and Tyson Foods Incorporated, as well as major trade associations such as the American Meat Institute and the National Chicken Council, which represent hundreds of domestic poultry producers. If Section 727's purpose were to restrict trade and protect the domestic industry, it seems unlikely that nearly all of the industry's most influential members would express opposition.

154. Accordingly, Section 727 meets the requirements of the chapeau and is justified under GATT Article XX(b).

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

155. China's First Written Submission also addresses certain claims with respect to provisions of the SPS Agreement. As the United States explained in its October 1, 2009 request for a preliminary ruling, China's claims under the SPS Agreement are outside the Panel's terms of reference. However, even aside from the fact that these claims are outside the Panel's terms of reference, China fails to make a *prima facie* case in its First Written Submission in support of the claims.

156. In particular, China fails to demonstrate – or even to assert – that Section 727 is an SPS measure that is subject to the cited provisions of the SPS Agreement. As the panel in *EC – Biotech* observed, “not every measure that qualifies as a measure within the meaning of the DSU constitutes, *ipso facto*, an SPS measure.”¹⁴⁷ That panel went on to note that “the mere fact that a measure within the meaning of the DSU meets the definition of an ‘SPS measure’ set out in Annex A(1) [of the SPS Agreement] does not mean that it is, *ipso facto*, subject to every provision of the SPS Agreement which applies to ‘SPS measures.’”¹⁴⁸ Thus, in order to

¹⁴⁵ Opening Statement of Rep. Rosa DeLauro, *Ag Appropriations Focuses on Public Health in a Global Economy*, Press Release from the Agriculture, Rural Development, Food and Drug Administration Appropriations Subcommittee of the House Committee on Appropriations, July 28, 2009 (Exhibit US-54).

¹⁴⁶ See Letter to President Barack Obama (Apr. 30, 2009) (Exhibit US-55).

¹⁴⁷ *EC – Biotech*, para. 7.1333.

¹⁴⁸ *EC – Biotech*, para. 7.1337.

demonstrate that a measure is inconsistent with a particular provision of the SPS Agreement, it is necessary first to show that the measure is, in fact, an SPS measure and that it is subject to the particular provision with which an inconsistency is claimed. China makes no such showing with respect to Section 727 or any of the provisions of the SPS Agreement it cites.

157. Indeed, China frames its complaint by asserting that, “to the extent that Section 727 and the Moratorium may be considered to be sanitary and phytosanitary measures within the meaning of the *SPS Agreement*, such measures would be inconsistent with Articles 2.3, 5.5, 5.1, 5.2, 2.2, 5.6 and 8 of the *SPS Agreement*.”¹⁴⁹ In other words, China claims merely that if Section 727 is subject to the cited provisions of the SPS Agreement, then it would be inconsistent with them. But China does not assert that Section 727 is, in fact, subject to any of these provisions. Rather, China expressly avoids making such any assertion. Thus, it has failed to meet its burden of asserting and proving a *prima facie* case in support of its claims.

158. China explains, in its response to the U.S. October 1 preliminary ruling request, that it framed its claims under the SPS Agreement as conditional claims or claims in the alternative.¹⁵⁰ According to China, it considered that the United States might invoke Article 2.4 of the SPS Agreement in order to defend Section 727, and if so, it would be for the United States to “meet the threshold requirement of demonstrating that the measures at issue are sanitary or phytosanitary measures.”¹⁵¹ The United States does not agree that the invocation of Article 2.4 by a responding party in a dispute would shift the burden of proof with respect to the complaining party’s claims, as China appears to assert. However, the Panel need not decide this issue, as the United States is not invoking Article 2.4 of the SPS Agreement as part of its defense in this dispute.

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

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

160. The United States takes note of China’s response to the U.S. request for a preliminary ruling of October 1, 2009,¹⁵² as well as the comments of the European Communities (“EC”) and

¹⁴⁹ China FWS, para. 117 (emphasis added).

¹⁵⁰ China FWS, para. 163.

¹⁵¹ China FWS, para. 164.

¹⁵² China FWS, paras. 161-189.

Korea on this request. Although China states that it intended to make claims under the SPS Agreement in the alternative (that is, if the United States invoked Article 2.4 of the SPS Agreement as a defense),¹⁵³ it is undeniable that China's consultations request, as written, does not request consultations in order to pursue alternative claims, but makes the request for consultations itself conditional on future developments. This is the defect in China's consultations request with respect to the SPS Agreement, and China's subsequent attempts at clarification cannot cure the jurisdictional requirement set forth in Article 1.1 of the DSU that consultations must be requested pursuant to the consultation and dispute settlement provision of each covered agreement for which dispute settlement under the DSU is sought.¹⁵⁴

161. The United States notes that many Members have properly invoked the consultation and dispute settlement provisions of a covered agreement in order to pursue alternative claims under that agreement. For example, Canada recently requested consultations with the United States pursuant to a number of provisions, including Article 11 of the SPS Agreement, in order to pursue claims that certain measures were inconsistent with, "in the alternative, Articles 2, 5 and 7 of the SPS Agreement."¹⁵⁵ The United States had no objection in that dispute to the invocation of the consultation and dispute settlement provision of a covered agreement in order to pursue an alternative claim under that agreement. It is the failure actually to invoke *the consultation and dispute settlement provision of a covered agreement* that gives rise to the jurisdictional problem with China's consultation and panel request here.

162. China's First Written Submission asserts that "there can be no reason for this preliminary ruling request other than to achieve delay"¹⁵⁶ and that the raising of this issue may have been an attempt by the United States of "potentially forcing an admission against China's own interest."¹⁵⁷ There is no basis for these assertions. As noted in its Preliminary Ruling Request, the United States alerted China to the deficiency in China's consultation request at the earliest possible moment, at which point China could have submitted an amended consultation request clearly requesting consultations under Article 11 of the SPS Agreement and indicating that it was raising its SPS claims in the alternative.¹⁵⁸ That would have been the end of the matter. Even if

¹⁵³ China FWS, para. 164.

¹⁵⁴ See *US – Cotton Subsidies (AB)*, para. 287 (stating that the panel in that dispute "should have limited its analysis to the request for consultations" in assessing whether consultations were requested for purposes of a preliminary ruling request).

¹⁵⁵ *United States – Certain Country-of-Origin Labeling (COOL) Requirements*, WT/DS384/1/Add.1 (May 11, 2009).

¹⁵⁶ China FWS, para. 171.

¹⁵⁷ China FWS, para. 171.

¹⁵⁸ U.S. Preliminary Ruling Request, paras 3-4.

China did not necessarily agree with the United States that its consultations request was deficient, China could have nonetheless decided that the most pragmatic way forward would be to amend its consultations request to put an end to the matter once and for all.

163. The issues presented by China’s consultations request is not a mere technicality. In raising the deficiency of China’s consultations request with China, the United States also is pursuing an important systemic concern. A complaining party should not be free to claim that it is not invoking the dispute settlement provisions of a covered agreement and then later claim that it did invoke them. If China’s approach here were to be accepted, it could lead to more and potentially greater confusion in future disputes. A responding party and potential third parties would be unable to divine what the exact legal issues will be in a dispute. The DSU provisions are clear and were agreed – a complaining party’s consultations request “shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.” A complaining party is not free to say that it is not using as the basis for its complaint a particular covered agreement only to say later that it is. As stated in its preliminary ruling request, clarity in the request for consultations is important for the overall operation of the dispute settlement system.¹⁵⁹ The interest and intent of the United States was, and continues to be, in the correction of the deficiency. That is all.

164. The United States would like to make one additional point. In paragraphs 178-180 of its First Written Submission, China argues that it provided an “indication” of the legal basis for its complaint under the SPS measures. While the United States does not agree with that assertion, more fundamentally, that is not the relevant issue before the Panel. The core issue before the Panel is whether, in its consultations request, China brought this dispute “pursuant to the consultation and dispute settlement provisions” of the SPS Agreement.¹⁶⁰ China did not.

IX. CONCLUSION

165. For the foregoing reasons, the United States respectfully requests that the Panel reject China’s claims in their entirety.

¹⁵⁹ U.S. Preliminary Ruling Request, para. 30.

¹⁶⁰ DSU Article 1.1.

LIST OF U.S. EXHIBITS

United States – Certain Measures Affecting Imports of Poultry from China (DS392)

U.S. Exhibit Description

Provided with U.S. Request for Preliminary Rulings (Oct. 1, 2009):

US-1 Letter from the United States to China (Apr. 27, 2009)

Provided with this submission:

US-2 Congressional Research Service, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions* (Aug. 5, 2008)

US-3 Congressional Review Act, 5 U.S.C. §§ 801-808

US-4 U.S. General Accounting Office, *Principles of Federal Appropriations Law*, vol. I, at I-5 (3d ed. 2004)

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