

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

Request for the Establishment of a Panel by China

The following communication, dated 23 June 2009, from the delegation of China to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

1. On 17 April 2009, China requested consultations with the United States ("US") pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade* ("GATT 1994"), Article 19 of the *Agreement on Agriculture* ("*Agriculture Agreement*"), and Article 11 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* ("*SPS Agreement*"), with regard to certain measures taken by the US affecting the import from the People's Republic of China ("China") of poultry products.<sup>1</sup>

2. Consultations were held on 15 May 2009, pursuant to each of the above-referenced provisions and agreements, with a view to reaching a mutually satisfactory solution. These consultations failed to settle the dispute.

3. Accordingly, China hereby requests that a panel be established pursuant to Article 6 of the DSU; Article XXIII:2 of the GATT 1994; Article 19 of the *Agriculture Agreement*; and Article 11 of the *SPS Agreement*.

4. China challenges certain related measures that prevent the importation of poultry products from China into the United States. First, various US laws, including, *e.g.*, Section 727 of Division A of the Omnibus Appropriations Act of 2009 ("Section 727") (signed into law as Public Law 111-8), as such, prohibit the expenditure of any US Government funds necessary to allow for the importation of poultry products from China. Second, there is an ongoing US moratorium in the form of a suspension of the (a) consideration of applications for the approval of, (b) granting of approval of, and (c) implementation of approvals of, the import of poultry products from China. This moratorium results in a ban on the import of poultry products into the US from China. These measures are described in greater detail below.

5. The first set of measures challenged by China includes Section 727, any amendments or replacement measures, any subsequent closely-related measures, and any future closely-related

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<sup>1</sup> WT/DS392/1. Pursuant to an exchange of letters between the United States and China, on 27-28 April 2009, and prior to actual consultations, China confirmed that its request for consultations had been made pursuant to all four of the agreements specified in the consultation request, *i.e.*, the DSU, the GATT 1994, the *Agriculture Agreement*, and the *SPS Agreement*.

measures.<sup>2</sup> Section 727 currently prohibits the US Department of Agriculture ("USDA") from taking action, including expending funds, to: (1) establish or implement measures allowing for the importation from China of poultry products, including those that the USDA has already determined are eligible to be so imported under existing US measures, and (2) establish or implement measures expanding the scope of poultry products that may be imported from China. The necessary consequence of Section 727 (like its predecessor<sup>3</sup>) is to compel and sustain a prohibition on the ability of USDA to take those actions that are required by US law and regulations before the US can permit the importation of poultry products from China. This results in a ban on the import of poultry products from China into the US. This is inconsistent with the United States' WTO obligations.

6. Second, since at least December 2007, the US has imposed a moratorium in the form of a suspension of (a) consideration of applications for the approval of, (b) granting of approval of, and (c) implementation of approvals of, the import of poultry products from China under the US system for regulating the import of poultry products. This system includes the Poultry Products Inspection Act, as amended (21 U.S.C. §§ 451-471) ("PPIA"), and the related regulations of the USDA's Food Safety and Inspection Service (9 CFR Parts 300-592) ("FSIS Regulations"). This moratorium was initiated by the predecessor to Section 727<sup>4</sup> and continued by Section 727, as it will be by any amendments or replacement measures, any subsequent closely-related measures, and any future closely-related measures. The moratorium is also effectuated by the deliberate failure of the US to follow and implement the PPIA and the FSIS Regulations (e.g., for inspections, auditing, and evaluation) related to the eligibility of countries and entities to import poultry products, as applied to China. By contrast, the US follows and implements such laws, regulations, and procedures for other WTO Members. The effect of this moratorium has been to ban the import of poultry products from China into the US. The moratorium and resulting ban on the import of poultry products from China into the US are inconsistent with the United States' WTO obligations.

7. The existence and operation of Section 727, any amendments or replacement measures, any subsequent closely-related measures, and any future closely-related measures,<sup>5</sup> as well as the moratorium and resulting ban, on the importation of poultry products from China is illustrated by the following example. Part 381 of Title 9 of the US Code of Federal Regulations ("9 CFR"), including Section 381.196, identifies countries eligible to import poultry products into the United States. Following a detailed review by the USDA of China's poultry inspection system, including on-site inspections in China, the United States determined in early 2006 that China is eligible to import certain poultry products into the United States.<sup>6</sup> However, the USDA has not yet taken the necessary action to allow for such importation, pursuant to this determination of eligibility. Nor has the USDA conducted the periodic reviews of China that it generally relies upon when determining whether to maintain the eligibility of a country to import poultry products into the US. Pursuant to Section 727, any amendments or replacement measures, any subsequent closely-related measures, and any future

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<sup>2</sup> China understands that Section 727 is included in an annual appropriations measure, and is closely-related, in terms of nature and effects, to similar provisions included in previous appropriations measures, including but not limited to Section 733 of Division A of the Omnibus Appropriations Act of 2008, P.L. 110-161 ("Section 733"). Similarly, Section 727 would be closely-related to, and this request covers, any subsequent, including future, measures that have the same substance, essence, and/or legal implications for imports of poultry products from China, as the substance, essence, and/or legal implications for imports of poultry products from China, of Section 727, as set out in paragraph 4 of this request. One such measure appears to be included in an appropriations bill currently pending before Congress that would amend or replace Section 727, namely the pending "Bill making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies programs for the fiscal year ending September 30, 2010, and for other purposes," including Section 723 of the 18 June 2009 Appropriations Committee Markup thereof.

<sup>3</sup> See footnote 2.

<sup>4</sup> See footnote 2.

<sup>5</sup> See footnote 2.

<sup>6</sup> 71 Fed. Reg. 20867 (24 April 2006).

closely-related measures,<sup>7</sup> as well as the moratorium, the USDA is prohibited from taking action to establish or implement measures allowing for the importation into the US of poultry products that the US has already determined are eligible for importation from China, pursuant to the explicit terms of 9 CFR § 381.196. 9 CFR § 381.196 is, therefore, one of several US regulations that, by virtue of Section 727,<sup>8</sup> the moratorium, and the resulting ban, cannot be implemented with respect to products imported from China.

8. Moreover, Section 727, any amendments or replacement measures, any subsequent closely-related measures, and any future closely-related measures,<sup>9</sup> as well as the moratorium, prohibit USDA from taking action to expand the class of poultry products that could be eligible for import into the United States from China. Expansion of eligibility would require the establishment and/or implementation of measures that the USDA is prohibited from establishing or implementing because of these measures.

9. The US moratorium and resulting ban on the import of poultry products from China, as well as Section 727, any amendments or replacement measures, any subsequent closely-related measures, and any future closely-related measures,<sup>10</sup> are in breach of its obligations under the GATT 1994 and the *Agriculture Agreement*, including the following provisions thereof: Articles I:1 and XI:1 of the GATT 1994; and, Article 4.2 of the *Agriculture Agreement*.

10. Section 727, any amendments or replacement measures, any subsequent closely-related measures, and any future closely-related measures,<sup>11</sup> as well as the US moratorium, institute and maintain a quantitative restriction and prohibition, contrary to Article XI:1 of the GATT 1994 and Article 4.2 of the *Agriculture Agreement*. Moreover, by imposing these restrictions and prohibitions with respect to imports from China, but not similarly restricting and prohibiting the import from other Members of like products, the challenged measures result in the US failing to accord immediately and unconditionally to China an advantage, favour, privilege or immunity granted to other Members with respect to rules and formalities in connection with importation in violation of Article I:1 of the GATT 1994.

11. In addition, to the extent that some or all of the US measures at issue restricting imports of poultry products from China constitute sanitary and phytosanitary measures within the meaning of the *SPS Agreement*, the measures are inconsistent with the US obligations under the *SPS Agreement*, including Articles 2.1-2.3, 3.1, 3.3, 5.1-5.7, and 8 thereof.

12. To the extent that some or all of the US measures at issue constitute sanitary and phytosanitary measures within the meaning of the *SPS Agreement*, the US measures violate Articles 2.1, 2.2, 5.1-5.4, and 5.6 of the *SPS Agreement*, because any SPS measure is not based on a proper assessment of the particular risks presented and is not supported by sufficient scientific evidence. Also, any such measure, to the extent not applied with respect to similarly situated imports from other Members, violates Articles 2.3 and 5.5 of the *SPS Agreement*. Moreover, any SPS measure fails to observe the provisions of Annex C of the *SPS Agreement* with respect to the operation of control, inspection, and approval procedures, and therefore would violate Article 8 of the *SPS Agreement*. Additionally, any such US measure is not based on international standards, guidelines, or recommendations, or otherwise, consistently with Articles 3.1 and 3.3 of the *SPS Agreement*. Finally, any such US measure is not justified by Article 5.7 of the *SPS Agreement*, if applicable.

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<sup>7</sup> See footnote 2.

<sup>8</sup> See footnote 2.

<sup>9</sup> See footnote 2.

<sup>10</sup> See footnote 2.

<sup>11</sup> See footnote 2.

13. China requests that the panel be established with the standard terms of reference, in accordance with Article 7 of the DSU.

14. China asks that this request for the establishment of a panel be placed in the agenda for the next meeting of the Dispute Settlement Body, which is scheduled to take place on 20 July 2009.

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